

OFFICE OF
JUDGE ADVOCATE
GENERAL
OF THE ARMY

BOARD
OF REVIEW

HOLDINGS
OPINIONS
REVIEWS

VOL. 45

1944 - 1945

R

16

B63

v45

Judge Advocate General's Department

BOARD OF REVIEW

Holdings, Opinions and Reviews

Volume XLV

including

CM 269105 to CM 270941

(1944-1945)

**LAW LIBRARY
JUDGE ADVOCATE GENERAL
NAVY DEPARTMENT**

Office of The Judge Advocate General

Washington : 1945

03081

1940
1941
1942
1943
1944
1945
1946
1947
1948
1949
1950
1951
1952
1953
1954
1955
1956
1957
1958
1959
1960
1961
1962
1963
1964
1965
1966
1967
1968
1969
1970
1971
1972
1973
1974
1975
1976
1977
1978
1979
1980
1981
1982
1983
1984
1985
1986
1987
1988
1989
1990
1991
1992
1993
1994
1995
1996
1997
1998
1999
2000
2001
2002
2003
2004
2005
2006
2007
2008
2009
2010
2011
2012
2013
2014
2015
2016
2017
2018
2019
2020
2021
2022
2023
2024
2025

CONTENTS OF VOLUME XLV

<u>CM No.</u>	<u>Accused</u>	<u>Date</u>	<u>Page</u>
269105	Kolick	13 Dec 1944	1
269167	Mayer	13 Dec 1944	9
269224	Wagoner	22 Dec 1944	13
269294	Hogan	14 Dec 1944	25
269449	Campbell	28 Dec 1944	33
269596	Cannon	15 Dec 1944	47
269689	Storm	27 Dec 1944	55
269690	Williams	1 Jan 1945	67
269704	McGeever	15 Dec 1944	75
269707	Wolfsie	17 Jan 1945	81
269717	Evans	23 Jan 1945	99
269771	Moss, Roulhac	11 Jan 1945	111
269772	Romp	10 Jan 1945	117
269791	Summerford	6 Jan 1945	133
269792	Moore	11 Jan 1945	141
269866	Kunz	2 Apr 1945	153
270040	McKinnon	27 Dec 1944	167
270061	Sheridan	8 Jan 1945	179
270070	McGee	29 Dec 1944	193
270163	Baker	23 Jan 1945	203
270265	Branaman	5 Jan 1945	215
270281	Hoffer	17 Jan 1945	223
270352	Uyechi	16 Feb 1945	233
270372	Thompson	26 Jan 1945	241
270398	DuPuis	3 Jan 1945	253
270400	Lawson	10 Jan 1945	257
270425	Stevenson	5 Feb 1945	267
270454	Kreie	19 Jan 1945	289
270462	Ricker	10 Jan 1945	295
270477	Quigley	29 Dec 1944	305
270549	Richmond	16 Dec 1944	309
270591	Vanzant	24 Jan 1945	313
270640	Otterson	30 Jan 1945	317
270641	Smith	11 Jan 1945	329
270744	Brazelle	18 Jan 1945	345
270871	Shirley, Wright	16 Jan 1945	351
270910	Persinger	6 Jan 1945	359
270939	O' Gara	11 Jan 1945	371
270941	Boruski	1 Feb 1945	381

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

(1)

SPJGQ
CM 269105

13 DEC 1944

UNITED STATES

THIRD AIR FORCE

v.

Second Lieutenant PHILLIP
KOLICK (O-821298), Air
Corps.

Trial by G.C.M., convened at
MacDill Field, Florida,
4 November 1944. Dismissal.

OPINION of the BOARD OF REVIEW
ANDREWS, FREDERICK and BIERER, Judge Advocates

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant Phillip Kolick, Squadron S, 326 Army Air Force Base Unit, (CCTS), MacDill Field, Florida, was, at Sulphur Springs, Tampa, Florida, on or about 27 August 1944, in a public place, to wit, the Starlight Cafe, disorderly while in uniform.

Specification 2: (Finding of not guilty).

Specification 3: In that Second Lieutenant Phillip Kolick, * * *, did, at Tampa, Florida, on or about 27 August 1944, resist arrest by striking Technical Sergeant Roy G. Bernard and Corporal Glen A. Rogers, military policemen then in the lawful performance of their duty, with his fists.

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

Specification: In that Second Lieutenant Phillip Kolick, Squadron N, formerly of Squadron S, 326th AAF Base Unit,

(2)

(CGTS), MacDill Field, Florida, having been duly placed in arrest to the limits of MacDill Field, Florida, on or about 27 August 1944, did, at MacDill Field, Florida, on or about 1 October 1944, break his said arrest before he was set at liberty by proper authority.

He pleaded not guilty to all Charges and Specifications. He was found guilty of the Original Charge and Specifications 1 and 3 thereof and of the Additional Charge and the Specification thereof. He was found not guilty of Specification 2 of the Original Charge. No evidence of previous convictions was introduced at the trial. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that at about 0200, 27 August 1944, the accused was a guest at the Starlight Cafe, Sulphur Springs, Florida (R. 10, 11, 17). The cafe is a large public dining and dancing establishment and at the time in question there were approximately 500 people there (R. 18). Corporal Rogers of the Military Police was checking the cafe and noticed that the accused, who was sitting at a table with several friends, had his tie off, his shirt open and his sleeves rolled up (R. 11). The accused had had a few drinks, but was not drunk (R. 14, 19). Rogers asked the accused three times to police up and then walked away, expecting that the accused would comply with his request (R. 11). The accused, however, walked over to the door where Technical Sergeant Bernard, also of the Military Police, was standing (R. 11, 17). Bernard likewise asked the accused to police up, repeating the request at least three times (R. 11, 17), and stating that if he did not comply, he would have to leave the place (R. 19). About the third or fourth time, Bernard was told by the accused to "go fuck myself, I couldn't do nothing to him" (R. 17). Bernard turned to talk to the manager of the cafe, whereupon accused struck him on the neck with his fist and shoved him so that he, accused, could pass through the door (R. 17). Accused used profane language, referring to "Chicken shit MPs" and "that chicken-shit Corporal" (R. 19), and caught Bernard by the back of his shirt (R. 17). Thereupon, Bernard and another military policeman each took the accused by an arm and led him outside (R. 17). Accused did not walk but fought and kicked (R. 18). This episode occurred just inside the door leading into the dance hall in the immediate presence of two civilian policemen and the manager (R. 17, 20). The language of accused was at least loud enough to be heard by the two policemen, who thereupon came over (R. 18). Bernard had been about to call the officer of the day when the accused struck him and "got so we had to do something" (R. 17, 20). Once outside the cafe, everybody started crowding around (R. 17) and the accused became so noisy and boisterous that the military policemen decided to put him in a staff car and take him to the Military Police Headquarters (R. 11, 17). They put him in the car, but

he immediately got out, whereupon Bernard said "Come up to Headquarters and straighten the thing out" (R. 17). The accused resisted by cursing and striking Rogers and Bernard (R. 11, 12, 15, 17) and was finally put back into the car by force (R. 12, 17). This disorder occurred in front of the cafe, most of whose patrons were outside while it was going on (R. 18, 19). Accused then asked where they were going, and upon being told that he was being taken to Headquarters to see the Provost Marshal, said "Who, Captain Taylor? Fuck that son of a bitch. I know him. He's no good" (R. 17, 18). During the trip to Headquarters, the accused had to be more or less held by the military policemen to prevent him from hitting the driver, which he repeatedly threatened to do (R. 12). Upon arriving at Headquarters, the accused said "This is the same damn place I was before" and stated that he should have burned it down the last time (R. 17).

Upon learning of the disorder, Lieutenant Colonel Robert K. Martin, Commanding Officer of MacDill Field RTU (HB), the Group of which the accused's squadron was a part, directed that accused be placed in arrest pending investigation (R. 5). Notification of the arrest was given the accused in writing and the accused indorsed an acknowledgement of receipt thereon (R. 5; Ex. A). The confines of MacDill Field, Tampa, Florida, were set as the limits of arrest (Ex. A). At this time, the accused was a member of Squadron S of the Group (Exs. A, B). On 16 September 1944, the accused, being still in arrest, requested permission to go to Tampa for the purpose of consulting civilian counsel (R. 5). Written permission was given, authorizing the accused to leave MacDill Field from 1300 to 1700, 16 September 1944, for this purpose (R. 5, 6; Ex. B). Such written permission specified that an absence after 1700, 16 September 1944, would constitute a breach of arrest (Ex. B). On 18 September 1944, accused was transferred from Squadron S of the Group to Squadron N of the same Group (R. 6, 7; Ex. C). His new squadron commander did not notify him that his status of arrest continued, inasmuch as he was unaware of the fact that the accused was in arrest (R. 7). The accused, however, was not given any duties to perform (R. 7). The squadron commander testified that he had no authority either to place an officer in arrest or release one already in arrest (R. 8). On 1 October 1944, the accused was picked up by the Military Police in the Plaza Bar Room, Tampa, for breach of arrest (R. 8, 9). He was taken to Military Police Headquarters, where in response to questioning, he stated that he was not in breach of arrest since he had been transferred to another squadron subsequently to his arrest (R. 9). A check with the accused's Headquarters revealed that he was still under arrest, however, and upon being so advised, he was permitted to return to his station (R. 10).

4. The evidence for the defense consisted solely of the accused's sworn testimony, given after he had been properly advised of his rights as a witness (R. 20). The accused testified that he had been at the cafe

(4)

for about an hour and a half when Corporal Rogers told him to put on his tie (R. 25). He had been drinking before he reached the cafe but did not think he was drunk (R. 24, 25). He admitted that he had his tie off, his shirt unbuttoned and his sleeves rolled up, but said that it was very hot and that other military persons present had their ties undone and off (R. 22). Corporal Rogers told him several times to put his tie on, but he disregarded his "orders" because they seemed unreasonable in view of the fact that others were in the same condition (R. 22). He admitted at the trial, however, in connection with his refusal to comply, that "there is no basis for me acting like that" (R. 22). Finally, the accused walked over to the door to see whether he could locate a member of his party who had gone outside, and stopped and talked to Sergeant Bernard about putting on his tie (R. 22). He told the sergeant that he didn't think the situation warranted it (R. 22). The sergeant took a belligerent attitude and a heated discussion arose resulting in an "ultimatum" from the sergeant to the effect that accused would either put on his tie or go with him (R. 22). The accused declined to do either and the sergeant reached over to take his arm and lead him outside (R. 22). From there on it was "rather a mixed up mess", and the accused doesn't know what happened (R. 22). "There were people pulling and pushing and grabbing arms" and the accused finally found himself in the staff car after considerable effort on the part of the Military Police to get him there (R. 22). At one point, he was "tapped" on the head by a flashlight or club wielded by a civilian policeman and was threatened by one of the military policemen with a club (R. 22). The accused denied that he struck anyone intentionally but admitted that someone may have been hit as the result of his jerking his arms loose and "wrestling around" (R. 22). He admitted using profane language in the car and stated that he might have used profanity at the doorway of the dance hall (R. 22, 23). He had no recollection of making the alleged remarks about Captain Taylor and did not think he made them (R. 23). He also denied deliberately striking Sergeant Bernard with his fist in the cafe, but said that he may have hit him while trying to free his arms from Sergeant Bernard's grasp (R. 23, 24). The accused was uninjured in the scuffle except for two bruises on the jaw (R. 23).

With respect to the breach of arrest alleged in the Specification of the Additional Charge, the accused testified that he hadn't paid much attention to the notification of arrest which he had received and acknowledged, but assumed that he was under arrest to the field and that he had been put in such status by Squadron S (R. 24). Hence he believed that his transfer to Squadron N terminated his arrest, especially since his new squadron commander had said nothing about it (R. 21, 25). Accordingly, he went to town practically every day thereafter and did not learn that he was still under arrest until he was apprehended by the Military Police at the Plaza Bar in Tampa early in the morning of 2 October 1944 (R. 21).

5. With respect to Specification 1 of the Original Charge alleging disorderly conduct in the Starlight Cafe, the evidence convincingly shows a course of conduct by the accused fully justifying the finding of guilty reached by the court. There is no question that the cafe was a public place, and by his own admission, the accused repeatedly disregarded the requests of the Military Police to adjust his tie and otherwise police up. This finally resulted in a disorderly scene within the cafe, involving the use of loud profanity by the accused and a physical scuffle flowing from the accused's refusal to accompany the Military Police outside. This scene was witnessed by at least three people and once outside the cafe, the accused continued his profanity and physical struggling in a further effort to avoid accompanying the Military Police, this time to their Headquarters. The evidence shows that at this point, many of the 500 patrons of the cafe had gone outside to witness the disorder, thus indicating that it had attracted considerable public attention. While there is no direct evidence that the condition of the accused's uniform was violative of any specific directive on the subject, it was not contended by the defense that the requests of the Military Police were improper. Furthermore, with respect to his refusal to comply, the accused admitted in his testimony that "there is no basis for me acting like that". The only excuse given was that it was extremely hot and that other members of the military personnel were similarly out of uniform. While the accused made some attempt to indicate that the Military Police took a belligerent attitude toward him, there is nothing in the record to show that their acts and attitude were in any way unwarranted or that the action taken and the force used against the accused were excessive under the circumstances of his bellicose and disorderly attitude. With respect to the place of the disorder, the Specification alleges that it occurred "in a public place, to wit, the Starlight Cafe", whereas the evidence shows that the more serious aspects of it occurred outside and in front of the cafe. Even assuming that this constitutes a variance, however, no objection on this score was raised by the accused and in any event, the slight variance in locale would be immaterial (CM 235530, Hobbins, 22 B.R. 105). Under all the circumstances therefore, it seems plain that the acts of the accused constituted disorderly conduct in violation of Article of War 96, as charged.

Specification 3 of the Original Charge alleges that accused resisted arrest by striking the military policeman with his fists, the offense being charged under Article of War 96. Despite the contention of the accused that he struck no intentional blows, the evidence leaves no real doubt that he resisted the Military Police in the manner described. No question was raised by the defense as to the legality of the arrest nor was it contended that the accused was not advised that he was under arrest. The arrest appears to have been proper under the authority and procedure

(6)

prescribed by the War Department in paragraph 16b, FM 19-5, 14 June 1944, where it is provided that the Military Police may take into custody any person subject to military law who is guilty of a violation of the Articles of War or whose conduct is such that restraint is necessary. It is further provided in the same paragraph that in the case of officers, the arrest may be made by the senior noncommissioned officer present if no officer is available for the purpose, and that once arrested, an officer should be taken immediately to the Provost Marshal's office, force being authorized where necessary. The record amply demonstrates that the arrest was necessitated by the unruly and disorderly conduct of the accused and was therefore authorized and legal under the directive of the War Department above cited. Nor was there any doubt that the accused was aware of the fact that he was under arrest. He did not contend otherwise and while it does not appear that he was expressly so advised, it is affirmatively shown that he was told that he was being taken to Headquarters and that his resistance continued thereafter. Under the circumstances, therefore, the finding of guilty of this Specification appears to be amply justified by the evidence.

The Specification of the Additional Charge sets forth a breach of arrest, the Charge being laid under Article of War 69. The record reveals that as a result of the disorders previously described, the Commanding Officer of the Group of which accused's squadron was a part ordered him into arrest pending investigation of the affair. The notification of arrest was in writing and accused indorsed his acknowledgement thereon. Thereafter, accused was apprehended in a bar in Tampa, Florida, which was outside the limits of his arrest. The arrest was made by order of Lieutenant Colonel Robert K. Martin who was described in the body of the testimony and in the notification of arrest as Commanding Officer of MacDill Field RTU (HB), a Group of which accused's squadron was a part. It appears that Lieutenant Colonel Martin had authority to place accused in arrest, as a "commanding officer" within the meaning of paragraph 20, Manual for Courts Martial, 1928, a Group for purposes of administering military discipline being the equivalent of a regiment (par. 2g, C 1, 29 June 1943, AR 95-10, 27 July 1942). Hence the arrest was ordered by competent authority. The only defense to the Specification lies in the contention by accused that he believed that his transfer from Squadron S to Squadron N of the same Group, having occurred between the arrest and the breach, terminated the arrest and left him free to leave the post. There is no showing that accused made the slightest inquiry as to the effect of the transfer on his status, and the arrest, having been ordered by higher authority, definitely appears not to have been terminated by the transfer from one squadron to another. Accused, therefore, assuming that his testimony is entitled to belief, was operating upon a mere mistake of fact which, although admissible in extenuation, does not constitute a defense (MCM, 1928, par. 139g). Nor does the prolonged duration of the arrest attributable to the delay in

bringing the case to trial constitute a defense since although accused may have been entitled to a release or to earlier action on the charges, he was not authorized to release himself (CM 229280, Payne, 17 B.R. 109). Accordingly, the court's finding of guilty of this Charge and Specification is legally sustained by the record.

6. Records of the War Department disclose that the accused was born in Michigan and is 23 years of age. According to the Report of Psychiatric Examination attached to the record of trial, he was recently married. He completed the ninth grade in school and thereafter operated an auto-salvage yard and was employed as a laborer on motion picture sets and as a boilermaker mechanic. He entered the Army as an enlisted man on 23 January 1943 and served as such until 7 January 1944 when, having completed the air cadet training program, he was appointed temporary second lieutenant, Army of the United States. On 5 February 1944, he was punished under Article of War 104 for absenting himself from roll call and formations for three days, punishment consisting of restriction for a period of seven days. On 1 July 1944, he was again punished under Article of War 104, this time for reporting for duty as co-pilot under the influence of liquor, punishment consisting of reprimand and forfeiture of pay in the amount of \$75.

7. The court was legally constituted and had jurisdiction of the person and of the subject matter. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of either Article of War 69 or 96.

Walter R. Andrews, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

Abraham J. [Signature], Judge Advocate.

(8)

SPJGQ
CM 269105

1st Ind.

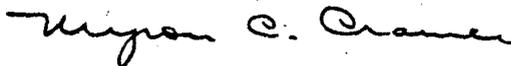
War Department, J.A.G.O., - To the Secretary of War.

DEC 18 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 Phillip Kolick (O-821298), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence. The conduct of the accused in creating so conspicuous a disorder in a public place and in resisting with violence and profanity the lawful and proper efforts of the military police to place him in arrest, together with his subsequent breach of arrest, demonstrates that he has no proper appreciation of the responsibilities and standards of conduct required of a commissioned officer. This conclusion is supported by the fact, as shown in War Department Records, that it had been necessary twice before during the accused's service of eight months as a commissioned officer to punish him under Article of War 104, once for absenting himself from formations and roll call for three days and once for reporting for duty as a co-pilot while under the influence of liquor. Accordingly, 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 the above recommendation into effect, should such action meet with approval.



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

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

(Sentence confirmed. G.C.M.O. 51, 27 Jan 1945)

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

(9)

SPJGK
CM 289167

13 DEC 1944

UNITED STATES

v.

Private ALBERT W. MAYER
(32414331), 4119th Army
Air Forces Base Unit (Air
Base), Section B, Brookley
Field, Alabama.

MOBILE AIR TECHNICAL SERVICE COMMAND

Trial by G.C.M., convened at
Brookley Field, Alabama, 14
November 1944. Dishonorable
discharge and confinement for
five (5) years. Disciplinary
Barracks.

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

1. The Board of Review has examined the record of trial in the case of the soldier named above.
2. Since the record of trial is legally sufficient to support the findings of guilty of Charge II and its Specification (AW 58 - Desertion) and the sentence as approved by the reviewing authority, the only question requiring discussion is that of the legal sufficiency of the evidence to support the findings of guilty of Charge I and its Specification, wherein accused is alleged to have escaped from confinement on or about 30 September 1944 and thereby to have violated Article of War 69.
3. The evidence shows that accused was legally committed to the Post Stockade, Brookley Field, Alabama, as a prisoner, unsentenced, on 28 June 1944 (R. 20). He passed from the status of a "prisoner, unsentenced" to that of a "garrison" prisoner on 29 July 1944, and this was his status at the time of his alleged escape on 30 September 1944 (R. 8-9, Ex. 1). His duties at the time of his alleged escape, as well as for about ten days prior thereto, were those of a cook for the guard squadron mess (R. 30). He had apparently been mess sergeant for this same mess before being confined (R. 36). The mess hall in which he worked was situated outside and about four blocks from the stockade (R. 32). Accused had not been officially paroled nor made a trusty but was seen from time to time by various guards and prisoner chasers going to and from the mess hall without guard, and some of these stated that they were under the impression that accused was a trusty (R. 30,31,33,34,38,40,43,45,47,48). Private John W. Thomas and a Private Glover, prisoner chasers, were in charge of prisoners working in the mess hall on the afternoon of 30 September (R. 46,47). Private Thomas, who had been drinking before he went on duty about 1:30 p.m. (R. 49), stated that none of the prisoners, of which there were eight, was pointed out to him as his particular responsibility (R. 47). He had, before 30

September, seen accused go to and from the mess hall without guard, had been informed by the head prisoner chaser that it was all right for accused to do this (R. 50), had been informed by accused that he was a trusty (R. 47), believed that accused was a trusty (R. 47), and did not at any time during the afternoon consider that he was guarding accused (R. 47,48). Some of the prisoners finished their work earlier than others on the evening of 30 September and Private Glover conducted five of these prisoners to the stockade, leaving Private Thomas and three prisoners, viz, accused, a Private Stubbs, and a Private Fentress, at the mess hall (R. 48). Accused had told Private Thomas during the afternoon that both he and Private Stubbs were trusties, so about 6:30 p.m. Private Thomas conducted Private Fentress to the stockade, leaving accused and Private Stubbs at the mess hall (R.48). Private Thomas turned in his gun and went back toward the mess hall. He met accused and Private Stubbs before he got to the mess hall and they told him that they were going to the stockade, whereupon Private Thomas left them where they were and proceeded on to town (R. 48). There was no proof that accused returned to the stockade. He was definitely ascertained to be absent at roll call the following morning. So also was Private Stubbs (R. 37,38,14,16). Accused had not been released nor authorized to be absent. He was later apprehended in Texas.

4. The evidence shows that accused absented himself without authority from the post at which he was serving a sentence to confinement, but there is no evidence to show that he broke away from any physical restraint. The only logical conclusion to be drawn from the evidence is that he and Private Stubbs absented themselves after the guards had left them and without having reentered the stockade. While not officially a trusty, it appears that accused was nevertheless being accorded some of the privileges ordinarily enjoyed by a trusty, and absented himself while outside the stockade and unhampered by a sentry or guard. "Confinement imports some physical restraint" (par. 139a, MCM, 1928), and the Manual for Courts-Martial provides that -

"A violation of a restraint on liberty other than arrest or confinement - for example, the restraint imposed on a prisoner paroled to work within certain limits - should be charged under A.W. 96" (par. 139a, MCM, 1928).

The record of trial does not establish the offense charged, that is, escape from confinement, for the physical restraint which is the essence of confinement did not exist (CM 191403, Evans, 1 B.R. 247; CM 191766, Gilchrist; 1 B.R. 297; CM 224109, Medlock, 14 B.R. 69; CM 244521, Humphrey, 28 B.R. 337).

5. For the reasons stated above, the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Charge I and its Specification, but legally sufficient to support the findings of

guilty of Charge II and its Specification and the sentence as approved
by the reviewing authority.

James G. Egan, Judge Advocate.
Charles H. Stinson, Judge Advocate.
Norman M. Moore, Judge Advocate.

(12)

1st Ind.

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

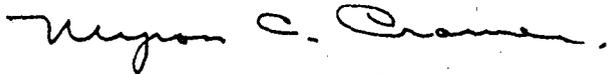
DEC 13 1944

TO: Commanding Officer,
Mobile Air Service Command,
Brookley Field, Alabama.

1. In the case of Private Albert W. Mayer (32414331), 4119th Army Air Forces Base Unit (Air Base), Section B, Brookley Field, Alabama, 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 I and its Specification, but legally sufficient to support the findings of guilty of Charge II and its Specification and the sentence as approved by the reviewing authority, which holding is hereby approved. Upon disapproval of the findings of guilty of Charge I 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 269167).



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.

(13)

SPJGK
CM 269224

22 DEC 1944

UNITED STATES)

CAMP EARLE

v.)

Private DONALD D. WAGONER
(6296657), Harbor Craft
Detachment (Transportation
Corps), Alaskan Department
(At Large).)

Trial by G.C.M., convened at Attu
Island, Alaska, 17-20 October 1944.
Dishonorable discharge and confine-
ment for life. Penitentiary.

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

1. The Board of Review has examined the record of trial in the case of the soldier named above.
2. The accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 92nd Article of War.

Specifications: In that Private Donald D. Wagoner, Harbor Craft Detachment, (Transportation Corps), Alaskan Department (At Large), did, at Camp Earle, Alaska, on or about 24 September 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Technician Fourth Grade Jesse D. Beemer, a human being by shooting him with a Thompson Submachine Gun.

He pleaded not guilty to and was found guilty of the Charge and the Specification. Evidence of one previous conviction by a special court-martial for wrongful use of a Government truck without authority, for which he was reduced to private and sentenced to forfeit \$35 of his pay for five months, 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 the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The evidence for the prosecution shows that accused was a private in the Harbor Craft Detachment, Army Transport Service (Transportation Corps), at the time of the commission of the offense with which he is charged, stationed at Camp Earle, Attu Island, Alaska (R. 5,10,28). The victim of the fatal shooting was Technician Fourth Grade (Sergeant) Jesse D. Beemer,

(14)

Maintenance Platoon, same service, also stationed at Camp Earle (Pros. Ex. 1, R. 29). On the evening of Saturday, 23 September 1944, a "hill-billy jam session" was held in the room of Sergeant Beemer in the rear of the "ATS orderly room", starting shortly after supper and lasting at least until 0415 the following day (R. 10,13,16,23,62). During the course of the evening a number of enlisted men dropped into the room, including Technician 4th Grade (Sergeant) William H. Carter, Technician 5th Grade (Corporal) Gustave A. Kowalski, Privates First Class Alva B. Witt and George E. Gretten, Privates Samuel F. Roberts and Thomas E. Sanders, and accused (R. 10,14,22). Private Roberts took a case of beer to the party, and it and at least a part of but not more than another case of beer, furnished by deceased, were consumed during the evening (R. 10,11,16,18,19,20). No one saw any intoxicants other than beer consumed at the party, none saw any alcohol mixed with the beer, and none saw any jug or mayonnaise jar, except Corporal Kowalski, who got intoxicated rather quickly but recalled having seen a mayonnaise jar, containing a white liquid the nature of which he did not know (R. 11,12,13,19,20,25,26,27,72,73). There were no unusual incidents or arguments. Some of the men played musical instruments and some sang and talked (R. 10,13,71,72). Every one drank except Privates First Class Witt and Gretten (R. 18,22,25). Private Roberts, according to his and Witt's testimony, was somewhat intoxicated when he left at about two o'clock on Sunday morning. Both Roberts and Witt were under the impression that at the time of their departure together, about 0200, only accused and deceased remained in the room (R. 16,19,20,23). Private First Class Gretten, 203d Infantry, a checker on special duty at the camp, wrote letters in his hut until well after midnight and then went over to the orderly room to mail these letters. Attracted by the music in deceased's room, he entered it and remained until about 0415. At the time of his departure, only accused and deceased were in the room, neither appearing drunk (R. 24,25,26). Just before Gretten left accused and deceased were "pitching quarters at a crack in the floor" (R. 188).

At about 0615 Sunday, 24 September, accused entered Hut 639, which was occupied at the time by Sergeant Stanley F. Rowe, Corporal Kowalski, Private Roland L. Dement, two others referred to as "Tec.5 Pond" and "Hennessey" (shown as "J.H." on Pros. Ex. 4), and three civilians. One Pajet, who was also assigned to the hut, was absent on duty at the time (Pros. Ex. 4, R. 44,51,63). Accused was crying as he sat down on the bed occupied by Kowalski, to whom he complained that deceased had hit him in the head with a beer bottle (R. 44,51,63). Private Dement, who occupied the bed opposite that of Corporal Kowalski, noticed that accused had a skin abrasion over his eye and blood on his face. He heard accused state that "he would kill that Okie [a nickname for deceased] before the day was over" and saw him leave shortly afterwards. He went back to sleep and awoke again when his alarm clock rang at 0630 (R. 28,29,45). Sergeant Rowe was also awakened by accused's entrance into the hut and his conversation with Kowalski. According to Sergeant Rowe, Kowalski started out

to find deceased but was called back by accused who stated that he would "take care of his own troubles" (R. 51,52). After accused's departure, Kowalski also left and returned later with a carbine, which he unloaded by his bunk (R. 53,56,57). Sergeant Rowe then went back to sleep and was subsequently awakened by a loud report, "like the explosion of a gun", opposite his bunk. He saw accused standing by the vacant bunk, normally occupied by "Pajet", with something in his hand. After accused left the hut, Sergeant Rowe turned on the lights and found three bullet holes about 25 inches above the floor in a panel near Pajet's bunk (R. 53,54,55,56, Ex. 4). Earle Hinder, civilian, who occupied one of the cots in Hut 639, heard some one come in around 0600 on 24 September. He went back to sleep and was later awakened by shots. When he looked to see what caused them, he discovered accused standing across from his "bunk" with a gun in his hand (R. 57-58).

Corporal Kowalski testified that after he had abandoned the idea of going to Sergeant Beemer's hut and returned to his own hut he changed his mind and decided to follow his original plan. Upon arriving at deceased's room, he found it in great disorder, with the stove knocked to one side and bottles strewn around. Noticing Sergeant Beemer's rifle in the room (deceased was apparently not present), Kowalski unloaded it, took it back to his own hut, hid the ammunition in his bunk and placed the rifle with his own (R. 63,64,69). Kowalski then suggested to accused, who was in the hut, that they "go to chow" and accused left for the mess hall while Kowalski completed the lacing of his shoes (R. 65). A sketch of this mess hall, which was between 200 and 300 yards from Hut 639 (R. 50), was offered as Prosecution Exhibit 2. This building consists of a large dining room, measuring 160 feet on its northern and southern lines and 20 feet on its eastern and western lines. To the rear or south of the dining room are a kitchen and "wash room". The kitchen is immediately east of the wash room but there is no opening between the two. The "normal entrance" to the building is through the "wash room", which has an interior door or opening, leading into the dining room. In the dining room are the tables, the serving counter, and the racks, in which are kept the trays and eating utensils. There is an opening from the dining room into the kitchen, and three direct entrances to the dining room from the outside, one of which is known as the "north entrance". In the rear of the kitchen there is located a "storage room".

Accused reached the mess hall ahead of Kowalski, who, upon his arrival there, saw deceased in the kitchen (R. 64). Deceased had been in the kitchen as early as 0500, at which time he appeared to be drunk, and had been seen in and around it for at least 45 minutes thereafter (R. 87,88). Kowalski called to deceased and they went together into the wash room where they were later joined by accused. "Beemer started again and wanted to whip Wagoner again", but Corporal Kowalski successfully intervened and accused left (R. 64,65). Accused passed through the dining room, where he was seen by Private Dement, who had arrived in the mess hall in the

meanwhile (R. 31,65). While there is no testimony as to where accused then went, it is apparent that it was at this time that Sergeant Rowe heard the firing in Hut 639, saw accused standing with something in his hand, and discovered the three bullet holes. After accused's departure from the mess hall, deceased remarked, "By golly, I am going back to get my rifle and shoot Wagoner", and laughed when told by Kowalski that he (Kowalski) had already taken the gun. Kowalski then suggested that they get their "chow" and the two proceeded to the rack and procured their trays and utensils, with Kowalski in the lead (R. 65,71,97). Private Dement, who had gotten his tray and his food, and had seated himself at the second table from and facing the north entrance saw accused come back into the mess hall "with his hands in his pocket" and look "over towards the washroom", where deceased and Kowalski were standing, just prior to passing into the dining room. Accused walked toward them as they were approaching the tray rack, and as he did so, "Sergeant Beemer said to Wagoner 'Fuck you, you old cocksucker' and Wagoner turned around and went back to the door", that is, the "north entrance", remarking as he did so, "Have you fellows seen anybody killed on Sunday morning?" (R. 31, 32,33,45,46). It appears (although it is not absolutely clear) that accused then went outside the building (R. 46,47,50,77). When he reappeared he was armed with a Thompson submachine gun (R. 32,78,81). Approaching deceased, accused called out, "Come and get it" (R. 32,33,47). Deceased, who had a tray and his eating utensils in his left hand and a cup in his right, walked toward accused and when he was within "kicking distance" of accused kicked out towards accused, apparently causing the gun to be deflected slightly. At the same time he threw the cup, which did not strike accused. Simultaneously, the gun was fired once. Four more shots were immediately fired and deceased crumpled and fell near the serving counter (R. 33,34,36,48,79,94). The gun was on single fire and the several shots were distinguishable (R.35, 80). Private Dement later discovered that the gun used by accused was one issued to him (Dement), which he kept on the shelf above his bunk in Hut 639 with his clips, containing 20 rounds each, and other items of equipment (R. 36,37). Upon checking up, Private Dement found his gun and one clip missing from his quarters (R. 37). When the gun and clip were subsequently taken into the possession of Captain Charles C. Hein, Post Provost Marshal, the clip still contained 12 rounds (R. 117, Pros. Ex. 10). Five empty .45 caliber cartridges were found at the scene of the shooting (R. 116) and three bullet holes had been found in Hut 639 by Sergeant Rowe (R. 55).

At five minutes to seven on the morning of 24 September, Captain Fred M. Weiss, Medical Corps, Camp Earle Station Hospital, was awakened and told that there had been a shooting at the mess hall. In turn he awakened Captain Jordan B. Dell'Era, and the two proceeded to the mess hall, where they saw deceased lying near the serving counter. Captain Weiss pronounced him dead. Four bullets had entered the body, the points of entry being the right thorax, the right lower sternum, the left abdomen, and the left thigh (R. 6,8, Ex. 1). At a subsequent autopsy, conducted by Lieutenant Colonel

Herbert E. Hill, Medical Corps, that officer also determined that death was due to these bullet wounds (R. 8,9).

Immediately after the shooting accused set the gun against the wall, walked into the kitchen and said, "Somebody call an ambulance. Don't let a man die like that" (R. 36). Corporal Kowalski called the "medics", and Howard M. Gordon, a civilian cook, the "M.P.'s" (R. 85). Accused then requested Gordon to find out how badly deceased was hurt and made no reply when informed that Gordon thought deceased was dead (R. 85). Shortly thereafter he asked another civilian cook, Aage Fritz Hansen, what his religion was and upon being told, "Lutheran", added, "I think I have killed a man. Will you pray for me?". Accused then cried a little, walked up and down with his hands in front of his eyes, and declared, "Oh my God. I killed a man!" (R. 90-91).

When Private First Class Marvin A. Urness of the Military Police arrived at the mess hall at about ten minutes to seven, he found deceased on the floor, "gasping for breath". He then passed into the kitchen and, noticing the bruises on accused's face, inquired, "What is the matter with you Wagoner?". Accused immediately asked, "Is he dead yet?" and, upon receiving a negative reply, asked whether the "M.P.'S" were on their way, and told about a fight in the orderly room in the course of which he had been hit over the head with a beer bottle (R. 100). When Private First Class Virgil H. Parker, also of the Military Police, reached the kitchen a little later, accused volunteered the statement, "I am the man you are looking for. I just killed a man" (R. 102). Private First Class Edwin Simonson, a third member of the Military Police to go to the kitchen, heard accused remark in the Mess Hall, "I am the man who called the MP.'s", and later as they were proceeding to the stockade, heard him inquire, "Is he dead?" (R. 108). Private Adrian White was the last member of the military police to reach the mess hall. Noticing accused's condition he inquired whether accused had been in a fight. Replying, accused stated, "It amounts to it. I think I just killed a man" (R. 112,114).

Various statements as to accused's condition on the morning of the killing were made by the witnesses. When accused entered Burt 639, Private Kowalski, who himself had a "hangover", could not say whether or not accused was drunk. On previous occasions, when he had seen accused drunk, accused appeared happy. He had never seen accused cry before (R. 69,73). Sergeant Rowe considered accused's appearance in the hut abnormal and his voice "peculiar" (R. 56). According to Private Dement, when accused entered the hut "he looked more or less to me like somebody who had been in an automobile wreck and was shocked pretty heavy and looked like his face was skinned more or less". By being shocked he meant "drunk". "He accused was talking pretty well thick. He couldn't get his words out like he wanted to" (R. 44).

As to accused's appearance in the mess hall, prior to the shooting, Private Dement testified that "he looked like he had pretty steady nerves * * * he looked like he was drunk * * * like he had a sort of funny look on himself" (R. 48). According to Private Spellings, accused "looked like he was in a daze like * * * he looked unusual". Accused was walking "kind of slow" and talking in a low voice which was normal for him, and the witness didn't notice "too much wrong" with him (R. 82). After the shooting the civilian cook, Hansen, thought accused "looked kind of dazed", but did not see him stagger nor could he say that accused's speech was thick (R. 92). All four members of the military police who went to the kitchen after the killing found accused nervous but had no difficulty in understanding him. To Private Simonson he seemed "rather dazed" (R. 110), and to Private White he "seemed to be a little drunk * * * looked as though he were not in his right mind" (R. 113-114).

According to an extract from a radio from the Deputy Commander of the Alaskan Department to the Commanding General of Camp Earle, accused's "AGCT score" was 92 (R. 117-118).

For the defense.

It was not unusual for accused to get drunk and not remember what had happened (R. 119,121,128,134,137). Accused drank heavily, indulged in alcohol and other strong liquors, "carried his liquor well", and had never been seen crying when drunk (R. 119,122,127,128,134,136,137). Accused had been drinking during the week in which the killing took place, and on the afternoon preceding the tragedy, Saturday, had a gallon jug of alcohol on the "orange barge" to which he was assigned (R. 129,130). Around five o'clock that afternoon, as accused was getting ready to leave his hut, he "had a rain hood and in this rain hood he uncovered a jar" which looked "like a pound coffee jar, and it was full of liquor or something". This liquor was white (R. 134,135). Accused did not sleep in his hut on either the Friday or Saturday night immediately preceding the crime (R. 135). At about 0530 on the morning of the crime, deceased entered the hut normally occupied by accused, fell over a washstand, took the comforter from, and looked at the face of the occupant of one of the bunks, went over to deceased's bed, and after mumbling, "God damn it", left the hut (R. 129,130, 135). Deceased was powerfully built and was a "man to avoid when he was drunk", being "quarrelsome" when in that condition (R. 140).

Captain Jordan B. Dell'Era locked deceased's room on the afternoon of the crime without examining it. Later that afternoon or the following afternoon he and Major William W. Sweet, Jr., investigating officer, went into the room and found about 36 empty beer bottles and a clear bottle, "something like a pint beer bottle", which contained about one ounce of a liquor that smelled like alcohol. A careful search failed to disclose anything else "which even appeared to have liquor in it". The room was in disorder, with the stove shoved aside and the stove pipe knocked loose.

Normally the room was kept in a neat condition (R. 140-145).

After being advised as to his rights, accused elected to testify in his own behalf. He stated that he had joined the party in deceased's quarters, and when the beer was "about gone", returned to his hut and brought back a jug of alcohol. The alcohol was mixed with the beer that was left.

"* * * This Slim Roberts was the man that done the mixing of the drinks, and after the beer was out, there was a bottle of apple juice. * * * and from then on it was mixed in the apple juice bottle with water. * * * The next thing I know anything about was someone woke me up in the stockade, telling me that the Captain wanted to see me. I went in to see Captain Hein, the Provost Marshal, and he asked me if I knew that I was in hot water. I couldn't be sure, but I believe I answered to him, 'Yes, sir', and he asked me if I wanted to make a statement. He advised me of my rights and so forth, and I told him I didn't believe so, because I wasn't feeling very good right then and I didn't know what it was all about and wanted time to think a little bit, to figure out where I was and why. The prisoners in the stockade was the ones that told me what I was in for. I believe that is all, sir."

Accused was unable to state whether he had been drinking alcohol during the week preceding the party, but knew that he had consumed "quite a bit of whiskey and rum" (R. 146,147).

On cross-examination accused stated that he could not say that he was drunk when he went to the party on Saturday evening (R. 147), but was pretty sure that he had started drinking on Wednesday and had had some alcohol on Saturday (R. 150). He purchased the gallon of alcohol on Saturday in "Navy Town" for \$120.00 (R. 149). Upon being awakened in the stockade on Sunday he "got up and got straight" and reported to Captain Hein in the stockade (R. 152). It was in the guardhouse that he found out that Beemer had been shot (R. 154). He had no recollection of "pitching quarters" or of being alone with deceased in the hut (R. 154).

According to a radio from the Deputy Commander, Alaskan Department, there was no record of any arrest of accused by civilian authorities (R. 189).

Lieutenant Commander Alexander R. MacLean, Medical Corps, United States Naval Reserve, testified as an expert that amnesia may result from a blow on the head when not accompanied by a fracture, and that there might be a total lack of memory during a period immediately following the blow. While a fracture was not necessary it would be necessary for a concussion to occur to produce the temporary loss of memory. In witness' opinion it would not be unreasonable to say that a man who had been drinking excessively and had also sustained a blow upon the head without a fracture,

might have had temporary amnesia, provided that the blow was of sufficient intensity to cause concussion (R. 38,39,40,41,42,43).

Rebuttal.

Apparently Captain Murray E. Margulies, Medical Corps, neuropsychiatrist of the Camp Earle Station Hospital, was called as a rebuttal witness for the prosecution, although not designated as such. Captain Margulies examined accused at 0930 on Sunday, 24 September 1944, and found a small abrasion over the right eyebrow, approximately one inch and a quarter in diameter, another over the right knee joint, and a third over the right buttock and a very, very slight injury over the right cheek bone. There were no other external marks or physical injuries (R. 160). Accused had no neurological disorders of any kind, and was suffering from no type of psychoneurotic abnormality "with the exception of acute intoxication, which I came to the conclusion by certain tests" (R. 162). By "acute alcoholism" witness meant a "physical and mental state of an individual which follows ingestion of alcohol and results in certain physical and mental disturbances, such as incoordination, inability to perform mental work, impairment of memory or of speech" (R. 163). Accused, in witness' opinion, was only mildly intoxicated and his mental faculties had been impaired "very little". A blood test, taken shortly before the examination, showed a "concentration of 1.25 mg of alcohol per 1 cc of blood" (R. 163). At the time of the examination, accused was fully oriented as to time and place and it was witness' opinion that accused "was feigning a mental abnormality known as amnesia" (R. 162). In examining accused, witness considered the possibility of a concussion. Consequently he conducted a neurological examination, including an X-ray of the skull and a consideration of accused's statements, in answer to questions, as to "how he failed to remember". There was nothing to substantiate a diagnosis of concussion of the brain (R. 166). A mental test disclosed accused's mental age to be ten years. An "AGCT" score of 92 indicates a mental age of 9 years and two months. In witness' opinion, if a person has a score of 92 under normal conditions, and discloses a mental age of ten years when he is under a mental strain and is to some extent under the influence of alcohol, the individual would at the latter period be "more or less under his normal mental condition" (R. 167).

In answer to the request that he tell the court "what the circumstances would necessarily have to be under which the diagnosis of amnesia may be made", Captain Margulies made the following statements:

"This is a question that requires, perhaps, a little discussion about amnesia. It is first, worthwhile for us to realize that it is only a symptom of a disease, and in order to be able to make that diagnosis you have to find a disease in which amnesia may occur. In analyzing the accused's examination, in my opinion

he was not suffering from insanity in which amnesia may occur. Therefore, I have ruled out insanity. Amnesia again occurs in hysteria. In my opinion accused did not suffer from hysteria. It did not fit into the clinical picture of hysteria. It could be the result of an injury to the brain. However, there was no evidence of it. It could be a symptom of constitutional disease, and the physical examination failed to confirm that. It could be due to alcoholism, in which one type especially is likely to cause amnesia. However, the behavior and examination failed to give, failed to make, failed to substantiate the only thing by which we could confirm the accused's statement that he has been suffering from amnesia." (R. 166).

A second examination of accused on the following afternoon at 1500 confirmed Captain Margulies' first impression that the "soldier was malingering pertaining to memory" (R. 160,167).

On cross-examination, Captain Margulies explained that "passing out" and amnesia are not the same thing - "to pass out would mean a man is seemingly unconscious or not conscious enough to walk. The man doesn't know what is going on" (R. 171). Alcoholic amnesia from the excessive use of alcohol is quite common (R. 171), and there is a form of intoxication, known as pathological intoxication, which may result in an individual's going to some other place without knowing how he got there or what he was doing, becoming "disoriented", falling asleep, and awakening from ten to twenty hours later with a realization that something has occurred of which he has no recollection (R. 174). (On redirect examination (R. 182) witness testified that unless an individual is particularly susceptible to alcohol, amnesia from indulgence in intoxicating liquors would have to be from "more than a mild indulgence".) To arrive at a conclusion as to an individual's loss of memory there should be observation of the patient, a discussion with him to see whether his speech is coherent, relevant and connected, an examination of his "school knowledge, his intellect, and ability to perform mental work", a determination of his orientation as to time, place, and person, and a search for "evidence of hallucinations and illusions, and his emotional reactions" (R. 171). Laboratory tests are not infallible (R. 176,177), but errors in connection with blood tests are very rare. When there is a conflict between a laboratory test and a clinical examination, it is Captain Margulies' practice to have the test repeated (R. 184).

6. The testimony shows conclusively that Technician Fourth Grade Jesse D. Beemer met his death in the Army Transport Mess, Hall at Camp Earle, Alaska, on Sunday morning, 24 September 1944, as a result of bullet wounds inflicted by the accused with a Thompson Submachine Gun. The shooting occurred after an all night party in Sergeant Beemer's hut, in which a number of enlisted men participated, and very apparently came as the aftermath of a quarrel, accompanied by a physical clash, between accused and deceased, which occurred sometime between 0415 and 0600 of that day. There are no

details as to this quarrel, as accused professed ignorance of what occurred, and he and deceased, both ostensibly not drunk, had been left alone in deceased's hut at 0415 by the last departing guest. That there had been a struggle is evidenced by the appearance of the deceased's room and by accused's physical condition when he appeared at the tent of Corporal Kowalski around 0615, crying and complaining that he had been hit over the head by deceased with a beer bottle. Approximately 36 bottles of beer had been consumed at the party by six of the participants. Other than accused's statement, there is no proof that any other intoxicant was consumed, but there was found in deceased's room a bottle, about the size of a pint beer bottle, which contained only about one ounce of a white liquor that smelled like alcohol. Around 0615, when accused sought and obtained first aid treatment from Corporal Kowalski he made the threat that he "would kill that 'Okie' [a nickname for deceased] before the day was over", and shortly thereafter went to the mess hall with the corporal. There they saw Sergeant Beemer, who had been in the kitchen as early as 0505 and who had also been discovered in accused's hut between 0500 and 0530, apparently looking for accused. Corporal Kowalski called deceased into the "wash room" where they were later joined by accused. Almost immediately deceased, who was a large, well-built man, threatened to beat accused up again. Corporal Kowalski prevented any further trouble and accused left. It is apparent that he then went to Hut 639, about 200 to 300 yards away, procured Private Dement's Thompson submachine gun, and returned to the mess hall. It is not entirely clear where he left the gun, but the testimony is rather conclusive that it was not brought into the hall. During accused's absence deceased made the remark to Corporal Kowalski that he was going to get his rifle and shoot accused, but laughed and made no further threats when informed by Corporal Kowalski that he had already taken the gun. At Corporal Kowalski's suggestion that they eat, he and deceased obtained their trays and eating utensils, and were proceeding toward the serving counter when accused reentered the mess hall. Upon seeing accused, deceased applied a vile epithet to him, whereupon accused picked up the machine gun, which he did not have in his possession at the time, and approached deceased with the words, "Come and get it". There was a distance of about ten feet between them at the time. Deceased took a few steps forward until he was within "kicking distance" of accused, and kicked and simultaneously threw a cup at deceased. The cup did not strike accused. At the same moment accused fired the gun, which seems to have been slightly deflected momentarily either by being struck when deceased kicked or by a movement, voluntary or involuntary, on the part of accused, and followed up this first shot with four more. All were single shots, which entered deceased's body. Deceased crumpled, fell, and died shortly afterwards.

It clearly appears, therefore, that the killing was deliberate, premeditated, and intentional, and constituted murder under Article of War 92. Even a motive was present, revenge for the physical punishment inflicted and the insult hurled by deceased. Accused did not plead provocation, or self defense or other legal justification for his action, but

apparently relied upon a plea of drunkenness, or of amnesia or lack of consciousness, induced by the blow on his head which had been inflicted some time earlier that morning by deceased, or by over-indulgence in intoxicants, or by both. Accused's degree of drunkenness and consciousness at the time of the commission of the crime was a question of fact for determination by the court. Obviously both accused and deceased had been drinking and showed the effects of their indulgence, but it is the opinion of the Board that the record of trial clearly establishes that accused was not so drunk as to be incapable of entertaining the specific intent to kill the deceased, the absence of which would reduce the crime to manslaughter, and was not suffering from any mental incapacity, which relieved him of responsibility for his actions. While the possibility of the crime being merely manslaughter on the theory that it was committed in the heat of anger is not suggested in the record, the Board is of the opinion that accused's deliberate steps, leading up to the killing, previously detailed, preclude the classification of the crime in this lower category.

As opposed to the testimony that accused gave the appearance of being slightly dazed or somewhat drunk, his actions indicate a clear comprehension of what he was doing and what was transpiring. Following the altercation with deceased in the latter's hut, accused proceeded to the hut of his friend, Corporal Kowalski, and, after receiving first aid treatment, deterred the corporal from looking for deceased by advising him that he would handle his own troubles. He apparently had no difficulty in finding his way to the mess hall, nor in returning to the hut after deceased's renewed hostile attitude. That he was aware of what he was doing is further shown by his action in procuring Private Dement's submachine gun and in again returning to the mess hall, where he laid aside the gun until accused hurled a vile epithet at him. His remark as he turned to get the gun, "Have you fellows seen anybody killed on Sunday morning?", and his challenge to deceased, as he was advancing toward him, "Come and get it!", further indicate that he was well aware of what he was doing. His words and actions after the killing likewise confirm the conclusion that he was in adequate possession of his mental faculties. He suggested that an ambulance be summoned, he requested one of the cooks to go and find out deceased's condition, he asked another cook to pray for him when he learned that deceased was probably dead, and when the military police arrived he advised them that he was the man they were seeking.

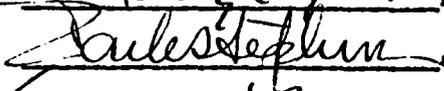
The testimony of Captain Margulies, based on his examination of accused about two and a half hours after the commission of the crime, supports these conclusions as to accused's condition. It was Captain Margulies' opinion as an expert that accused was only mildly drunk and that his amnesia was feigned. Accused was well oriented, displayed normal intelligence and showed no real lack of memory. Captain Margulies could find no indication of amnesia and no physical or mental condition which could have induced that state. In particular there was lacking any concussion, a physical requirement, in the absence of a fracture of the skull, as testified to by Lieutenant Commander

MacLean, expert witness called by the defense, for the creation of amnesia as the result of a blow on the head. Captain Margulies verified his first conclusions by a second examination of accused the following day.

There is no evidence, direct, circumstantial, or inferential, to offset the above expressed facts and conclusions. The Board of Review is of the opinion, therefore, that the record of trial fully establishes every element of the crime of murder (MCM, 1928, 148a) and that the court was clearly justified in finding accused guilty of that crime under Article of War 92.

7. The Charge Sheet shows that accused was 29 years of age, and was inducted into the service of the United States at Fort Bliss, Texas, on 30 October 1939, without prior service.

8. The court was legally constituted and had jurisdiction over the accused 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 finding of guilty and the sentence. A sentence of either death or imprisonment for life is mandatory upon conviction of murder in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement by sections 273 and 275 of the Criminal Code of the United States (18 U.S.C. 452, 454).

 , Judge Advocate.
 , Judge Advocate.
 , Judge Advocate.

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

(25)

SPJGQ
CM 269294

14 DEC 1944

UNITED STATES)

v.)

Captain DANIEL W. HOGAN)
(O-482618), Dental Corps.)

ARMY AIR FORCES
WESTERN TECHNICAL TRAINING COMMAND

Trial by G.C.M., convened at
Keesler Field, Mississippi,
6 November 1944. Dismissal
and total forfeitures.

OPINION of the BOARD OF REVIEW
ANDREWS, FREDERICK and BLEBER, Judge Advocates.

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

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

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

Specification: In that Captain Daniel W. Hogan, Dental Corps, Section "E" (Medical), 3704th Army Air Forces Base Unit, did, at or near Ocean Springs, Mississippi, on or about 10 October 1944, with intent to rape her, commit an assault and battery upon Miss Beatrice Kingston, by willfully and feloniously spreading her legs, slapping her face, and forcefully pressing his body against her body.

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

Specification: In that Captain Daniel W. Hogan, Dental Corps, Section "E", (Medical), 3704th Army Air Forces Base Unit, did, at or near Ocean Springs, Mississippi, on or about 10 October 1944, wrongfully, unlawfully, dishonorably, and by force and against her will, fondle Miss Beatrice Kingston, a woman not his wife, under such circumstances as to bring discredit upon the military service.

He pleaded not guilty to, and was found guilty of all Specifications and Charges. 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, at such place as the reviewing authority may direct, for a period of ten years. The reviewing authority approved only so much of the findings of guilty of the Specification of Charge I and of Charge I as involves a finding of guilty of assault and battery in violation of the 96th Article of War, approved the findings of guilty of the Specification of Charge II and of Charge II, approved only so much of the sentence as provides for dismissal and total forfeitures, and forwarded the record pursuant to Article of War 48.

3. The evidence for the prosecution was as follows:

Miss Beatrice Kingston (R. 13), the prosecutrix, 22 years of age, had resided in Biloxi, Mississippi, all her life (R. 23). She was, and had been for about twenty-five months, a dental assistant at Station Hospital Dental Clinic Number Two, at Keesler Field, where the accused was and had been, throughout that period, on duty (R. 13,23). She was his assistant for about a year and a half of that time (R. 13,24). She had had no dates or social association with him, except that she had met him at an officers' dance about a month before the trial and had occasionally ridden with him in his car from the field to her home in Biloxi and once to a church in Biloxi, one of these rides being with the accused alone and the few others with another officer present (R. 13,24). She knew that the accused was married (R. 13).

On 10 October 1944, the witness completed her day's work as assistant to the accused at about 10:15 p.m., went into Biloxi on the bus, stopped at a cafe for a light repast, and was walking toward her home when the accused drove up and offered her a lift home in his car (R. 14). His car was a blue convertible, which she thought was a La Salle (R. 14). The top was down (R. 15). She got in the car. Her home was about seven blocks further in the direction in which they were going. The accused proposed that they take a ride. The witness said that she was sorry, but it was getting late and she must get home, so could not go. Nevertheless, the accused continued driving. The witness thought that he would turn at the end of the avenue and take her back to her home (R. 15), but he continued across the bridge, on the road to Ocean Springs. On the bridge, the accused grabbed the witness and pulled her toward him. She pulled away, told him to stop and repeated that she must go home. The accused continued across the bridge. The witness protested angrily. She grabbed the steering wheel. The accused asked if she were trying to wreck the car. She replied that she didn't care whether she did or not, and insisted that he take her home. He drove on into a vicinity with which the witness was not familiar, turned into a side road and stopped. This was a country road, and she saw no houses around there (R. 16). The accused pulled the witness over toward

him and forced his kisses and embraces upon her. She protested. The accused would not stop, but increased his efforts and "got violent". The witness screamed. The accused "got down" and drove the car farther back into the country road (R. 16). The witness opened the door and had one foot on the road, but the accused increased the speed of the car and held onto her coat. She kicked the car door open. He told her to close it or it would break off. He drove farther, stopped and resumed his advances. She screamed. He slapped her face. He tried to force her legs apart. They struggled. He had his hand over her mouth. She could not breathe, and was frightened and weak. He was trying to force his body upon hers and trying to force her legs apart. She was struggling and trying to keep him away (R. 17). He tried to put his hand in her underwear (R. 18), and did put one hand under her panties and inserted his finger in her vagina once. He accused her of not being a virgin (R. 19). In pushing his hand away, she discovered that the accused had his penis out. He continued trying to force himself upon her. She screamed again. He again slapped her, but desisted from his efforts and drove on a little further. His headlights revealed a cemetery. He turned the car about and stopped. He then started talking, proposing that she get on his shift regularly at the clinic so he could drive her to and from work every day, and that she live with him. He said that would be easily arranged, was being done every day, and that his wife had everything she wanted. The witness told him that she did not care to hear about his personal affairs, but wanted to be taken home. He grabbed her again and pushed or pulled her down in such manner that her head struck the steering wheel, and the back of the seat fell and hit her in the back (R. 18). She said, "Oh, my back". He was trying to force himself upon her. She screamed. He slapped her. She bit his thumb. She then demanded that he leave her alone and take her home (R. 19), calling him by the name of Captain Graham (R. 19,39), whereupon he accused her of "running around" with Captain Graham, became angry and took her straight home (R. 19). Captain Graham was a married man with two children. She had never dated him, nor any other married man (R. 19,39). Captain Graham's name perhaps came to her mind as the dental officer on the other shift, where she had been working (R. 39).

The accused took the witness to her home, where he left her, at about 1:00 to 1:15 a.m. She went into the house, where she lives with her parents, her sister, Mrs. Wells, and her sister's three children. All were sleeping. She waked her sister (R. 20) and told her what had happened. The witness did not want to disturb her mother, who had been ill. Her sister gave her some ammonia to quiet her, and put her to bed. The next morning, her sister called the doctor and the military police (R. 21). Doctor O'Mara examined her and taped her back. Bruises were then showing about her thighs. The following day at his office, she had an internal examination. She remained away from her work for about two weeks (R. 21,22).

The accused had his hand inside her underwear "just a second or so". She did not strike or scratch the accused or pull his hair, but resisted by pulling away from him and shoving against him (R. 27). There

(28)

were no cars or people about as they came back through Ocean Springs. It was all dark. She made no effort then to leave the car because she knew that the accused then was taking her home (R. 28,29). Arrived at her home, the accused handed her her purse from the back seat. She was not then so hysterical that she could not remember her stationery box, which contained some addresses, and her purse (R. 29). On the drive home, the accused tried to hold her hand (R. 29,30). She wore a nurse's uniform, which was not torn, but was mussed and wrinkled so she could not wear it the next day (R. 30). When the accused was trying to force himself upon her, he was practically on top of her (R. 36,39). She guessed that what he had in mind was to have intercourse (R. 22). The reason she shut the car door when the accused told her to do so, after she started to get out and he pulled her back, was that she was afraid of him. He had been "beast enough to slap a woman", and she did not know what he would do. She was out there alone with him in a strange place (R. 40).

Mrs. Irma Wells, sister of the prosecutrix, (R. 46), was awakened by Beatrice at about 1:15 a.m. Witness was worried about Beatrice being out so late, and realized at once that something had happened to her (R. 47). Beatrice told the witness that the accused had attempted to rape her. She was hysterical and looked near to collapse. Witness warmed and quieted her, gave her a dose of ammonia and put her to bed. Her face was red, her hair mussed, she could hardly speak for crying (R. 50) and she had red marks on her legs from bruises that darkened later to yellow and then black and blue (R. 51,53). The lower region of her back was hurt (R. 51). Witness called the doctor and the military police the next morning (R. 51,52). Beatrice was wearing a white uniform, which was not torn but was wrinkled. Her shoes were marred a good bit (R. 53). Mrs. Wells testified that she did not know the accused, Captain Hogan (R. 52), but Miss Kingston testified that Mrs. Wells had met him (R. 55).

Dr. O'Mara, physician (R. 41), found Miss Kingston in bed the next day, suffering from pain in her back which made it very difficult for her to turn in bed, in a highly nervous state, and with bruises on the inner sides of her thighs and knees, about the size of fingerprints and thumbprints. Miss Kingston did not want to talk much, but her sister related what had happened. Dr. O'Mara taped Miss Kingston's back, for support (R. 42). The next day at his office, he made a vaginal examination. He was unable to insert more than one finger in Miss Kingston's vagina and unable to insert the vaginal speculum ordinarily used in such examination, as the vagina was too small to admit the instrument or to permit the insertion of two fingers (R. 43). The bruises on her legs showed more discoloration, indicating that they were recent bruises (R. 44).

Bruises about the size of a dime to a half-dollar, extending upward some nine to ten inches from the knees, on the inside of the thighs, were exhibited to the reporter at an inspection conducted by the Trial Judge Advocate in taking Miss Kingston's statement on 12 October 1944 (R. 11).

4. For the defense, Captain Mohlenbrock, Medical Corps, testified that he examined the accused on 14 October 1944, and found no scratches or bruises upon his face (R. 65). Five officers of field grade in the Dental Corps testified as character witnesses for the accused, including his immediate commanding officer and next previous commanding officer (R. 95-101).

The accused testified (R. 66), after explanation of his rights (R. 65). He had known Miss Kingston for about eighteen months, as she was a dental assistant in the same clinic where he worked, and he saw her several times a day. She was his assistant all but three or four months (R. 66,67). On 10 October, he had no prior arrangement to meet her. He had had dinner at a hotel with his wife and a small party, after which he took his wife and the others home and took Captain Rucks, one of the party who was leaving the station, out to his quarters at Keesler Field. The accused had a drink with Captain Rucks and visited until about 10:30 or 10:45, then drove back toward his home in Biloxi. He saw Miss Kingston walking. He stopped and she came and got in his car, a 1940 Dodge convertible (R. 68). She knew that he was married (R. 68). He asked her to take a ride with him. She said that she shouldn't be out too late, as her mother had been sick, but otherwise made no objection and did not at any time ask to get out or be taken home (R. 69). The top was down on the car. He drove across the bridge, through Ocean Springs, and out onto a country road off the highway. It was a moonlit night. He parked for about forty-five minutes and kissed Miss Kingston "a good many" times (R. 70). She made no effort to repulse his attentions (R. 71). They drove further, turned around because the road was rough, and parked for about forty-five minutes. He kissed her and she reciprocated. One thing led to another. He felt a "human desire" for intercourse. Finally he "worked up so (he) could touch her", and that is "as far as (he) got". They drove again and parked again and he continued to kiss her and try to "get her to go through intercourse, and she didn't want to", and finally he gave up and drove her home. The place was on the edge of Ocean Springs, not over half a mile (R. 71). He stopped in front of her house for the first time, though he "usually" picked her up at the corner and left her there. She was not hysterical or nervous. She started into the house and came back for her writing paper. She went in and he went on home (R. 72). On the entire trip, "things went along like a normal evening with a man out with a woman. There was none of this strife and force and fight that she has said". She could have got out at any time. She never slapped or scratched him. He never slapped her. He never intended to rape her (R. 73). He never unbuttoned his pants nor exhibited his private parts. He never put his hand over her mouth. She never bit him. He is fully aware of the responsibilities of an officer as to conduct, and, while he supposes that he should not have been out with her, he caused no commotion and was not noticed. "It was just a night when a man was out with a woman" (R. 74). "The woman was desirous of a little courting, so to speak, and (he) was desirous of whatever (he) could get". It would be impossible to rape a woman in the front seat of a car. He thought Miss Kingston weighed 145 pounds, instead of 136 as she testified (R. 37, 75). A girl that size and that age certainly knows the facts of life (R. 75).

The accused, on cross-examination and upon being questioned by the court, repeated his version of the night's activities (R. 76 and following). He "kissed her several times and worked her up like you would work up any woman that you wanted to have intercourse with. (He) finally succeeded in touching her" (R. 84-85). He wanted to have intercourse with her, which could be done in the car if the woman was cooperative enough. She said she didn't want to. She told him "No", not very definitely, but "like any woman would say they don't want you to". He did not force her. He did "the natural thing that anybody does - try to get them in the mood, give them a little loving, and so forth, just like any man in the court room would do it" (R. 85). He "touched" her vagina (R. 86, 87). He told her he thought she was kidding about being a virgin (R. 85), partly to see what she would say and partly on the basis of his touching her vagina (R. 86). He used just a "normal amount" of persuasion, not force (R. 87). He did not think she was positive in refusing intercourse. He desisted when convinced that she was. He thought maybe later she "would" (R. 88). He had his hand between her legs, but did not use much force to spread them apart - not enough force to make bruises normally. He "worked her up". She resisted "a certain normal amount, but finally gave in that much" (R. 89). He had had two or three drinks before dinner and one at Captain Rucks' quarters afterward (R. 90). She got in his car voluntarily. It was his idea to drive out in the country (R. 91). There was nothing in their conversation that made up his mind to go home - he just thought she wasn't going to. They had always been close friends. It was getting late and they just came back (R. 92). He was not fingering her to find out if she were a virgin, but "to get her worked up, and so forth, you might say" (R. 93). She didn't want intercourse, and he doesn't force women (R. 93). He did not use force in spreading her legs apart; she did not spread them willingly. He merely worked her up as far as she cared to go, "naturally like a man would do". It's a difficult question. "Any man who was ever out with a woman" should know that a woman, "unless she was nobody at all", would not "just spread her legs right open for you". If she would do that, she would have permitted intercourse. He would not necessarily reach the same conclusion when a woman let him finger her vagina. "There is a great many women that you can touch, and you know, yourself, that you can touch some and they won't let you go though intercourse". (At this point the Trial Judge Advocate declined to be cited as authority on the subject and the accused was admonished to speak for himself and not the members of the court or others present) (R. 95). The force used by the accused was "just a normal amount that I would use" (R. 95).

5. The evidence abundantly supports the action of the reviewing authority. The findings and sentence were properly modified to eliminate the element of intent to commit rape and the confinement appropriate thereto. The course of events in evidence indicates that the intention of the accused was not to overcome all resistance and have carnal knowledge of the prosecutrix without her consent (Par. 1491, MCM 1928, p. 179), but rather to obtain her consent, by methods which the accused still regarded

as appropriate at the time of his trial. Indeed, his testimony reflects such complete confidence in the persuasiveness of his own personal charm and masterful approach that he must never have considered the necessity of resort to rape for the indulgence of his rampant sexual proclivities. The lesser included offense of assault and battery was clearly established as consequential upon his amorous enterprise. (CM 218643, Bright, 12 BR 103, 116).

Also, the record amply supports conviction under the 95th Article of War. (CM 238048, Brennan, 24 BR 149, 163; CM 224286, Hightower, 14 BR 97).

The defense was careful to avoid placing in issue the character or reputation of the prosecutrix. The inferences from the record reflect favorably her chastity and good repute. Nevertheless, the accused throughout his testimony was more than willing to impute to her such receptiveness to his advances as would, if believed, and according to his standards, tend to lay the fault upon her, and excuse him. His testimony, replete as it is with protestations based upon the assumption that his conduct was normal and commendable and that the court should readily accord to him a sympathetic understanding, not only fails of credence, but brightly reveals the measure of his moral character. In his distorted view, there was no fault in any attempts short of rape that he, a married man, might make upon a female employee of his military station exposed by her duty to his daily presence. The status of an officer and a gentleman becomes him as badly as does the assumption of expert accomplishment in the philosophy and technique of seduction, which he so confidently arrogates unto himself.

6. The accused is 29 years of age, married, a resident of Belvidere, Illinois. He attended State Teachers' Colleges in Illinois and the University of Illinois, from which he was graduated with the degrees of Bachelor of Science and Doctor of Dental Surgery. He is a member of the American Dental Association. He was commissioned as first lieutenant, Dental Corps, Army of the United States, 22 July 1942, promoted to the grade of captain, 31 July 1943. He had served for 27 months as Assistant Post Dental Surgeon at Keesler Field, Mississippi, with performance ratings excellent. He has had no prior service and no previous trials by court-martial.

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 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 and mandatory upon conviction of a violation of Article of War 95.

(on leave) _____, Judge Advocate.

Herbert R. Bradner, Judge Advocate.

Alfred J. [Signature], Judge Advocate.

1st Ind.

War Department, J.A.G.O., **DEC 27 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 Daniel W. Hogan (O-482618), Dental Corps:

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

3. Consideration has been given to the attached letter dated 16 November 1944 from Colonel Harry E. Smalley, Dental Corps, to the Commanding General of the Army Air Forces Western Technical Training Command, requesting clemency in behalf of the accused, and also to the letter dated 11 December 1944 from Senator Scott W. Lucas to Brigadier General E. S. Greenbaum, and to its inclosure.

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



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

5 Incls.

- 1 - Record of trial.
- 2 - Dft. ltr. for Sig. of S/W.
- 3 - Ltr. fr. Col. Harry E. Smalley to Com. Gen., AAFWTC, 16 Nov. 1944.
- 4 - Ltr. fr. Senator Scott W. Lucas to B.G. E.S.Greenbaum, 11 Dec. 1944.
with incl.
- 5 - Form of action.

(Sentence as approved by reviewing authority confirmed.
Forfeitures remitted. G.C.M.O. 66, 27 Jan 1945)

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

(33)

SPJGK
CM 269449

28 DEC 1944

UNITED STATES)

v.)

Second Lieutenant ROY D.
CAMPBELL (O-521046), Air
Corps.)

ARMY AIR FORCES
WESTERN FLYING TRAINING COMMAND

Trial by G.C.M., convened at
Roswell Army Air Field, Roswell,
New Mexico, 5-6 October 1944.
Dismissal and total forfeitures.

OPINION of the BOARD OF REVIEW
LYON, HEPBURN and MOYSE, 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: (Withdrawn before arraignment by direction of the convening authority).

Specification 2: In that Roy D. Campbell, Second Lieutenant, Air Corps, did, at Washington, D.C. on or about 24 April 44, present for approval, allowance, and payment a claim against the United States by presenting to the Finance Officer, United States Army, an officer of the United States duly authorized to approve, allow, and pay such claims, in the amount of \$176.86 for reimbursement of monies in lieu of transportation in kind for his dependent family from Newark, New Jersey, to Las Vegas, Nevada, which claim was false and fraudulent in that Roy D. Campbell, Second Lieutenant, Air Corps, was not entitled to reimbursement of monies in lieu of transportation in kind for his dependent family from Newark, New Jersey to Las Vegas, Nevada and was then known by the said Roy D. Campbell, Second Lieutenant, Air Corps, to be false and fraudulent.

Specification 3: In that Roy D. Campbell, * * *, for the purpose of obtaining the approval, allowance, and payment of a claim against the United States by presenting to the Finance Officer, United States Army, at Washington, D.C., an officer of the United States duly authorized to approve,

pay, and allow such claims, did at Carlsbad Army Air Field, Carlsbad, New Mexico, on or about 10 April 44, make and use a certain paper, to wit:

"R E S T R I C T E D

- Symbols: DP--By direction of the President.
- TDN--Travel directed is necessary in military service.
- WP---Will proceed to.
- TPA--Travel by officer or his dependents by privately owned automobile is authorized. DS for officer's travel is authorized, par. 1 g. AR 605-180
- AD--Active Duty.

Special Orders)
No. 127

WAR DEPARTMENT.

Washington, May 7, 1943

E X T R A C T

Paragraph 20. DP following officer ordered to AD WP fr home to sta on date indicated. TDN. FD 31 P 431-01, 02, 03, 07, 08 A 0425-23. All dates are 1942 and personnel of AUS unless otherwise indicated:

Grade, Name, Section and Home Address	Eff. Date of Duty	Branch and Station to which assigned	Date of Rank
2ND LT Roy Darrell Campbell 0521048, Newark, New Jersey (Now at Las Vegas, Nev.)	12 May 1943	AC, AFFTC, WCAFTC, Stf & Faculty, Las Vegas Aerial Gunnery Sch, Las Vegas, Nev.	12 May 1943

By order of the Secretary of War:

G. C. MARSHALL,
Chief of Staff.

Official:

J. A. ULIO,
Major General,
The Adjutant General.

A TRUE EXTRACT COPY:

/s/ John C. Hird, Jr.,
/t/ JOHN C. HIRD, JR.,
2nd Lt., Air Corps,
Asst. Personnel Officer."

which said paper he, the said Roy D. Campbell, Second Lieutenant, Air Corps, then knew contained the false statement that his home of record was "Newark, New Jersey" which statement was false in that his said home of record was "Sacramento, California" and was then known by said Roy D. Campbell, Second Lieutenant, Air Corps, to be false.

Specification 4: In that Roy D. Campbell, * * *, for the purpose of obtaining the approval, allowance, and payment of a claim against the United States by presenting to the Finance Officer, United States Army, Washington, D.C., an officer of the United States duly authorized to approve, allow and pay such claims, did at Carlsbad, New Mexico on or about 10 April 44 alter and amend a certain paper by making the following erasure and substitution on said certain paper, to wit: AFO Form 542, dated 16 March 44, by erasing the words "Sacramento, California" in the fifth paragraph under "Remarks" and substituting therefor the words "Newark, New Jersey", which said amended paper, as he, the said Roy D. Campbell, Second Lieutenant, Air Corps, then knew contained a statement that his home of record was Newark, New Jersey, which statement was false in that his home of record was Sacramento, California and was then known by the said Roy D. Campbell, Second Lieutenant, Air Corps, to be false.

Specification 5: In that Roy D. Campbell, * * *, for the purpose of obtaining the approval, allowance and payment of a claim against the United States by presenting to the Finance Officer, United States Army, an officer of the United States duly authorized to approve, pay and allow such claims, did, at Carlsbad, New Mexico, on or about 10 April 1944, forge the signature of John C. Hird, Jr., Second Lieutenant, Air Corps, upon a purported true copy of paragraph 20, War Department Special Orders No. 127, dated 7 May 1943, by writing a certification thereon in words and figures as follows, to wit:

"A TRUE EXTRACT COPY
John C. Hird, Jr.
2nd Lt., Air Corps,
Asst. Personnel Officer".

Specification 1 was withdrawn before arraignment by direction of the convening authority. Accused pleaded not guilty to and was found guilty of the Charge and all Specifications. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. For the prosecution.

At all times pertinent to the issues involved, as well as at the time of trial, accused was in the military service (R. 20). On or about 4 January 1944 the accused presented in writing a claim against the Government for reimbursement of moneys in lieu of transportation in kind for travel by his wife and two children from Newark, New Jersey, to Las Vegas, Nevada (R. 26, Ex. 2). The claim was transmitted by mail to the Disbursing Officer, Finance Office, United States Army, Washington, D.C., for allowance and payment, and he was the proper officer having authority to allow and pay it (R. 22,23, Ex. 1). For reasons not disclosed in the record the claim was not allowed and the papers were returned to the accused on or about 24 January 1944 (Pros. Exs. 1, 2, 3). The accused resubmitted the claim on 8 March 1944. When submitted this second time the claim papers were accompanied by a correct extract copy of paragraph 20, Special Orders No. 127, War Department, 7 May 1943, whereby accused was ordered to active duty as of 12 May 1943 and to proceed from his home, which was listed as Sacramento, California, to Las Vegas, Nevada (Ex. 2,3,4, R. 30). This extract copy was certified to be a true extract copy by Second Lieutenant John C. Hird, Jr. (Ex. 2,3). The claim voucher was returned to accused under date of 16 March 1944 with a form letter attached (AFO #542) which had typed on it under "remarks" the communication that the claim could not be allowed in excess of cost of travel from Sacramento, California (accused's home address as contained in his travel orders) to Las Vegas, Nevada (Ex. 2,3). The claim was subsequently returned to the Finance Office and received there for the third time on 24 April 1944 (Ex. 2,3). When it arrived at the Finance Office this third time, there was among the supporting papers accompanying the claim voucher what purported to be a certified true copy of the above mentioned paragraph 20, S.O. No. 127, W.D. 7 May 1943, ostensibly certified as a true copy by the same Second Lieutenant John C. Hird, Jr., listing accused's home address from which he was ordered to active duty as Newark, New Jersey, instead of Sacramento, California (R. 29, Ex. 2,3). The signature of "John C. Hird" on the newly submitted extract did not correspond with the copy originally submitted. The form letter (AFO #542) which the Finance Office had sent to accused when the claim was returned to him under date of 16 March 1943 also accompanied the claim voucher upon its third submission by accused, but "Sacramento, California" had obviously been erased from the typed remarks originally contained in the letter and "Newark, New Jersey" substituted in lieu thereof, so that the instrument as altered read that the claim could not be allowed in excess of the cost of travel from Newark, New Jersey, to Las Vegas, Nevada (R. 29, Ex. 2,3). There was also attached to and made part of the claim a letter written by the accused reading as follows (Pros. Ex. 5):

"Carlsbad, New Mexico
April 10, 1944

"Finance Office U.S. Army
Washing, D.C.

Dear Sirs:

In compliance with AR 55-120 Par. 8 A (1) this is first and last (I hope) time I have claimed travel for dependents.

I believe I have all the necessary papers in order at this time.

Would appreciate fast action as expect to be shipped soon.

Thanks

Roy D. Campbell 2nd Lt.
O-521046

P.S.

I'll accept anything you will send and I'll quit bothering a check for any amount will be appreciated and acceptable
Incl #1. "

Upon noting the discrepancies described above, the disbursing officer sent the entire file to the office of Fiscal Director, Washington, D. C. (Ex. 1) and it was in turn forwarded to Carlsbad Army Air Field, Carlsbad, New Mexico, and turned over to Lieutenant L. George Schubert (R. 21).

Accused did not submit a claim for any specific amount. In claims of this nature the amount is left open as it is computed in the Finance Office at Washington. Travel allowance for his wife and two children from Newark, New Jersey, to Las Vegas, Nevada, if approved, would have amounted to \$176.68 (R. 42).

First Lieutenant L. George Schubert, Carlsbad Army Air Field, Carlsbad, New Mexico, made an official preliminary investigation of the matters involved between 10 and 13 July 1944 and during that time had the complete file of all original instruments involved in his possession (R. 10-14, 21, 24, 25). He studied the various instruments, showed them to affected personnel during the course of the investigation, and made an official report of his findings and recommendations (R. 16, 17). The complete file was returned to him on or about 15 July, a Saturday, to prepare court-martial charges against accused (R. 13). It was last seen in the office by Mrs. Sue Goldfin, a stenographer, at Headquarters Army Air Field, Carlsbad, New Mexico, about 4:00 p.m. on that date. On Monday morning (17 July) the file could not be found (R. 13, 14, 19). Lieutenant Schubert and Mrs. Goldfin searched the office, the files, the desks, "and every conceivable place that the file might have been", but failed to find it and were not thereafter able to

find it (R. 19). First Lieutenant Ralph T. Doyle, Intelligence Officer, Carlsbad Army Air Field, conducted a special investigation in an effort to locate the missing file, but never succeeded in finding it or in accounting for its disappearance (R. 20).

There is no evidence of record connecting accused with the disappearance of the papers in question, and no demand appears to have been made of him to produce them, or any of them, at the trial.

With the exception of a copy of the one letter of transmittal written by accused quoted at length above (Ex. 5), neither the originals nor copies of any of the written instruments which constitute the basis of this prosecution or which are alleged to have been used in connection with the presentation of the claim in question were introduced in evidence. The contents of each, in so far as proved, and such descriptions of the instruments as the record affords, were supplied by oral testimony. The originals, together with such copies of the instruments as were available, disappeared from or were in some unknown manner lost, mislaid, or destroyed as set forth above in the Legal Boards and Claims Office, Carlsbad Army Air Field, Carlsbad, New Mexico, on or about 15 July 1944 and a diligent search failed to discover any of them.

Lieutenant Hird, by whom both the correct and incorrect extract copies of accused's travel orders purported to be certified, was shown these copies by Lieutenant Schubert while the latter was investigating the case shortly before the papers were lost. Lieutenant Hird testified at the trial that he signed the certificate on the correct copy but did not sign the certificate on the incorrect copy and did not authorize any other person to sign his name thereto.

There was admitted in evidence without objection an Extract Copy of Special Orders No. 127, paragraph 20, received from and bearing the official seal of The Adjutant General's Office (R. 20, Pros. Ex. 4), and a copy of the letter written by the accused dated 10 April 1944 accompanying the claim and set forth in full above (R. 31, Pros. Ex. 5).

During his investigation Lieutenant Schubert interviewed the accused and after due and proper warning the accused in explanation of the alterations and discrepancies contained in the claim for travel for dependents said that he did not know anything about it; that he took the papers returned to him by the Finance Officer in Washington to Pilot Group No. 2 and was contemplating throwing them away but upon relating his difficulties to the pilots assembled, one of those present told him that as an enlisted man he had worked in Finance and that he would make the necessary corrections in the claim for him; that he (the accused) turned the papers over to this unknown pilot and left on

a flight; and later, without examining them, he mailed them back to Washington with his letter (Ex. 5, R. 33-34). Lieutenant Schubert was unable to locate or find the pilot referred to by the accused in the course of a diligent search made by him (R. 34). The accused voluntarily signed several affidavits prepared by Lieutenant Schubert concerning the matter under discussion (R. 34-35). None of these affidavits was offered in evidence.

4. The accused having had his rights with reference to testifying explained to him, elected to testify (R. 42). He is 32 years of age, married, and has two children, ages 5 and 9. He has the rating of a service pilot on single and two-motored planes.

He denied that he changed the Finance Form 542 or any copy of War Department Special Orders or that he forged anyone's signature to any papers. In January he filed a claim for dependent's travel after having consulted with "Finance" where he was advised that he was entitled to "one move". All of the papers were originally prepared by and the supporting document selected by "Finance". When they were returned to him from Washington he returned them to "Finance" and "they" fixed them up again and he sent them back to Washington. Again they were returned. He did not know what to do about it and was about to give the matter up. He took the papers in an envelope "down to where I work" and told "the fellows" who gather there about his difficulties. One of the pilots said that he had worked in "Finance" as an enlisted man and volunteered to help him with the papers (R. 50) and "seemed to know what should be done in this case". Accused gave him the papers and the pilot said, "I will see what seems to be the matter". He left the papers with this pilot and went on his mission. Upon his return the pilot had gone. A Lieutenant Brouse gave the accused the papers and said that "the fellow had just given" them to him to give to the accused. Without examining them he wrote the letter (Ex. 5) to send him "anything" and mailed the papers the following day. The next time he heard about it was when he was questioned about differences in signatures. Evidently changes had been made in the papers. "This boy had changed these papers" (R. 44-46). Accused had had no previous experience in filing claims against the Government. At the time of the occurrence there were from 50 to 100 officers in the Pilot Pool and from 15 to 35 of them are in the room at one time. He knew only a few of them. The accused was a high school graduate but never attended college (R. 47).

It was stipulated that on or about 10 November 1943 accused's dependents who were staying in Newark, New Jersey traveled to Las Vegas, Nevada (R. 47).

On cross-examination accused testified that at no time during the investigation had he ever mentioned Lieutenant Brouse's name to the investigating officer (R. 51). On or about 19 September the accused went to the office of the trial judge advocate and requested the trial judge

advocate to cause a Lieutenant Franklin P. Smith to be subpoenaed as a witness in accused's behalf (R. 53). He told the trial judge advocate that Lieutenant Smith was the person who had prepared the papers and that Lieutenant Smith was and always had been stationed at Las Vegas Army Air Field, Las Vegas, Nevada.

Although accused had discussed the case with the trial judge advocate on several previous occasions, he had never claimed that Lieutenant Smith had altered the papers and gave as his reason for withholding such information that he was trying to shield Smith. He stated that Smith had owed him quite a bit of money and that he had taken the papers to Las Vegas to prove to Smith that he needed his money badly. Smith had requested him to leave the papers with him, stating that he would "fix them up and send them through". An investigation disclosed that Lieutenant Smith had been killed in an airplane crash on 18 July 1944 and that accused had not gone on any cross-country trips from Carlisbad to Las Vegas as claimed (R. 54, 55). The accused admitted that at the time he had talked to the trial judge advocate in September "he made up quite a bit of stuff" which he told (R. 54).

The accused desired to explain his conduct with the trial judge advocate by relating a lengthy story concerning some stolen airplane tires which involved the Executive Officer and the trial judge advocate which caused him to distrust everybody. The president of the court interrupted the explanation and the trial judge advocate ceased his cross-examination.

Second Lieutenant Norman R. Brouse testified that he knew the accused and in April 1944 he was flying out of the same pilot group. On one day, about the 1st of April, he was desirous of using a typewriter at Pilot Group 2 in the "ready room", but there was another pilot using it and when the other pilot had finished he gave the witness some papers to give to the accused after first asking him if he knew the accused. He did not look carefully at the papers but there were a half a dozen papers and they looked like pay vouchers. When accused returned he turned the papers over to him (R. 60-63). The other pilot had worked on them with the typewriter (R. 65).

5. It is apparent from the summary of the evidence set forth above that the legal proof of the offenses charged depends in the first instance upon the admissibility of the secondary evidence offered to show the contents of written documents which documents were not offered in evidence. In proving the contents of written documents, particularly for the purpose of showing forgery, the instruments themselves should be produced. Where, however, the instruments are not available secondary

evidence is admissible, provided the person offering the secondary evidence first shows that the original has been lost, destroyed, or is in the possession of the accused (CM 217104, Bradley, XI BR 222, and authorities therein cited.) The prosecution has fully complied with this requirement.

It necessarily follows that the evidence admitted by the court to prove the contents of the various documents submitted by the accused to the Finance Officer in presenting his claim against the United States for dependents travel allowance was properly presented and legally admitted.

The pertinent parts of Article of War 94 read as follows:

"Any person subject to military law who makes or causes to be made any claim against the United States or any officer thereof, knowing such claim to be false or fraudulent; or

"Who presents or causes to be presented to any person in the civil or military service thereof, for approval or payment, any claim against the United States, or any officer thereof, knowing such claim to be false or fraudulent; or

"Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or against any officer thereof, makes or uses, or procures, or advises the making or use of, any writing or other paper knowing the same to contain any false or fraudulent statements; or

"Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, forges or counterfeits, or procures, or advises the forging or counterfeiting of any signature upon any writing or other paper, or uses, or procures, or advises the use of any such signature, knowing the same to be forged or counterfeited; or

* * * * *

"Shall, on conviction thereof, be punished, etc."

Specification 2 of the Charge.

In support of this Specification the undisputed evidence for the prosecution and the admission of the accused showed that the accused

did in April 1944 present for approval, allowance and payment a claim against the United States by presenting a claim to the Finance Officer, U. S. Army for reimbursement of monies in lieu of transportation in kind for his dependent family from Newark, New Jersey to Las Vegas, Nevada; that the amount of the claim if allowed would have been \$176.86; and that the accused was entitled to reimbursement of this nature only from Sacramento, California to Las Vegas, Nevada, because his true orders ordering him to duty at Las Vegas, Nevada showed his home address to be Sacramento, California. The only issue of fact disputed by the accused was whether or not he knew at the time he presented his claim that it was false. If he knew that then the court could properly infer fraud and label the attempt to collect the false claim as fraudulent.

It was clearly shown by the evidence and also admitted by the accused that he had twice previously presented his claim and that the claim had been twice rejected. The reason for rejecting it the first time was not disclosed in the record. The reason for rejecting it the second time was clearly shown to be the fact that accused's home address was Sacramento and that therefore he was not entitled to be reimbursed for travel from Newark, New Jersey. This was brought to his attention by the communication under the heading "remarks" on AFO Form 542 in clear and concise language. The information concerning accused's home address appeared on the W.D. SO No. 127 of 7 May 1943 (which for the sake of brevity will hereinafter be referred to as WDSO #127). Accused himself provided the Finance Officer with WDSO #127 when he presented his claim the second time. So far as the record shows the information regarding the accused's home address appeared only on that order until the Finance Officer included it in his remarks to the accused in his reply on AFO Form 542. When the claim was again presented (the third time) this information was deleted by (a) substituting a false WDSO #127 setting forth that the accused's home address is Newark, New Jersey, and (b) by erasing it from AFO Form 542 and substituting "Newark, New Jersey".

The accused claims that he did not know that these changes had been made when he returned the papers. There was no direct evidence presented by the prosecution that the accused did know it, but the circumstances showed beyond any reasonable doubt that he must have known it. He admittedly had the papers in his possession for at least one day before he mailed them. He admittedly wrote the letter attached to the papers in which he stated "I believe I have all the necessary papers in order at this time". This could only mean that he realized that the claim would not be allowed if supported by the papers previously attached to it but this time the papers were "in order". The only change made to or in the papers was the false change of address. It follows that he was aware of that change and for that reason was of the opinion that they were in order "at this time". He was the only person interested in collecting the claim and the only one who had a real motive to effect the false change in the papers. We find no difficulty in reaching the conclusion

that the court was justified in finding beyond a reasonable doubt that the accused knew the papers were false, that therefore the claim was false, and that therefore it was fraudulent. The weight of the evidence strongly favored such a conclusion and amply supported the finding.

Specification 3 of the Charge.

In support of this Specification the undisputed evidence for the prosecution and the admissions of the accused showed that the accused used a false copy of WDSO No. 127 for the purpose of obtaining the approval, allowance, and payment of his claim. Again the accused denied knowledge of the falsity of the order. By the same reasoning set forth above with reference to Specification 2 the Board of Review is of the opinion that the court properly and justifiably found that he did know of its falsity when he used the false order for the purpose alleged.

Specifications 4 and 5 of the Charge.

With reference to these Specifications the evidence for the prosecution shows beyond doubt, and the accused admits, that, for the purposes alleged in the Specifications, the AFO Form 542 was altered and amended and the name of John C. Hird was forged on WDSO #127. In defense the accused claimed that if any alteration or amendment was made in AFO Form 542 or if the name of John C. Hird was forged on WDSO #127 it was done by some other person and that he was not aware of it when he mailed the papers to the Finance Officer. The accused admitted that he had in his possession, for at least 24 hours before mailing, all of the papers that he mailed to the Finance Officer. The Finance Officer stated that among the papers received by him from the accused were the forged signature of John C. Hird on the purported copy of WDSO #127 and the altered or amended AFO Form 542. While there was no direct proof that the accused forged John C. Hird's name or that he altered the AFO Form 542, yet these acts may properly and legally be presumed from these circumstances.

"A person who is recently in possession of, and attempts to sell or obtain money on, a forged note is presumed to have forged it, and unless such possession or forgery is satisfactorily explained the presumption becomes conclusive" (12 Ruling Case Law par. 26).

"Possession of a forged paper by accused, with a claim of title thereunder, if unexplained, raises a presumption that he forged it, or procured it to be forged. In any event, such evidence warrants an inference, sufficient to support a conviction, that accused made or participated in the forgery" (37 C.J.S. sec. 80b, page 91).

The story told by the accused of the strange unidentified pilot having had previous possession of the papers and that if any alterations or forgeries were made he made them was not believed by the court. The

accused's explanation of his possession of spurious papers was not therefore satisfactory and it was properly rejected. The Board is of the opinion that the court was justified in rejecting such an explanation under the circumstances. It taxes our credulity to believe that a stranger who had no interest whatsoever in the matter would deliberately commit a forgery, manufacture a fictitious War Department order and tamper with a Government form. The evidence therefore clearly sustains the findings of guilty of the specifications under discussion.

The four specifications of which the accused was found guilty all arose out of the one transaction. It was unnecessary to charge the accused with four violations of the 94th Article of War under the circumstances. However, in view of the fact that the sentence of dismissal is legally supported by a conviction of any one of the specifications, the error, if any, was harmless and did not affect any substantial rights of the accused.

6. War Department records show the accused to be 33 years of age, a high school graduate, and married. For eight years he was employed as an automobile mechanic in a garage in Kansas. Following this employment he appears to have owned and operated an airport for a period of one year. Thereafter and for two years he was employed in drilling oil wells. He installed engine controls in an airplane factory for 6 months in 1941 and then during the following six months acted as engine crew chief at an airplane and engine repair base in Sacramento, California. On 9 December 1942 he became a trainee instructor at the Army Air Forces Advanced Flying School, Mather Field, California. He enlisted in the Air Corps Enlisted Reserve on 1 August 1942. He applied for a commission in the Army of the United States on 1 March 1943, giving as his address 1017 Howell Avenue, Sacramento, California, and as a result was on 6 May 1943 appointed second lieutenant, Army of the United States, and ordered to report to Las Vegas, Nevada, for active duty.

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

Wm E. Jones, Judge Advocate.
Earl Stephens, Judge Advocate.
William M. Hayes, Judge Advocate.

1st Ind.

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

JAN 8 - 1945

- 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 Roy D. Campbell (O-521046), 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 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-Draft of ltr. for
sig. Sec. of War.

Incl.3-Form of Ex. action.

(Sentence confirmed but forfeitures remitted. G.C.M.O. 96, 24 Mar 1945)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General

SPJGN
CM 269596

15 DEC 1944

UNITED STATES)

ANTILLES DEPARTMENT

v.)

Trial by G.C.M., convened at
APO 851, c/o Postmaster, Miami,
Florida, 3 November 1944. Dis-
missal.

First Lieutenant PATRICK
J. CANNON (O-1795859), Corps
of Military Police.)

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 1st Lt. Patrick J. Cannon, CMP, 501st Military Police Battalion, did, on or about 8 May 1944, while serving in the capacity of Provost Marshal of the First Military Police District, San Juan, Puerto Rico, wrongfully solicit and accept a loan of money in the sum of TWO HUNDRED (\$200.00) DOLLARS, from Pedro Montanez, owner of the "MONTANES BAR", San Juan, Puerto Rico, with whom it was the duty of the said 1st Lt. Patrick J. Cannon, as a representative of the Government, to carry on official negotiations; this to the prejudice of good order and military discipline, and in violation of Paragraph 2, e (2) (a) 1, ARMY REGULATIONS 600-10.

Specifications 2 through 17 identical with Specification 1 except as to name, date, and amount, as follows:

<u>Specification</u>	<u>Name</u>	<u>Date</u>	<u>Amount</u>
Spec. 2	Pedro Montanez	27 May 1944	\$300.00
Spec. 3	Manuel Cabrera	Month of June	50.00
Spec. 4	Manuel Cabrera	Month of June	25.00
Spec. 5	Victor Segarra	3 June 1944	25.00
Spec. 6	Victor Segarra	4 June 1944	40.00
Spec. 7	Albert Cuevas	Month of June	10.00
Spec. 8	Jorge Valldejuli	Month of May	225.00
Spec. 9	Monserrate Estrada	Month of June	27.00
Spec. 10	Julio C. Rivera	10 June 1944	75.00
Spec. 11	Juan Puertas	3 June 1944	25.00
Spec. 12	Juan Puertas	15 June 1944	20.00
Spec. 13	Juan Puertas	Month of June	5.00
Spec. 14	Larry A. Noll	Month of June	250.00
Spec. 15	Emilio Rios	Month of June	75.00
Spec. 16	Joaquin Medina	Month of July	20.00
Spec. 17	Nicolas Orango Ruiz	Month of July	25.00

Specifications 18 through 23: (Findings of guilty disapproved by reviewing authority).

He pleaded not guilty to and was found guilty of the Charge and all Specifications with certain exceptions and substitutions of which it is necessary to note only the following: Excepting the word "during" and substituting therefor the word "about" in Specification 9; excepting the words "a loan of money in the sum of" and substituting therefor the words "loans of money in the total sum of" and excepting the word "manager" and substituting therefor the words "manager of casino and part owner of the" in Specification 14; excepting the words "month of June" and substituting therefor the words "months of June and July" in Specification 15; and excepting the word "July" and substituting therefor the word "June" in Specification 17. He was sentenced to be dismissed the service. The reviewing authority disapproved the findings of guilty as found by the court of Specifications 18 to 23 inclusive, 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 3 March 1944 the accused was appointed Provost Marshal of the First Military Police District of Puerto Rico in addition to his other duties (R. 11; Ex. 1, 2). The city of San Juan is in such district (R. 12; Ex. 3). In such capacity he was required to perform the usual duties of such position including

the inspection of public entertainment establishments with authority to place them "on limits" or "off limits" (R. 12-14; Ex. 4). He was relieved as Provost Marshal on 14 July 1944 (Ex. 5).

During May 1944, Pedro Montanez was the owner of the "Montanez Bar" which was patronized largely by military personnel in the city of San Juan as were the other establishments hereinafter mentioned (R. 21-23). During the preceding April the bar had been placed "off limits" but the accused, after consulting with its owner, returned the "on limits" placard shortly thereafter (R. 24-25). On 8 May 1944 the accused upon the representation that he needed funds with which to finance a divorce secured a loan of \$200 from Montanez (R. 25-26; Ex. 6). The accused later, on or about 26 or 27 May 1944, secured a further loan of \$300, promising to repay both loans within two or three months (R. 26-27; Ex. 7). The sum of \$100 had been repaid through the accused's commanding officer (R. 28, 32). The lender made the loans "because I thought the accused is a nice gentleman and not because he is a Provost Marshal" but also asserted that he was familiar with the accused's duties (R. 30, 32).

Manuel Cabrera was the manager of the "Paramount Club" which had been placed "off limits" during the month of June 1944, because an officer while drunk had lost \$50 or \$60 while gambling there (R. 34, 35). The money was returned at the accused's request and the club was placed "on limits" again (R. 35). Shortly afterwards the accused solicited and obtained from Cabrera a loan of \$50 which was not repaid as agreed (R. 36). About 15 days later the accused solicited another \$50 loan but obtained only \$25 which also was not repaid as agreed (R. 37, 38). These loans were made because the accused "was the man who had the power to put me off limits" (R. id).

Victor Segarra was the owner of the "Continental Bar" and during one of the accused's inspection trips had lent him \$25 which was later repaid (R. 41, 42). On 4 June 1944 the accused solicited and obtained from Segarra another loan of \$40 which was not repaid as agreed (R. 42, 43; Ex. 8). The accused at about the end of June or the first of July, during one of his inspection trips, solicited and obtained a loan of \$10 from Alberto Cuevas, manager of the "Continental Bar", which was not repaid as agreed (R. 45, 46). Both of these men knew that the accused was the Provost Marshal and were familiar with his duties (R. 42, 46).

Jorge Valldejuli was the owner of the "Zombie Club" and had become acquainted with the accused as Provost Marshal during the month of April (R. 47, 48). During the month of May 1944, the accused obtained credit in the club's gambling room for \$200 evidenced by his "I.O.U." and

also a loan of \$25 in cash which indebtedness of \$225 has not been repaid (R. 48, 49; Ex. 9).

Monserrate Estrada was the owner of the "Old Paradise Bar and Hotel", which the accused frequently inspected, and about May 1944, he invited the accused to have a few drinks with him at "Jacks Night Club" where the accused borrowed from him the sum of \$27 for gambling purposes (R. 52). Before this loan was solicited and secured Estrada's bar and hotel had been "off limits" but shortly thereafter the "on limits" placard was restored. The loan was not repaid (R. 53-55).

Julio C. Rivera was an accountant for "Jacks Inc.", a night club. On 10 June 1944 the accused solicited and obtained from him a loan of \$75 which has not been repaid (R. 57, 58; Ex. 10).

Juan Puertas was the resident manager of the "Escambron Beach Club" which the accused visited several times as Provost Marshal (R. 60). During one of these visits on 3 June 1944 the accused solicited and obtained a loan of \$25 for which he gave his "I.O.U." (R. 60, 61; Ex. 11). Later on 15 June 1944 the accused secured an additional \$20 on his "I.O.U." (R. 61, 62; Ex. 12). On 17 June 1944 the accused solicited a further loan which was refused except for the amount of \$5, which was advanced without an "I.O.U.". None of the loans had been repaid (R. 62)

Larry A. Noll was part owner of the "Grand Hotel" which also operated a bar and casino and he had become acquainted with the accused during the spring of 1944 while he, the accused, was Temporary Provost Marshal. Late in June or early in July 1944, the accused solicited from him a loan of \$300 but was advanced only \$100 (R. 64-66). Two days later the accused secured another \$100 and shortly thereafter an additional \$50, aggregating the sum of \$250 in loans which he agreed to pay by installments before Christmas of this year (R. 65, 66). The loans have not been repaid (R. id.).

Emilio Rios was in charge of the "El Morocco Bar" which was also inspected by the accused who on 28 June 1944 solicited and obtained from Rios a loan of \$50 which was subsequently on 18 July 1944 increased to \$75. Both loans were in cash and their full amount of \$75 has not been repaid (R. 71-73).

During July 1944, while inspecting the "Reno Bar" the accused borrowed \$20 from its owner, Joaquin Medina, and failed to repay it as agreed (R. 75-76). During the months of May or June 1944, the accused while inspecting the "California Bar" and the "I Stay Here Bar" also solicited and obtained from their owner, Nicolas Orange Ruiz, a loan of \$25 which has not been repaid (R. 77-78).

All of the above mentioned lenders personally testified. By direction of the court Paragraph 2, e (2), Army Regulation 600-10 was read to the court (R. 10).

4. The defense presented no evidence except the accused's unsworn written statement which was presented to the court after the accused had been advised of his rights as a witness (R. 80). After relating the accused's previous good record in the service for about nine years, the statement continues as follows:

"On the 3rd of December 1942 I married Miss Rose R. Reynolds, from which marriage a child was born on the 23th of August 1943. On January 1944 when I was ordered to report for duty in this Department, I executed an allotment in favor of my wife for \$150.00.

"What circumstances caused my wife to pursue such conduct as would cause a Child's Welfare Organization at Norfolk, Virginia to seize my child and remove him from the custody of my wife, I do not know. But I suddenly found myself in a series of domestic difficulties which had me contending with lawyer fees, and liabilities for bills beyond my earning capacity, which had been incurred by my wife. All this terminated in a divorce decree obtained by her against me in the Second Judicial District Court of the state of Nevada on the 7 day of October 1944.

"During this period from May to October of this year while off duty my actions were those of any man under extreme domestic difficulties, who was making an effort to save his home and marriage from ruin and to protect the welfare of his child.

"After having been refused a loan from the local banks I turned to the only sources of money I knew; from the people I had met by virtue of my duties. In view of my difficulties these people were kind enough to extend these personal loans to me. It was, and still is my intent to repay these kindnesses despite the unfortunate circumstances which now surround these loans" (Def. Ex. 1).

5. Specifications 1 through 17 allege that the accused during the months of May, June and July while serving as Provost Marshal of a military police district which included a named city wrongfully solicited and obtained from named owners or employees of designated bars, hotels, night clubs and restaurants, with whom it was his duty as a representative of the Government to carry on official negotiations, personal loans in the

aggregate amount of \$1397.00 to the prejudice of good order and military discipline and in violation of Paragraph 2 e (2) (a) 1, Army Regulation 600-10. Such alleged offenses are properly chargeable under and are violative of Article of War 95 (CM 234644 [1943] Bull. JAG 1943, p. 343). The pertinent provisions of the aforementioned regulation are as follows:

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

(a) It is impossible to enumerate all the various outside activities and interests to which these regulations refer. The following examples may be regarded as typical:

1. Acceptance by an officer of a substantial loan or gift or any emolument from a person or firm with whom it is the officer's duty as an agent of the Government to carry on negotiations" (P. 2, e, (2) (a), 1, AR supra).

The prosecution's evidence is uncontradicted and conclusive. It shows that the accused, while Provost Marshal in a district where a large city was situated, within a period of about 75 days solicited and secured loans aggregating \$1397.00 from twelve different persons who either owned or were employed by business establishments with whom the accused in performing his duties was required to deal in his official capacity. Only an insignificant part of the money thus obtained has been repaid and that only after his acts had been discovered. Although only one witness directly testified that his loan was motivated because of the accused's position, the facts showing that all of the loans were secured within a short period of time and from persons whose businesses depended upon the accused's discretion compel the conclusion that the money would not have been advanced if the accused had not been in an official position to benefit the lender. These matters are implicitly admitted in the accused's unsworn statement. Under such circumstances the solicitation and acceptance of the loans were

not merely indiscreet or improper but constituted dishonorable conduct which was violative of Article of War 95 (CM 234644, supra). The evidence, therefore, beyond a reasonable doubt establishes the accused's guilt of the alleged offenses as found by the court and amply supports the findings of guilty of the Charge and Specifications 1 through 17 inclusive as made by the court.

6. The accused is about 30 years old. The War Department records show that he attended high school for three years. For nine months in 1936-1937 he was employed by the United States Steel Company as a pipe-fitter's helper. He has had enlisted service from 6 July 1934 until 24 June 1936 and from 24 June 1937 until 9 October 1942 when he was appointed a second lieutenant upon completion of Officers' Candidate School and has had active duty as an officer since the latter date. He was promoted to first lieutenant on 6 February 1943.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty as made by the court and approved by the reviewing authority and the sentence, and to warrant confirmation thereof. Dismissal is mandatory upon a conviction of a violation of Article of War 95.

Abner E. Lipscomb, Judge Advocate.

Robert J. Plummer, Judge Advocate.

Gabriel H. Holden, Judge Advocate.

(54)

SPJGN
CM 269596

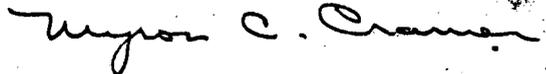
1st Ind.

War Department, J.A.G.O., DEC 19 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 Patrick J. Cannon (O-1795859), Corps of Military Police.

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

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



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

3 Incls.

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

(Sentence confirmed. G.C.M.O. 45, 27 Jan 1945)

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

(55)

SPJGQ
CM 269689

27 DEC 1944

UNITED STATES)

v.)

First Lieutenant JACK H.
STORM (O-734025), Air
Corps.)

ARMY AIR FORCES
WESTERN FLYING TRAINING COMMAND

Trial by G.C.M., convened
at Williams Field, Chand-
ler, Arizona, 24 October
1944. Dismissal, total
forfeitures and confinement
for three (3) years.

OPINION of the BOARD OF REVIEW
ANDREWS, FREDERICK and BIERER, Judge Advocates

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Jack H. Storm, First Lieutenant, Air Corps, 3010th AAF Base Unit, did at Tucson, Arizona on or about 23 September 1944, with intent to defraud wrongfully and unlawfully make and utter to the Pioneer Hotel, a certain check, in words and figures as follows, to wit:

No. _____	
Phoenix, Arizona <u>Sept. 23 1944</u>	
Pay to The	
Order Of <u>Pioneer Hotel</u>	<u>\$10.00</u>
Ten and no/100- - - - - Dollars	

VALLEY NATIONAL BANK
Phoenix, Arizona /s/ Jack H. Storm, Jr.

in payment of hotel bill, he, the said Jack H. Storm, First Lieutenant, Air Corps, then well knowing that he did not have and not intending that he should have sufficient funds in the Valley National Bank for the payment of said check.

Specification 2: Similar to Specification 1, but alleging check dated 24 September 1944 in the amount of \$15, made and uttered to the same payee for the same purpose.

Specification 3: Similar to Specification 1, but alleging check dated 23 September 1944 in the amount of \$10, made and uttered to El Presidio Hotel, Tucson, Arizona, and the fraudulent obtaining of \$10.

Specification 4: Similar to Specification 1, but alleging check dated 30 July 1944 in the amount of \$15, made and uttered to the Arizona Club, Phoenix, Arizona, and the fraudulent obtaining of \$15.

Specification 5: Similar to Specification 1, but alleging check dated 23 July 1944 in the amount of \$10 drawn against Valley National Bank, Tucson, Arizona, made and uttered to the Officers' Mess, Minter Field, California, and the fraudulent obtaining of \$10.

He pleaded not guilty to and was found guilty of the Charge and all Specifications. No evidence of previous conviction was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for five years. The reviewing authority approved only so much of the findings of guilty of Specifications 3, 4 and 5 as involve findings that the accused wrongfully failed to maintain a sufficient bank balance to meet the checks described therein. The reviewing authority approved only so much of the sentence as involves dismissal from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for three (3) years, and forwarded the record of trial for action under Article of War 48.

3. In the interests of clarity in the ensuing discussion of the evidence herein, it is desired to point out that the five Specifications of the Charge involve checks drawn against two separate bank accounts,

Specifications 1, 2 and 3 describing checks drawn against accused's account in Valley National Bank, Phoenix, Arizona, and Specifications 4 and 5 describing checks drawn against his account in Valley National Bank, Tucson, Arizona, the latter being a branch or subsidiary of the former (R. 21). In this connection, the court on motion of the trial judge advocate and with the consent of accused and his counsel, permitted amendment of Specification 4, so as to allege that the check described therein was dated at Tucson, Arizona, and drawn on the Valley National Bank of Tucson, Arizona, instead of being dated at Phoenix, Arizona and drawn on the Valley National Bank of Phoenix, as originally alleged (R. 65, 66, 67). This amendment appears to have been proper under the circumstances and within the powers of the court as defined in paragraph 73, MCM 1928. It was further stipulated between the parties that all evidence in the record of trial pertaining to the check described in Specification 4, shall pertain equally to such check after amendment of the Specification, appropriate amendment to paragraph 3, Prosecution's Exhibit A, which deals with such check, being likewise stipulated (R. 66, 67).

4. The evidence for the prosecution shows that for at least several months prior to 23 July 1944, the accused maintained a checking account with the Valley National Bank, Tucson, Arizona, (Ex. A, pp. 1, 2). Although deposits in the amount of \$100 per month were made to this account from May through August 1944 (Ex. A, p. 1), the account was overdrawn throughout the period from 17 July 1944 to 7 August 1944, as well as during at least two previous periods (R. 29, Ex. A).

On 23 July 1944, the accused made and delivered to the Officers' Mess, Minter Field, Bakersfield, California, a check in the amount of \$10 drawn against this account for which he was paid the sum of \$10 in cash (Ex. A, p. 1). At the time this check was issued to the Officers' Mess, the accused's account was overdrawn (Ex. A, p. 2). The check was presented for payment, but was not honored and was returned unpaid by reason of insufficient funds (Ex. A, p. 1; Ex. N, p. 1). The Officers' Mess was ultimately reimbursed by accused on 19 September 1944 (Ex. N).

On 30 July 1944, accused made and delivered to the Arizona Club, Phoenix, Arizona, a further check drawn against the Tucson account in the amount of \$15, for which he received a like sum in cash (Ex. A, p. 1). At the time this check was delivered, the accused's account was overdrawn (Ex. A, p. 2), and when the Club presented the check to the bank for payment, it was returned unpaid by reason of insufficient funds (Ex. A, p. 1, Exs. B, C, D, N). Thereafter, on 4, 16 and 28 August 1944 respectively, the Arizona Club addressed and mailed to the accused letters calling his attention to the fact that the check had been

returned, and requesting that the matter be adjusted (Ex. A, p. 1, Exs. B, C, D). The Club was finally reimbursed by accused by money order on 19 September 1944 (Exs. A, N).

The accused, in a written statement offered in evidence by the prosecution and admitted without objection by the defense, acknowledged writing and uttering the previously described checks, but stated that he did so without intent to defraud and under the belief that there were sufficient funds in his account to honor them. He admitted, however, that the overdrawing of his account was the result of carelessness on his part (R. 40, Ex. N).

On 12 August 1944, the accused opened a checking account with the Valley National Bank, Phoenix, Arizona, with an initial deposit of \$62.99 (R. 22, Ex. A, p. 3). No additional deposits were made to this account during the period with which this case is concerned (R. 22, Ex. A, p. 3), and the accused had no allotments payable to it (R. 29, 33). Nevertheless, between 9 September 1944 and 2 October 1944, nine checks aggregating \$105 were drawn against the account and were returned (R. 23, Ex. A, p. 3).

It was stipulated between defense counsel, the accused and the prosecution that on 23 September 1944, the accused made and delivered a check in the amount of \$10 drawn against this Phoenix account to El Presidio Hotel, Tucson, Arizona, for which he received value and which, upon presentation for payment by the hotel, was returned unpaid (R. 12, 13). The accused did not ask the hotel to delay presentation of the check, since he believed that he had sufficient funds in the bank to cover it (Ex. M). Nevertheless, it appears to have been returned by reason of insufficient funds in the account against which it was drawn (Ex. G).

Further checks against the Phoenix account were made and delivered by accused to the Pioneer Hotel, Tucson, Arizona, on 23 September 1944 and 24 September 1944 in the amounts of \$10 and \$15, respectively, for which like amounts were received in cash by accused (R. 13, 14, 15; Exs. E, F, M). Upon presentation of these checks by the Hotel for payment, they were both returned because of insufficient funds (R. 14, 15, Exs. E, F, G, M). In a statement to the investigating officer, the accused alleged that the clerk of the Pioneer Hotel who cashed these checks agreed to hold them until after 1 October 1944, inasmuch as accused did not think he had sufficient funds in the bank to cover them (Ex. M). This alleged agreement was denied by the clerk, who testified that it was contrary to the policy of the hotel to hold checks and that he had never violated such policy (R. 16, 17, 18). The clerk identified a copy of a letter addressed to the accused by the manager of the Pioneer Hotel and the El Presidio Hotel requesting reimbursement for the checks

above described, which letter he "presumed" to have been mailed and which was admitted into evidence without objection by accused (R. 19, Ex. G). The accused, however, denied that he had ever received it (Ex. M).

It was further shown that it was the policy of the Valley National Bank, Phoenix, to send a series of printed notices to its depositors when checks were returned for lack of sufficient funds (R. 25-28, Exs. H, I, K), although there is no evidence that such notices were sent to the accused in connection with the checks described in these Specifications or any others (R. 25, 26, 28). It was also the policy of the bank, at least where an officer had an allotment payable to his account, to allow reasonable overdrafts as a matter of courtesy (R. 30, 31). The purpose of this policy was to accommodate men in service whose moving about makes it difficult for the records of the bank to catch up with them and who, in consequence, are likely to run short in their accounts (R. 33). The officer, however, was never told in advance of this policy since it was preferred to reserve the privilege for cases of emergency (R. 34). Where there has been an abuse of the privilege, it is the policy of the bank to close the account (Ex. I). However, the bank did not consider the accused's case to be of so serious a nature as to necessitate the taking of this step (R.30).

5. The accused, having been informed of his rights, elected to be sworn and testify, such testimony constituting the only evidence for the defense.

He stated that he is married and has one child, but is separated from his wife (R. 43, 54). He admitted having had an account at the Valley National Bank, Tucson (R. 43), which he transferred to the Valley National Bank, Phoenix on 12 August 1944 (R. 63). At the time of transfer, the balance in the account was \$62.99 and thereafter he made no additional deposits to the account (R. 63). The accused had previously had an allotment payable to the Tucson bank in the amount of \$100 monthly which he terminated in August, 1944 (R. 47), and the bank at times had permitted him to overdraw his account (R. 47). He did not know how many checks he had executed which were dishonored by the two banks during the period from April to October 1944, but he admitted that it was possible that there might have been thirty-seven of such checks (R. 64, 65). The accused had had a checking account only once before for a period of about six months, which had been managed by his wife (R. 48). He kept no stubs or other records of the checks he wrote, attempting to keep track of his balance by memory (R. 48, 49, 59). During the period involved in the Specifications, accused was stationed at Williams Field, Arizona, but on 14 August 1944, he was sent to Santa Ana on detached service remaining there until 19 September 1944 (R. 49, 50).

The accused admitted having written all five of the checks described in the Specifications, delivering them to the persons mentioned and

receiving in return cash or value in the amounts in which the checks were written (R. 44, 46, 48). Although all of these checks were returned by reason of insufficient funds (R. 50), the accused denied that he at any time intended to defraud the persons to whom they were issued (R. 49). He recognized, however, that it was to the discredit of the military service to have an officer's checks returned because of insufficient funds and admitted that he was "carelessly * * * guilty of this wrong" (R. 50).

With respect to the checks drawn against the Tucson account payable to the Arizona Club and the Minter Field Officers' Mess, for which cash was received, the accused had believed at the time that there were sufficient funds in his account to cover them (R. 46, 48). Receipt of the letters from the Arizona Club demanding payment of the checks (Exs. B, C, D) was admitted, the first such letter having been received in due course and the second and third when accused returned from detached service at Santa Ana on 19 September 1944 (R. 47, 48, 60, 61, 62). The first letter was mistakenly supposed by accused to relate to another bad check he had given the Club and he accordingly sent a money order in payment of such check (R. 47, 48). Immediately after his return from Santa Ana, accused was called to the office of his commanding officer with reference to the various checks which he had written and which had been returned (R. 48, 50). He was instructed to take immediate action to cover the checks and was informed that if he were "caught again with a bad check", he would be court-martialed (R. 50). He thereupon covered the check to the Arizona Club (R. 48), and, partly with a view to settling up his financial affairs, sold his home in Alaska and requested that the proceeds be sent for deposit to his account in the Phoenix Bank (R. 51). Subsequently, he received a check from Alaska in the amount of \$500 dated 4 October 1944, such check having been forwarded directly to him rather than the bank as he had instructed (R. 51, Def. Ex. 1). At the same time, he decided to close his account at the Phoenix bank at the end of September, and handle his financial transactions in cash from then on (R. 52).

Thereafter on 23 and 24 September 1944, the accused issued the checks to the Pioneer Hotel and El Presidio Hotel drawn against his Phoenix account and described in Specifications 1, 2 and 3 (R. 44). He received cash for the two issued to the Pioneer Hotel, the one issued to El Presidio being in payment of a hotel room (R. 44). He believed that he had sufficient funds in his account to cover the El Presidio check (R. 44), although he admitted that he had no basis for this belief (R. 45). As for the checks given to the Pioneer Hotel, the accused knew he had insufficient funds to cover them (R. 53), but he agreed with the clerk who cashed them that they would be held until 1 October 1944 (R. 45, 57, 60). He knew, however, that such an agreement was contrary to the policy of the hotel (R. 57, 58), and he made no effort to make a deposit to his account on 1 October 1944 to cover the checks, expecting that the check from Alaska would arrive somewhat

earlier than it did (R. 60). Accused received the notices sent out as a matter of policy by the bank to its delinquent depositors (Exs. H, I, K) on or about 1 October 1944 (R. 49). He did not recall how many checks he drew against the Phoenix account, but he admitted that checks drawn exceeded the amount which had been deposited in the account at the time it was opened and to which no additional deposits had ever been made (R. 63).

It was orally stipulated between the prosecution and the defense that all checks described in the Specifications have been paid in full and that as far as was known, there were no outstanding checks of the accused which have not been paid (R. 42).

6. The reviewing authority approved "only so much of the findings of guilty of Specifications 3, 4 and 5 of the Charge as involve findings that the accused wrongfully failed to maintain a sufficient bank balance to meet the checks described therein." While this language is ambiguous in that it fails clearly to set forth an approval of the court's finding that the checks were made and uttered to the persons and for the consideration described in the Specifications, an examination of the Staff Judge Advocate's review and recommendation as to final action makes it clear that the reviewing authority intended to approve the findings of guilty of these Specifications except the words therein "with intent to defraud," "fraudulently", "well knowing that he" and "and not intending that he should have", wherever they appear. While the action as written and signed fails to express this thought specifically, it leaves a basis for a reasonable inference to such effect and hence may properly be so construed (CM 235461, Ronemous, 22 BR 81).

In view of this action of the reviewing authority, no extended discussion of the evidence relative to Specifications 3, 4 and 5 is necessary. It is clear that the negotiation of worthless checks by an officer, even in the absence of an intent to defraud, is conduct of a nature to bring discredit upon the military service in violation of Article of War 96, and that such an offense is lesser than and included in the offenses set forth in these Specifications (CM 249006, Vergara, 32 BR 5). The accused admitted that he was "careless" in the negotiation of the checks, and the evidence amply demonstrates the truth of this admission. The account against which the checks described in Specifications 4 and 5 were written had been overdrawn during a part of every month but one during the period from April to July 1944. The account against which the check described in Specification 3 was issued was also seriously overdrawn, nine checks drawn against it having been returned during the month in which the check in question was cashed. Furthermore, the accused admitted that during the period from April to October 1944, as many as thirty-seven of his checks may have been dishonored. The admission of this evidence of the general condition of accused's accounts and of his other overdrafts was entirely proper for the purpose of showing knowledge and intent on the part of the accused (CM 239984, Hoyt, 25 BR 301).

It is apparent therefore that the negotiation of the worthless checks referred to in Specifications 3, 4 and 5 was not the result of an honest mistake on the part of the accused but, on the contrary, was at the very least the product of his neglect and carelessness in the handling of his financial affairs. Accordingly the record is legally sufficient to support the findings of guilty of these Specifications as modified by the reviewing authority.

As to Specifications 1 and 2, the findings of the court that the checks involved therein were negotiated with intent to defraud, were approved in full by the reviewing authority. It is to be noted that both these checks were drawn against the accused's account at the Phoenix bank, such account consisting solely of the initial deposit of \$62.99. Nine checks against this account were dishonored during the month in question, the aggregate amount of the dishonored checks alone exceeding the total amount of the deposits in the account. Furthermore, at the time the two checks complained of were cashed, the accused knew he had insufficient funds to cover them and could not possibly have been under the belief that the bank would honor any further overdrafts, especially since he had been informed by his commanding officer only a few days previously that various of his checks had been returned. The only defense advanced by the accused was that he had agreed with the hotel clerk who cashed the checks that they were to be held until 1 October 1944, although he admitted knowledge that such an agreement was contrary to the policy of the hotel. The agreement was denied by the clerk, and the court apparently gave little credence to it. Doubt as to the existence of the agreement is heightened by the fact that the accused took no steps to deposit funds to his account so as to cover the checks by 1 October 1944. Instead, he relied upon the hope that the check he was expecting from Alaska would arrive in time. Inasmuch as the arrival of this check appears to have depended upon the sale of a house in Alaska which accused had only decided to sell on or about 20 September 1944, it is difficult to understand how his expectation that the proceeds of sale would arrive by 1 October 1944 could have been anything more than a faint hope at best. It is uncontradicted that accused drew and cashed the checks at a time when he knew his bank account was not sufficient to cover them. He may have hoped that he would have enough money in the bank to pay them by the time they were presented for payment, but there was no substantial basis for the belief that the checks would be paid when presented. In effect the accused obtained loans from the hotel under the false pretense that he was cashing a check upon a sufficient bank account. Regardless of any intention on his part ultimately to make the checks good and the fact that they were afterwards paid, it is clear that they were cashed with intent to defraud (CM 250787, Eyen, 33 BR 47). Hence the record legally supports the court's findings that the checks were made and uttered with the intent to defraud.

Specifications 1 and 2 raise a further question, however, in that they allege that the checks were given in payment of a hotel bill, whereas the evidence reveals that they were given in return for cash. A similar discrepancy exists in Specification 3 where, conversely, the check was alleged to have been given for cash but was proven to have been issued in payment of a hotel bill. The court found the accused guilty of all three Specifications as charged, and the reviewing authority approved the findings as to Specifications 1 and 2 but, because of the variance, disapproved them as to Specification 3 insofar as they found the accused guilty of intent to defraud. It is difficult to understand why this distinction between the Specifications was made, but in any event it is considered that any difficulty that may exist by reason of the variance between the allegations in Specifications 1 and 2 and the proof thereof may be cured by approving the findings of guilty except the words "in payment of hotel bill". The Specification as so modified in each case, clearly states an offense and findings of guilty thereof may properly be sustained (CM 202601, Sperti, 6 BR 171 at p. 216). A further discrepancy between allegation and proof is found in Specifications 1 and 2 in that the checks are described in the Specifications as payable to the Pioneer Hotel whereas the checks themselves which are attached as Exhibits E and F show that they are payable to cash. This variance however was not complained of by the defense and in any event is immaterial. There is no question of the identity of the checks, and the proof is such that the record of trial would support pleas of double jeopardy should accused again be charged with offenses involved in the making and uttering of them (CM 226219, Rickards, 15 BR 27, p. 36).

At the close of the prosecution's case, the defense moved for a finding of not guilty as to all Specifications on the ground that the prosecution had failed to show an intent to defraud on the part of the accused (R. 41). This motion was properly denied by the court, since regardless of the question of fraud, the lesser offense of wrongfully issuing checks without sufficient funds on deposit to cover them was clearly shown in each case and the motion, therefore, could not properly have been granted (MCM 1928, par. 71d).

At one point during the trial, the defense counsel objected to continuing the case before the court "after the outburst by the prosecution, which the defense feels may have prejudiced the court" (R. 33). The record reveals no particular "outburst" by the prosecution and the objection of the defense appears to have been based upon the prosecution's effort to introduce evidence relative to the total number of bad checks cashed by the accused during the period in question. This evidence, as previously stated in this opinion, was properly admissible and for the most part was admitted at one time or another during the trial. Hence the action of the court in "overruling" the defense counsel's "motion" was entirely

proper, there being no showing of any prejudice to the accused. Nor did any prejudice to the accused arise from the fact that the Trial Judge Advocate took the stand as a witness for the purpose of identifying a written statement made to him by the accused during a preliminary investigation concerning certain checks the accused had written. This testimony was at first objected to by defense counsel, but upon being given an opportunity to read the statement referred to, he withdrew his objection. The Trial Judge Advocate took the statement in question in his capacity as post legal officer and there is no indication that he thereby became biased, hostile or prejudiced against the accused within the import of paragraph 41a, Manual for Courts-Martial 1928.

7. Records of the War Department disclose that the accused was born in Aberdeen, Washington, and is now 24 years and 5 months of age. He is married and has one child, 16 months old, but it is shown in the record of trial that he is separated from his wife. He attended high school for 3 years and thereafter was employed as an electrician's helper. He entered the Army on 31 March 1942 as an aviation cadet and on 3 December 1942, having completed the aviation cadet training program, he was commissioned as a temporary second lieutenant, Air-Reserve, Army of the United States, and ordered to active duty. On 17 November 1943, he was promoted to first lieutenant, Army of the United States. In recommending him for promotion, his commanding officer rated him "Excellent" as to manner of performance of his duties as a basic flying instructor. On 20 December 1943, he was punished under Article of War 104 for disturbing the peace at a hotel in Tucson, Arizona, by engaging in a fist fight with a civilian, punishment consisting of a reprimand.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed at the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings of guilty of the Charge and of Specifications 1 and 2 except the words "in payment of hotel bill" and is likewise legally sufficient to support the findings of guilty of Specifications 3, 4 and 5 as approved by the reviewing authority. It is also legally sufficient to support the sentence as approved by the reviewing authority, and to warrant confirmation thereof. A sentence of dismissal, total forfeitures and confinement at hard labor for 3 years is authorized upon conviction of a violation of Article of War 96.

Fletcher R. Andrews, Judge Advocate.

Herbert B. Frodeven, Judge Advocate.

(on leave), Judge Advocate.

1st Ind.

War Department, J.A.G.O., JAN 9 1945 - 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 H. Storm (O-734025), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty of the Charge and of Specifications 1 and 2, except the words "in payment of hotel bill", and of Specifications 3, 4, and 5 as approved by the reviewing authority; and legally sufficient to support the sentence as approved by the reviewing authority and to warrant confirmation thereof. The conduct of the accused in carelessly and negligently issuing numerous checks against overdrawn bank accounts, and in willfully issuing two checks with full knowledge that his account was insufficient to meet them, demonstrates that he lacks a proper appreciation of the responsibilities and standards of conduct required of a commissioned officer. In December 1943, accused was punished by reprimand under Article of War 104 for conduct of a disorderly character. For the reasons that full restitution had been made to the payees of the worthless checks before this trial, and that the accused appears to have intended ultimately to make the checks good at the time they were issued, I recommend that the sentence as approved by the reviewing authority be confirmed but that the forfeitures be remitted and the period of confinement be reduced to one year. I further recommend that the sentence as thus modified be carried into execution, and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry 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 as approved by reviewing authority confirmed but forfeitures remitted and confinement reduced to one year. G.C.M.O. 92, 22 Mar 1945)

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

(67)

SPJGH
CM 269690

1 JAN 1945

UNITED STATES	)	ARMY GROUND FORCES REPLACEMENT DEPOT NO. 1
)	
v.	)	Trial by G.C.M., convened at
	)	Fort George G. Meade,
Second Lieutenant JAMES M.	)	Maryland, 21 November 1944.
WILLIAMS (O-1823678), In-	)	Dismissal.
fantry.)	

OPINION of the BOARD OF REVIEW
TAPPY, GAMBRELL 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: Violation of the 96th Article of War.

Specification: In that Second Lieutenant James M. Williams, Company A, 5th Replacement Battalion, 2d Replacement Regiment (Inf), was at Atlanta, Georgia, on or about 0615, 11 October 1944, drunk and disorderly in a public place, to wit: Crumps Restaurant.

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

Specification 1: In that Second Lieutenant James M. Williams, Company A, 5th Replacement Battalion, 2nd Replacement Regiment (Inf), did, without proper leave, absent himself from his organization at Fort George G. Meade, Maryland, from about 0700, 28 October 1944 to about 1825, 28 October 1944.

Specification 2: In that Second Lieutenant James M. Williams, Company A, 5th Replacement Battalion, 2nd Replacement Regiment (Inf), did, without proper leave, absent himself from his organization at Fort George G. Meade, Maryland, from about 1620, 30 October 1944 to about 2300, 30 October 1944.

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

Specification: In that Second Lieutenant James M. Williams, Company A, 5th Replacement Battalion, 2nd Replacement Regiment (Inf), having been duly placed in arrest at Fort George G. Meade, Maryland, on or about 1830, 28 October 1944, did, at Fort George G. Meade, Maryland, on or about 1620, 30 October 1944, break his said arrest before he was set at liberty by proper authority.

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

Specification: (Finding of not guilty).

ADDITIONAL CHARGE IV: Violation of the 61st Article of War.

Specification: In that Second Lieutenant James M. Williams, Company A, 5th Replacement Battalion, 2nd Replacement Regiment (Inf), did, without proper leave, absent himself from his organization at Fort George G. Meade, Maryland, from about 0830, 12 November 1944 to about 0630, 13 November 1944.

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

Specification: In that Second Lieutenant James M. Williams, Company A, 5th Replacement Battalion, 2nd Replacement Regiment (Inf), having been duly placed in arrest at Fort George G. Meade, Maryland, on or about 1830, 28 October 1944, did, at Fort George G. Meade, Maryland, on or about 0830, 12 November 1944, break his said arrest before he was set at liberty by proper authority.

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

Specification: (Finding of not guilty).

The accused pleaded not guilty to all Charges and Specifications, was found not guilty of Additional Charge III and its Specification and Additional Charge VI and its Specification, and was found guilty of all other Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to dismissal and confinement for one year. The reviewing authority approved only so much of the sentence as provides for dismissal and forwarded the record of trial for action under Article of War 48.

3. In support of the original Charge and its Specification, the prosecution introduced evidence to show that sometime between 4 a.m. and 5 a.m. on 11 October 1944, accused was present in uniform in Crump's Cafe, Atlanta, Georgia. He engaged in conversation with the cashier and eventually commenced

cursing her because she could not recall the names of some companions with whom he had previously visited the cafe. Lieutenant G. R. Elliott of the Atlanta Police Department, who was in the establishment with Patrolman James W. Smith, Jr., approached accused and informed him he must either behave himself or leave. Accused indicated he would follow neither alternative whereupon he was informed that if he persisted in his conduct he would be taken into custody. Accused then threatened officer Elliott and, removing his blouse, struck the latter a head blow with his fist. During all this time accused was "wobbly" in his stance, used obscene language and was belligerent in speech and action. In the opinion of both policemen accused was drunk. After accused struck officer Elliott, he was forcibly taken into custody and removed to Military Police Headquarters in the city (R. 10; Pros. Exs. A, B).

At Military Police Headquarters accused verbally abused the two policemen and indicated his desire to engage in a fist fight with officer Elliott. The accused was taken to the Station Hospital at Fort McPherson for a blood alcohol test sometime between 6:30 and 7 a.m. that morning (R. 10; Pros. Ex. C). At the Station Hospital, Captain Carl R. Green of the Medical Corps, gave accused a blood alcohol test and also a general sobriety examination. The blood test revealed an alcoholic content of 2.5 milligrams per cubic centimeter of blood and the sobriety examination demonstrated that accused was drunk (R. 10; Pros. Ex. D).

In support of Specification 1 of Additional Charge I, the prosecution introduced evidence to show that under the company regulations of accused's organization at Fort George G. Meade, with which regulations accused was familiar, roll call for replacement officers was held by the company commander each morning except Sunday at 7:30 a.m. (R. 14, 24; Pros. Ex. G). Accused was absent from roll call at 7:30 a.m. on 28 October 1944 and did not return to his organization until 6:25 p.m. that same day (R. 14, 15; Pros. Ex. H). About 5:45 p.m. that day, Captain Henry J. Trimble, Jr., and First Lieutenant Lawrence L. Mowery had observed accused asleep in the lobby of the Laurel Hotel, Laurel, Maryland, and after awakening him and discovering that he had been drinking, Captain Trimble accompanied him to camp where accused reported to the regimental duty officer, Lieutenant Kenneth J. Gfoerer (R. 11, 12; Pros. Exs. E, F).

In support of Specification 2 of Additional Charge I and the Specification of Additional Charge II, the prosecution introduced evidence to show that General Orders No. 5, Headquarters Second Replacement Regiment, 7 May 1944, provided that the regimental duty officer, "as the representative of the Regimental Commander, is authorized to place officers and enlisted men under arrest" (R. 26; Pros. Ex. L). Acting pursuant to that authority,

Lieutenant Gfoerer, the regimental duty officer, placed accused in arrest at 6:30 p.m., 28 October 1944, when accused reported to him accompanied by Captain Trimble. Accused was informed that under the terms of his arrest he would be limited to his quarters except for visits to the mess hall (R. 25, 26; Pros. Ex. E). On 28 October 1944, after accused was placed in arrest, the company commander gave instructions that accused was to sign his name on a form of report each hour. This practice was discontinued on Monday morning, 30 October 1944 (R. 22). At roll call at 7:30 a.m. on 30 October 1944, accused's company commander extended the limits of accused's arrest to permit him to visit the dental clinic at 12:45 p.m. but instructed him to report back to his barracks thereafter (R. 17, 23, 30, 31). Accused absented himself without leave from his organization from 4:20 p.m., 30 October 1944 to 11 p.m., 30 October 1944 (R. 18; Pros. Ex. I). At roll call on 31 October 1944, accused explained his absence to his company commander by stating that he did not think he was any longer in arrest after the requirement of hourly signing the form had been lifted. He also stated that during his absence he had sought to have his watch repaired and had attended to the cleaning and pressing of some of his clothing (R. 18). However, other than the trip to the dental clinic and permission to make a telephone call, accused had no authority from his company commander to exceed the limits of his arrest on 30 October 1944 (R. 17, 20).

In support of the Specifications of Additional Charges IV and V, the prosecution introduced evidence to show that, while accused was still in arrest, he absented himself from his organization from 8:30 a.m. on 12 November 1944 to 6:30 a.m. on 13 November 1944 (R. 19; Pros. Ex. J). About 11 p.m. on 12 November 1944, accused was seen in the vicinity of the Camden Station, Baltimore, Maryland, where he was engaged in conversation with a soldier (R. 25; Pros. Ex. K). After roll call on 13 November 1944, in response to questions asked by his company commander, accused stated that he had broken arrest because he was "barracks whacky". He also made further statements to the effect that he had been drinking since the 10th of the previous month and could not endure the restriction of his arrest (R. 19, 20).

4. After accused's rights had been explained to him, he elected to remain silent and no evidence was introduced by the defense.

5. The evidence is ample to sustain accused's conviction of being drunk and disorderly in a public place (Charge and its Specification) and of absenting himself without leave on three separate occasions during the period from 28 October 1944 to 13 November 1944 (Additional Charge I, Specifications 1, 2, and Additional Charge IV and its Specification).

Accused's conviction of twice breaking arrest can only be sustained, however, if his arrest was legal. Officers can be placed in arrest by

*** commanding officers only, in person, through other officers, or by oral or written orders or communications. The authority to place such persons in arrest or confinement will not be delegated" (MCM, 1928, par. 20).

So far as is here relevant, "commanding officers" includes "the commanding officer of a regiment, detached battalion, detached company, or other detachment, and their superior" (MCM, 1928, par. 20).

Accused was placed in arrest by the regimental duty officer under authority of General Orders of the Regimental Commander which authorized the regimental duty officer, "as the representative of the Regimental Commander, ... to place officers and enlisted men under arrest". It must be determined whether by these General Orders the Regimental Commander was attempting to delegate his authority to place officers in arrest or whether he was merely acting "through" the regimental duty officer.

Analyzing the first cited portion of paragraph 20 of the Manual for Courts-Martial, it is noted that the authority to arrest (exclusive, of course, of situations arising under Article of War 68) resides in "commanding officers only" (underlining added). This authority to determine who shall be arrested, when he shall be arrested and what geographical limits shall be imposed under the arrest, may be exercised by a commanding officer through three channels, i.e., in person, through other officers, or by orders or communications. If it is exercised in person, it is clear that the commanding officer personally will order the particular officer into arrest. If it is exercised through orders or communications, it is likewise clear that an order or communication will be issued by the commanding officer informing the particular officer that he is in arrest. In both cases, the act of arresting is the personal act of the commanding officer. Similarly, when the commanding officer acts "through other officers" the act of arresting must still be the personal act of the commanding officer. The officer through whom he acts is just a conduit of information to the officer being arrested and exercises no authority relative to the arrest itself. In other words, the officer through whom the regimental commander acts merely informs the officer being arrested of the act of arrest performed by the commanding officer personally. The arrest is not the act of the informing officer but the act of the commanding officer (See CM 228394, Jarbeck, 16 BR 139, 157). This construction of the authority of a commanding officer to arrest "through other officers" is the only construction that is consistent with the two limitations that commanding officers only can arrest officers and that they cannot delegate that authority.

Here, the regimental commander did not arrest accused. The arrest was the personal act of the regimental duty officer. Not only was accused not arrested by the regimental commander but, furthermore, an examination of the General Orders of the regimental commander, under the authority of which the regimental duty officer acted, reveals that these orders purport to delegate the authority to arrest and, consequently, are of no legal force or effect. These orders purport to authorize regimental duty officers "as the representative of the Regimental Commander" to arrest "officers and enlisted men". It is patent on the face of these orders that the authority to perform the act of arrest was being delegated to the regimental duty officer. Any arrest made under these orders would be the personal act of the regimental duty officer and not the act of the commanding officer. Under these orders the regimental duty officer had discretion as to whom to arrest, when to arrest and what geographical limits to impose under the arrest. He could exercise all power and discretion incident to the authority to arrest. To delegate all incidents to an authority is to delegate the authority. Since the authority to arrest cannot be delegated, the orders were of no force and effect and the arrest of accused by the regimental duty officer was illegal.

This conclusion is not inconsistent with the opinion expressed in a recent case, CM 253660, Brown. In that case accused was drunk and disorderly in a post dispensary and when asked by a Colonel Thaxton, the "second ranking officer" at the post, the senior officer being then at his home some distance away, if he would go to his quarters and remain there until sober, accused replied that he would not. Thereafter he was ordered into arrest by Colonel Thaxton. As properly held in the opinion, accused's conduct at the time of his arrest constituted a disorder within Article of War 68 and his arrest by any commissioned officer would have been legal under that Article of War. The arrest was also sustained on the grounds that Colonel Thaxton, "the officer next in command" to the commanding officer of the post, had the power to order accused into arrest in the absence of the commanding officer.

In the present case there is no evidence to indicate that accused was disorderly when ordered into arrest. Also there is no evidence that Lieutenant Gfoerer, the regimental duty officer, was the officer next in command to the regimental commander and that the regimental commander was absent from the post at the time of the arrest. Thus, there is no evidence to indicate that Lieutenant Gfoerer had succeeded, even temporarily, to the command functions of the regimental commander and to his authority to arrest. Although an arrest is presumed to be legal (MCM, 1928, par. 139a), that presumption is here rebutted by the circumstances established on the face of this record.

Since accused's arrest was illegal, accused cannot be found guilty of breach of arrest (MCM, 1928, par. 139a) and, accordingly, the evidence

does not sustain the findings of guilty of Additional Charge II and its Specification and Additional Charge V and its Specification.

6. Accused is single and 25 years of age. Prior to his entry into military service he was a sign painter. He served in the National Guard of Pennsylvania from 9 March 1936 to 17 February 1941 and on the latter date entered federal military service as an enlisted man. On 4 February 1943, after completing the officer candidate course at the Tank Destroyer School, Camp Hood, Texas, he was commissioned a second lieutenant.

7. The court was legally constituted and had jurisdiction of the person and the offenses. Except as noted above no errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally insufficient to support the findings of guilty of Additional Charge II and its Specification and Additional Charge V and its Specification, legally sufficient to support all other findings of guilty and to support the sentence as approved by the reviewing authority and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 61 or Article of War 96.

Thomas N. Jappy, Judge Advocate.

William H. Gambrell, Judge Advocate.

Robert C. Swethan, Judge Advocate.

(74)

SPJGH
CM 269690

1st Ind.

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

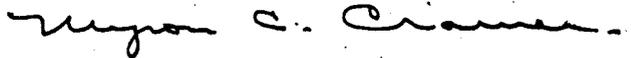
JAN 9 - 1945

- 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 James M. Williams (O-1823678), 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 Additional Charge II and its Specification and Additional Charge V and its Specification; legally sufficient to support all other findings of guilty and to support the sentence as approved by the reviewing authority and to warrant confirmation of the sentence. I recommend that the sentence as approved by the reviewing authority be confirmed and carried into execution.

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.



3 Incls.

Incl 1 - Record of trial.

Incl 2 - Dft ltr for sig S/W.

Incl 3 - Form of action.

Myron C. Cramer,

Major General,

The Judge Advocate General.

(Findings of guilty of Additional Charge II and its Specification and Additional Charge V and its Specification disapproved. Sentence as approved by reviewing authority confirmed. G.C.M.O. 84, 21 Mar 1945).

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

(75)

SPJGK
CM 269704

15 DEC 1944

UNITED STATES

v.

Private EDWARD M. MCGEEVER
(39246409), Section A,
2114th Army Air Forces Base
Unit, Pilot School, Specialized
4-E and Instructor School, Lock-
bourne Army Air Base, Columbus
17, Ohio.

ARMY AIR FORCES
EASTERN FLYING TRAINING COMMAND

Trial by G.C.M., convened at
Columbus, Ohio, 11 November
1944. Dishonorable discharge
and confinement for five (5)
years. Disciplinary Barracks.

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

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

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

CHARGE: Violation of the 98th Article of War.

Specifications: In that Private Edward M. McGeever, Section A, 2114th Army Air Forces Base Unit, Pilot School, Specialized 4-E and Instructor School, Lockbourne Army Air Base, Columbus 17, Ohio, did, at Township of Hamilton, County of Franklin, State of Ohio, on or about 24 October 1944, wrongfully and unlawfully make improper exposure of his person in the presence of Norma Young, a female child under fourteen (14) years of age.

He pleaded not guilty to and was found guilty of the Charge and its Specification. Evidence of three 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 a period of five 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 50 $\frac{1}{2}$.

3. The evidence for the prosecution shows that the accused, a soldier in the military service of the United States stationed at an Air Base near Columbus, Ohio, about 1:30 A.M. on the morning of 24 October 1944, without

invitation or authority entered a farmhouse, located across the road from the west entrance of the Base (R.T), occupied by Mr. Leo E. Young and his family. Accused entered through the unlocked back door and turned on all the lights in the three rooms on the ground floor of the house (R. L). He then went up the stairway which led to a bedroom in which there were two double beds (R. K). Mr. and Mrs. Young occupied the bed on the left. Their two daughters, Mary, age 7, and Norma, age 10, occupied the one on the right. It was dark in the room. In the opinion of Mr. Young there was not enough light there for one to see the occupants of the beds. The accused undressed himself except for his undershirt, sat on the foot of the bed occupied by the children and smoked a cigarette. He thereupon lay down on the bed. Norma rolled against him and thinking it was her brother told him to get up. When he failed to do so she struck him three times in the face. He would not get up so she called her father (R. E). Mr. Young, awakened by his daughter's cries, arose and saw a man, whom he later identified as the accused, sitting on the bed occupied by his daughters near its foot. He turned on a lamp containing a 15-watt bulb which threw a very dim light, and observed the accused sitting on the bed dressed in an undershirt which came down to his hip bones (R. I,M). Accused's clothes were lying on the floor in a pile. At his insistence the accused slowly got dressed. He put on his Army shirt while sitting on the bed and when he stood up to put his trousers on Mr. Young could see his private parts (R. I,K,M). The girls, however, were not in a position to see the accused's exposure because of their position back of the accused and because of the piled up bed covers (R. I,J). Mrs. Young awakened and also saw the accused sitting on the bed in his undershirt. When asked if she saw the accused's privates exposed in the presence of the children, she answered, "Well, I didn't get up out of bed. I told them (the children) to hide their faces until he was dressed" (R. P-Q). Mary was awakened by Norma and saw the accused sitting at the foot of the bed in his undershirt but did not see him get up to get dressed (R. B,C).

Norma first saw the accused when he was sitting at the foot of her bed dressed only in his undershirt with his back to her. She also saw him standing up with his back toward her putting on his pants, at which time he had on his Army shirt (R. F,G). When she awoke "he had his hand on my arm" and was lying down. Accused sat up when she called her father (R. F). When Mr. Young asked what he was doing there accused gave numerous irrational answers, such as, "they told him the place was haunted and he wanted to spend the night in it", and "he didn't have no knife". Mr. Young kept telling him to get dressed. It took accused 10 to 15 minutes to get dressed (R. P). Mr. Young accompanied the accused downstairs and asked him to leave. The accused requested him to fix him some coffee and sandwiches and followed Mr. Young outside. They talked together for a while. Mr. Young then left accused talking to his 16-year old son who had come downstairs and went for the military police. He returned in five minutes. The military police soon arrived and took the accused away (R. K).

In Mr. Young's opinion the accused was drunk. He did not carry on a rational conversation although he was able to walk "straight".

While in the custody of the military police accused kept asking for a cigarette and when asked exactly what had happened said he did not know, but when asked what "made him do it, * * * said he didn't know, he just did it" (R. T,U). In the opinion of the military police accused was under the influence of liquor (R. U).

About 9 A.M. of the same day the accused, having been properly warned, voluntarily stated to Captain F. W. Garwacki, Provost Marshal of the Air Base, in response to questioning, that he had opened the back door of the farmhouse and walked in, put on all of the lights and walked up the stairs. He saw two girls in bed. He sat on the bed and finished smoking his cigarette. He then got undressed and "reached over and touched" (R. Z) or put his hand on the arm of one of the girls "with the intentions of having intercourse with her". At that time he was dressed in his under-clothes. When he attempted to awaken the girl she screamed. Some one from the other bed in the room, who proved to be the girl's father, then ran over and pulled him "out of bed". When asked if he had made any attempt to find out the age of the girl, he answered, "Well, she looked old enough" (R. V,W,Z). Lieutenant F. E. Welcome who was present during the interview testified that the accused's reply to the question was that he thought the girl was between 18 and 20 years of age (R. Z).

4. The accused elected to testify in his own behalf. In civilian life he had been a professional fighter or boxer and had been "beaten up" in fighting, as evidenced by a cauliflower ear. In 1940 he was in an automobile accident and as a result had had about 25 stiches taken in his head. He suffers lapses of memory. For four months he was held under observation in a hospital (R. A1). As to the night of 24 October he remembered very little. He remembered going into the farmhouse; the room was so dark that he could not see anybody; there was only one bed in the room; he sat on it; he did not remember touching anybody, but remembered getting dressed and returning to the Base with the military police; he entered the farmhouse through the unlocked front door and went upstairs without invitation. He had been drinking but could not remember where in Columbus he drank nor how much. He remembered two girls screaming in the room (R. A, 3-6).

5. The specification alleges, and the evidence clearly shows, that the accused wrongfully and unlawfully made improper exposure of his person in the presence of Norma Young, a female under 14 years of age. Such conduct is manifestly of a nature to the discredit of the military service and constitutes a violation of Article of War 96. No offense other than improper exposure is charged.

The question arises, - is the sentence imposed by the court and

approved by the reviewing authority, to wit, dishonorable discharge, total forfeitures, and confinement at hard labor for a period of five years, a legal sentence? The answer is, No. It is the opinion of the Board of Review that the offense alleged and proved is closely related to the offense of indecent exposure of the person, for which the maximum punishment is confinement at hard labor for six months and forfeiture of two-thirds pay per month for six months (MCM, 1928, par. 104e; CM 240227, Holland, B.R. 26, p. 1,3).

6. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty, but legally sufficient to support only so much of the sentence as involves confinement at hard labor for six months and forfeiture of two-thirds of his pay per month for six months.

Wm. C. Fox, Judge Advocate.
Ed. Stephen, Judge Advocate.
Thomas M. Meyer, Judge Advocate.

1st Ind.

DEC 20 1944

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

TO: Commanding General,
Army Air Forces Eastern Flying Training Command,
Maxwell Field, Alabama.

1. In the case of Private Edward M. McGeever (39248409), Section A, 2114th AAF Base Unit, Pilot School, Specialized 4-E and Instructor School, Lockbourne Army Air Base, Columbus 17, Ohio, 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, but legally sufficient to support only so much of the sentence as involves confinement at hard labor for six months and forfeiture of two-thirds of his pay per month for six months, which holding is hereby approved. Upon vacation of so much of the sentence as is in excess of confinement at hard labor for six months and forfeiture of two-thirds of his pay per month for six months, and the designation of a post guardhouse as the place of confinement, 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 269704).



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.

(81)

SPJGK
CM 269707

17 JAN 1945

UNITED STATES)

SECOND ARMY

v.)

Captain SIDNEY WOLFSIE
(O-1049037), Quartermaster
Corps.)

Trial by G.C.M., convened at Camp
Rucker, Alabama, 10 November 1944.
Dismissal, total forfeitures, and
confinement for five (5) years.

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

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

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

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

Specification 1: In that Captain Sidney Wolfsie, Quartermaster Corps, 3796th Quartermaster Truck Company, Camp Rucker, Alabama, being at the time a Class A Agent Officer for First Lieutenant F. A. Turner, Finance Department, Finance Officer, Camp Rucker, Alabama, did, at Camp Rucker, Alabama, on or about 30 April 1944, feloniously embezzle by fraudulently converting to his own use, the sum of \$5.10, lawful money of the United States, the property of the United States, furnished and intended for the Military Service thereof, entrusted to him, the said Captain Wolfsie, by the said First Lieutenant Turner.

Note: There are three other Specifications, under this Charge, identical in form and language with Specification 1, except as to date and amounts, which exceptions are as follows:

<u>Spec.</u>	<u>Date</u>	<u>Amount</u>
2	30 June 1944	\$157.64
3	31 July 1944	11.30
4	31 August 1944	173.23

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

Specification 1: In that Captain Sidney Wolfsie, Quartermaster .

Corps, * * *, did, at Camp Rucker, Alabama, on or about 30 April 1944, with intent to deceive First Lieutenant F. A. Turner, Finance Department, Finance Officer, Camp Rucker, Alabama, officially report to the said First Lieutenant Turner on a "War Department Return of Funds and Statement of Agent Officers Balance," War Department, Finance Department Form Number 45B, dated 30 April 1944, that he received the sum of \$3069.65, property of the United States, in trust, that he had returned paid vouchers for \$3069.65, and there was no balance chargeable to him from said trust funds, which report was known by the said Captain Wolfsie to be untrue in that he did have a balance of \$15.10, chargeable to him for which he did not have a valid paid voucher.

Specification 2: In that Captain Sidney Wolfsie, * * *, did, at Camp Rucker, Alabama, on or about 30 June 1944, with intent to deceive First Lieutenant F. A. Turner, Finance Department, Finance Officer, Camp Rucker, Alabama, officially report to the said First Lieutenant Turner on a "War Department Return of Funds and Statement of Agent Officers Balance," War Department, Finance Department Form Number 45B, dated 30 June 1944, that he had received the sum of \$2857.85, property of the United States, in trust, that he had returned paid vouchers for \$2678.10, and that there was no balance chargeable to him, from said trust funds, which report was known by the said Captain Wolfsie, to be untrue in that he did have a balance of \$157.64 chargeable to him for which he did not have a valid paid voucher.

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

Specification 1: In that Captain Sidney Wolfsie, * * *, did, at Camp Rucker, Alabama, on or about 1 August 1944, feloniously embezzle by fraudulently converting to his own use, the sum of \$5.00 lawful money of the United States, the property of Private Walter L. Anderson, 3796th Quartermaster Truck Company, entrusted to him by the said Private Anderson.

Note: There are seven other Specifications, namely, 2, 3, 4, 5, 6, 7 and 8, under this Charge, which are identical in form and language with Specification 1 except as to dates, amounts embezzled and persons whose funds were embezzled, which exceptions are as follows:

<u>Spec.</u>	<u>Date</u>	<u>Amount</u>	<u>Owner of embezzled funds</u>
2	1 August 1944	\$5	Private First Class Charles Glossen
3	1 August 1944	\$5	Private Herbert James
4	1 August 1944	\$10	Technician Fifth Grade John Marshall
5	1 August 1944	\$15	Technician Fourth Grade Joseph Middleton
6	1 August 1944	\$9	Sergeant Walter Wells
7	1 September 1944	\$20	Private Herbert James
8	1 September 1944	\$5	Corporal Leon Robinson

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

3. Summary of the evidence.

During the months of April, May, June, July and August 1944, accused was the commanding officer of the 3796th Quartermaster Truck Company (R. 31). For a part of the time his rank was that of First Lieutenant (R. 23). Throughout this period the company was one of the units paid by the Finance Officer of Camp Rucker, Alabama (R. 17,18). To facilitate the payment of units serviced by the Post Finance Officer, Captain Fred A. Turner, Class A Agent Finance Officers were designated in Special Orders, issued by the Commanding Officer of Camp Rucker, as authorized by Army Regulations (R. 17,18). Accused was named in this manner as the Class A Agent Officer for the 3796th Quartermaster Truck Company for the months of April, June, July and August, 1944 (R. 22, Stipulation, R. 16; Pros. Exs. 2, 3 and 4).

In accordance with the standard operating procedure at Camp Rucker and regulations, the amount due to the enlisted personnel of an organization is determined by the Finance Officer from the pay roll, signed by such personnel in time to be submitted to that officer on the 15th of the month, and, consequently, prior to the receipt of payment. After submission of the roll some names may be "redlined" because of erroneous or incomplete statements, but by the 27th or 28th of the month the roll normally has been properly corrected. The total due is then paid by the Finance Officer to the Class A Agent Officer in cash upon his signing a "W.D., F.D. Form No. 45A" (R. 18, 19,28; Pros. Exs. 9,10). The Agent Officer then proceeds to pay off the troops under his command (R. 19). As each man is paid by him, a witnessing officer, who has a duplicate copy of the pay roll, checks the amount that is so paid (R. 20). If for any reason a man is not paid, his name is "redlined". In actuality a blue line is "drawn through all the figures starting on the

left hand side of the page through the amount to be paid and the soldier's signature", and is initialed by the witnessing officer (R. 20). Under the standard operating procedure at Camp Rucker, a Class A Agent Officer has until 4 o'clock of the day following receipt of the funds, to return "the money or the pay roll. * * * In other words, he turns into us /Finance Office/ cash and men on the pay roll showing that they are paid to equal the total amount that he has taken out" (R. 21). A War Department Finance Department Form No. 45B is executed by the Class A Agent Officer when he returns the cash and the pay roll to the Finance Officer (R. 22; Exs. 9, 10).

In his capacity as Class A Agent Officer, accused received the funds shown on the pay rolls to be due the enlisted personnel of the 3796th Quartermaster Company for the months of April, June, July and August, 1944, and prior to 4 p.m. of the day following receipt of the funds made his returns to the Post Finance Officer. The names of all of the absent men whose pay was subsequently retained by accused appear on and each had signed the pay roll for the respective months involved (Pros. Exs. 5,6,7,8, Stipulation, Pros. Ex. 1). No men were "redlined" on the April roll, and no cash was turned in by the accused. Some names were redlined on the June, July and August rolls and some cash turned in (R. 23, 24, and 25). Details as to these rolls will be summarized hereinafter under the applicable Specifications. A Class A Agent Officer is "entirely responsible for the cash that is in his possession" (R. 26, 29). Accused made no report during April, June, July or August, 1944, of any loss of funds entrusted to him (R. 26) nor did he report at any time that any of such funds were stolen from him (R. 29).

April (Specification 1, Charge I, Specification 1, Charge II) -

For the month of April, \$3069.65 was disbursed to the accused (R. 14,15, 23; Pros. Exs. 5,9). He "redlined" no names and returned no money (R. 15, 23,24; Pros. Ex. 9). He executed War Department Finance Department Form Number 45B dated 30 April 1944, certifying that he ^{paid} vouchers for \$3069.65, and that no balance was chargeable to him (R. 15; Pros. Ex. 9). On 27 April Corporal P. J. Weakley left the 3796th Quartermaster Truck Company for the purpose of attending school at Camp Lee, Virginia (R. 47) and therefore did not personally receive his pay due him on the 30th of April (R. 59-60). If he had been present on 30 April he would have been paid \$15.10 (R. 47). On the day of his departure he borrowed \$10 from the company clerk and requested accused to repay the company clerk out of his pay and send him the balance (R. 48,54). The company clerk was reimbursed by the accused on pay day, 30 April 1944 (R. 48,52,53,55,56). Although the accused had agreed to mail the balance of \$5.10 to Weakley after pay day (R. 54), he did not do so (R. 48, 49). On August 20, after Weakley had returned from school he requested the balance from the accused who stated he would pay Weakley as soon as he could get a check cashed (R. 49,54). Weakley was eventually paid in the latter part of September out of a fund provided by the accused for the purpose

prior to the institution of these charges (R. 34, Pros. Ex. 15).

June (Specification 2, Charge I; Specification 2, Charge II) -

For the month of June, the accused drew \$2857.85 (R. 14,15,23; Pros. Ex. 10) and returned \$179.75 (R. 14,15,24; Pros. Exs. 6,10). This latter amount resulted from the "red-lining" of Technical Sergeant Longrin, Staff Sergeant Anderson and Private Richardson (R. 24). He executed War Department, Finance Department Form Number 45B, dated 30 June 1944, certifying that he had paid vouchers for \$2678.10, and that no balance was chargeable to him (R.15; Pros. Ex. 10). On 22 June, Sergeant Dunnings went on furlough (R. 65,70). If he had been present on 30 June he would have received \$157.64 pay (R. 65). Dunnings was not paid on 30 June, nor was his name "redlined" (R. 60,61,65, 80; Pros. Ex. 12). Before leaving on furlough, Dunnings told the accused he would leave with the company clerk the address to which he wanted his pay forwarded (R. 70), and left the address on the accused's desk (R. 71,79). After his return from furlough, the sergeant asked the accused for his money (R. 66). The accused stated he had banked it (R. 66,67,72,75,77) and gave him \$40.00 (R. 66,67,73,76,78). About 20 July, the accused stated to Dunnings he had lost his money (R. 66,67). Dunnings told the accused that he would wait for his money (R. 68). In the latter part of July, the accused paid Dunnings an additional \$15.00 for a total payment of \$55.00 (R. 68). The accused told the witnessing officer, Lieutenant Moeslein, on 30 June that he would wire the money to Dunnings the next day (R. 61,63). Later, the accused stated to Lieutenant Moeslein that "he had taken care of it" (R. 62). Dunnings finally received the balance due him on 18 September 1944 (R. 70).

July (Specification 3, Charge I) - For the month of July, the accused drew \$2305.18 (R. 23) and returned \$239.98 (R. 14,24; Pros. Ex. 7), resulting from the "red-lining" of Corporal Monroe, Technician Fifth Grade McCorney and Privates James, Lockblugh, Paul, Prior, Smith and Trammel (R. 25). On 31 July, Private John H. Callahan was on furlough (R. 74), and was not paid although his name was not "redlined" (R. 92,93). The accused told the witnessing officer that he would keep the money for Callahan and pay him when he returned (R. 93). Callahan's pay for the month of July was \$11.30 (R. 7; Pros. Ex. 7).

August (Specification 4, Charge I) - In August, \$2960.24 was disbursed to the accused (R. 23). He returned \$114.25 (R. 14,25; Pros. Ex. 8), Staff Sergeant Manning, Private First Class Olawumi and Privates Baker, Glossen, Johnson and Morgan having been "red-lined" (R. 25). Sergeant Collins left on furlough on 23 August (R. 24) and did not receive his August pay of \$47.90 (R. 14, 80; Pros. Exs. 8,12; R. 95,115,116). Upon his return from furlough on 3 September, he asked the accused for his pay and the accused told him his money was in the bank (R. 95). The next evening he again asked for his pay and the accused stated that when he had time he would go to the bank and get the money (R. 96). Technician Fifth Grade Watley was

on furlough from 23 August to 5 September and did not receive his August pay of \$32.13 (R. 14,80,98,115,116; Pros. Exs. 8,12). Around 6 September he saw the accused who gave him \$30.00 and said he owed him the balance which he would give him some other time (R. 99). Private First Class Neubel went on furlough 29 August and did not receive his pay of \$39.80 (R. 14,36,101; Pros. Exs. 8,14) on 31 August (R. 80,101,115,116; Pros. Ex. 12). When he returned from furlough on 13 September, the accused was on leave (R. 101). Private Walton was on furlough from 17 August to 2 September and did not receive his August pay of \$11.80 on the 31st (R. 14,80,102,115,116; Pros. Exs. 8,12). He saw the accused on 4 September who declared he would pay Walton at noon that day (R. 104). He did not receive his pay at that time (R. 104). Private Weatherspoon left on furlough 23 August and was not present to be paid \$12.50 on 31 August (R. 14,80,106,115,116; Pros. Exs. 8,12). On 6 September he requested his pay from the accused who stated he would pay him that evening (R. 107). The accused did not pay him during the month of September (R. 107). Private Williams left for his furlough on 27 August and did not collect his August pay of \$12.50 on pay day (R. 14,108,115,116; Pros. Exs. 8,12). When he returned on 11 September, the accused was not present in the company (R. 109). Private Rachel, being on furlough from 24 August to 5 September, did not receive his August pay of \$16.60 on pay day (R. 14,80,112,115,116; Pros. Ex. 8,12). On 6 September he requested his pay from the accused who paid him \$16.00 (R. 113). The balance of 60¢ was not paid then (R. 113). The accused told him to ask for the 60¢ later, and he would give it to him (R. 114). On 31 August the accused told the witnessing officer that he would pay those men who were on furlough when they returned (R. 80,117; Pros. Ex. 12). The name of none of these six men was redlined. All subsequently, on 18 September 1944, received the balances due them from a fund provided by the accused (R. 34, Pros. Exs. 14 and 15).

Red Cross (Charge III) - Prior to 31 July 1944, Corporal Walter L. Anderson, Private First Class Charlie Glossen, Private First Class Herbert James, Technician Fifth Grade John H. Marshall, Technician Fourth Grade Joseph B. Middleton, Sergeant Walter Joseph Wells, and Corporal Leon N. Robinson had secured loans from the American Red Cross (R. 82,83,84,85,86,118,120,121,126,129,132,134,135; Pros. Ex. 16). It was the practice in the 3796th Quartermaster Truck Company during June, July and August 1944, for a commissioned officer to accept money from soldiers on pay day for repayment of their Red Cross loans, to turn over the money to the Red Cross, obtain a receipt and deliver it to the soldier who made the payment (R. 39,87). On 31 July, after they had been paid, James gave the accused \$5.00 (R. 121), Marshall \$5.00 (R. 126,127), Middleton \$10.00 (R. 129,130), and Wells, \$9.00 (R. 133) to be applied to their Red Cross loans (R. 127,130,133; Pros. Ex. 13). On 31 August, Anderson, James, Marshall, Middleton and Robinson gave the accused \$5.00 (R. 119), \$20.00 (R. 122), \$5.00 (R. 127), \$5.00 (R. 130) and \$5.00 (R. 136) respectively, towards repayment of their loans (R. 80, 119,122, 127,130,131,136; Pros. Ex. 13). Sometime in August Glossen gave the accused \$5.00 for payment on his loan (R. 80,89; Pros. Ex. 13,16). The accused did

not turn over these collections (totaling \$74) to the Red Cross (R. 80, 82,86; Pros. Ex. 13) until 2 October, when he paid \$74.00 to the Red Cross to be applied towards the loans of Anderson, Glossen, James, Marshall, Middleton, Robinson and Wells (R. 80,87,88,89; Pros. Ex. 13,16). On the same day, the Red Cross issued appropriate receipts (R. 119,123,128,131, 134,137; Pros. Ex. 16).

About 11 September the accused went on leave and returned approximately 24 September (R. 31,40). During his absence, Lieutenant Pistor assumed command of the company (R. 32). About 12 or 14 September complaints were made to Lieutenant Pistor by certain enlisted men in reference to their pay (R. 32). He investigated and then wrote (R. 33) to the accused in reference to these complaints at New Rochelle, New York (R. 32) on 13 or 14 September (R. 33,37). On or about 21 September (R. 37) he received a Western Union money order or check from the accused (R. 37) in the sum of \$227.14 (R. 33,37). On the same day, Pistor sent a telegram to the accused (R. 33,34,37) and on 22 September received another Western Union money order from the accused in the sum of \$19.13 (R. 34,37). Pistor cashed the money orders or checks thus received (R. 34) and paid Collins, Neubel, Walton, Weatherspoon, Williams, Dunnings, Watley, Rachel and Weakley, the money due them (R. 36; Pros. Ex. 14; R. 37, Pros. Ex. 15, R. 50,69,97,99,102,105,107,109,113). Although Lieutenant Pistor received from the accused sufficient money with which to pay Callahan he did not pay him because Callahan had been transferred (R. 34,37; Pros. Ex. 15), and because the accused claimed he had paid this soldier (R. 42,43). Between the 23rd of September and 1 October, Pistor received complaints from soldiers in the company with respect to Red Cross loans (R. 38,39). He subsequently had a conversation with the accused who showed him a list of names and amounts and asked him to take the list to and pay the Red Cross; he (the accused) had the money in his pocket and was ready to pay it. Lieutenant Pistor declined to go as he was too busy and did not want to have anything to do with the matter (R. 40-41). The list that the accused showed him totaled \$74.00 (R. 41).

For the defense.

The accused, Captain Wolfsie, being fully warned of his rights, elected to testify under oath (R. 144). On 27 April 1944, Corporal Weakley who was about to leave for school, told him that he needed money to travel (R. 149). It was agreed that the company clerk would lend \$10.00 to Weakley and be reimbursed by the accused out of Weakley's pay (R. 150). Weakley was not present on 30 April 1944, and was not redlined (R. 150). The accused reimbursed the company clerk \$10.00, inserted the remainder of Weakley's pay, \$5.10, in an envelope (R. 151) and put the envelope in his foot locker which was kept under lock and key (R. 151). On 27 June 1944, Sergeant Dunnings left on furlough (R. 151). The accused told Dunnings to leave his address with the company clerk and stated that he would wire or mail his pay to him (R. 152). The accused did not send the money to Dunnings because the memorandum containing the address was lost (R. 152). He put Dunnings' pay in

the same envelope with Weakley's money in the foot locker (R. 153). The accused did not use the field safe in the orderly room to which he and the second in command had the only keys because the field safe was open quite a few times during the day and he felt that the money would not be as safe there as in his room (R. 153,172). After returning from a July 4th week-end, the accused discovered that his foot locker had been broken into and the money stolen (R. 154). He did not report the loss (R. 154,173,180). About a week after his return from furlough, Dunnings asked the accused about his money and the accused told him that he had the money in the bank and would get it for him at the first possible chance (R. 155,174). A few days later Dunnings again asked the accused for his money (R. 155). This time the accused stated that he had lost it (R. 155,174). On this occasion accused gave \$40.00 to Dunnings who stated that accused could pay him the balance when he had it (R. 155). Subsequently, he paid Dunnings another \$15.00 (R. 155,158). On 31 August 1944, the accused's company was in bivouac (R. 157). Following the receipt of the August pay roll from the finance office, the accused paid the men who were present, returned the pay of those men who had been transferred from or were not in the organization and placed the money for men on furlough in an envelope (R. 157). The total amount that he retained for the men on furlough was \$173.23 (R. 158). On 31 July, 1944 and again on 31 August 1944, the accused collected money from men in his organization to apply on their Red Cross loans (R. 158,160,161,159,205, Def. Ex. A and B). Because of the pressure of duties and the shortage of officers during the month of August, the accused was unable to pay the Red Cross the money that he had collected on 31 July 1944 (R. 158,171). On his return to camp on 31 August 1944, he picked up the envelope containing the 31 July 1944 collections with the expectation of paying both this amount and the amount he collected on 31 August 1944 at the same time (R. 158,198). On 31 August 1944, he put the Red Cross money that he had collected in the same envelope with the collections of 31 July, clipped with the envelope containing the money for the men on furlough, and placed the envelope in his pocket (R. 162,170). That evening, while proceeding on a black-out drive in the bivouac area, he lost the envelopes (R.162,170). A search for the envelopes on the night of 31 August 1944 and 1 September 1944 was unsuccessful (R.162). He did not report the loss to anyone (R. 163). When the men returned from furlough and inquired about their August pay he made excuses and endeavored to borrow money from other officers (R. 163,200,205). He reimbursed Watley and Rachel in part from his own funds (R. 163). Callahan received his pay, \$11.30, when he returned from furlough (R. 187,188). The accused went on leave on 12 September 1944 (R. 164,183). While he was home, he withdrew money from his savings bank account in New Rochelle, New York, and wired \$277.64 to Lieutenant Pistor by Western Union on 21 September (R. 164,183,185,188). This was done before he had received any communication from Lieutenant Pistor or from any other officer in his battalion (R. 184, 191). That same afternoon he received a wire from Lieutenant Pistor requesting

an additional \$19.13, which he immediately wired back by Western Union money order (R. 164,185). He was unable to withdraw this money from his savings account prior to 21 September because the bank book was in the custody of his family and he did not receive it from them until 20 September (R. 189, 193,194). The accused returned to his organization on 24 September, or 25th of September 1944 (R. 164). On 2 October 1944, he asked Lieutenant Pistor to go to the Red Cross for him, pay the money on the loans of the various enlisted men and obtain receipts (R. 165). Pistor stated he was too busy and would not do so (R. 165). The accused then obtained permission from his superior officer went to the Red Cross and paid them \$74.00 (R. 165). Mr. Reilly of the Red Cross, gave him a receipt for the \$74.00 and said he would give individual receipts to the enlisted men concerned (R. 165). When the accused made his accounting to the finance office for the moneys he received for the payment of troops on 30 April 1944, he certified in his statement that he had paid Weakley the amount of \$15.10 (R. 156). At the time he signed this certification he knew it was false (R. 169). Following payment to the troops on 30 June 1944, the accused made an accounting to the finance officer and certified that he had paid Sergeant Dunnings the amount of his pay, \$157.84 (R. 156). At the time he signed this statement he knew it was false and that he was submitting a false report (R. 168,169). It was not his intention to deceive the Post Finance Officer in making these false statements (R. 156). In the organization where accused had served previously as a Class A Agent, it was the practice to withhold money of men on furlough who were expected to return within a short time after pay day and to pay these soldiers as soon as they returned (R. 166). The accused withheld the money of the men on furlough for their convenience as he realized that they would need their money upon their return (R. 165,166). He had no intention to defraud or embezzle (R. 165,166). During the months of April, May, June, July and August, the accused had no unusual expenses (R. 176,178,182,183) with the exception of \$200.00 to \$300.00 spent while on convalescent leave in April (R. 182) and had no allotments to his family (R. 166,167). While the accused had War Bonds which he had purchased for cash they were in safe-keeping with his family (R. 200).

Sergeant Pumphrey, the company clerk, called as a witness by the defense, testified that the day after Sergeant Dunnings went on furlough, he found the memorandum containing Dunnings' address on his desk (R. 139). Before 30 June 1944, the memorandum was misplaced (R. 140,141). About a day or two before Dunnings' return from furlough, the memorandum was found (R. 141,142).

It was stipulated that if five former Commanding Officers of the accused and the Executive Officer of the 137th Quartermaster Battalion (R. 206) were present and sworn as witnesses they would testify that the accused's reputation for honesty and integrity and as a law abiding citizen was good and that his efficiency in performing his duties was excellent (R. 205; Def. Ex.C). The present commanding officer of the accused, the accuser herein, also testified that the efficiency of the accused and his reputation for honesty and

integrity were excellent (R. 207, 208) but that if the facts determined by his investigation were substantiated, he would not desire the accused as an officer in his battalion (R. 208).

4. The record clearly establishes that accused, as the duly designated Class A Agent Officer to make payments to the 3796th Quartermaster Company for the months of April, June, July and August 1944 received from the Post Finance Officer at Camp Rucker, Alabama, cash funds for that purpose, and did not disburse them in their entirety or account properly for them, as required by specific Army Regulations. When he disbursed the pay roll fund on 30 April 1944 he did not pay Corporal Weakley, who was entitled to receive \$15.10. Acting upon the verbal authority granted him by the corporal, he paid the company clerk, to whom the corporal was indebted, the sum of \$10, but failed to forward the remainder to the corporal. When he disbursed the pay roll fund for June on the 30th of that month accused retained the sum of \$157.64, which was the amount due to Sergeant Dunnings. The sergeant had requested the accused to forward his pay to him, owing to the fact that he would be absent on furlough on pay day. The accused neither forwarded the money to Sergeant Dunnings nor did he pay him when he returned from furlough. Without the knowledge or consent of the enlisted men involved, accused on 31 July 1944 retained from the pay roll money \$11.30, which was the amount due to Private John H. Callahan, who was absent on furlough on pay day, and, on 31 August 1944, \$173.23, which was the total amount due to seven other enlisted men who were on furlough at that time. Only a part of the amounts so retained by accused was paid by him to these men when requested to do so upon their return. In no instance did the accuse "redline" or have "redlined" by the witnessing officer the names of the men to whom payment was not made, nor did he disclose on the returns filed by him with the Finance Officer on "W.D., F.D. Form No. 45B" that he had failed to pay them or that he had retained the funds for their payment. In rendering his return on this form for April, accused acknowledged receipt of \$3069.65, listed no cash returned, and certified that he had returned paid vouchers (the pay roll) for the entire amount and that there was no balance chargeable to him. In making his return for June, accused acknowledged receipt of \$2857.85, listed cash returned of \$179.75 (which covered amounts due men whose names had been redlined but did not include the amount due to Sergeant Dunnings), and certified that he had returned paid vouchers (the pay roll) for the entire amount less the cash returned, and that there was no balance chargeable to him. He acknowledged that he knew these statements to be false, but denied that they were made with any evil intent. The evidence justifies the conclusion that Corporal Weakley authorized the accused to pay \$10.00 out of the \$15.10 due him on the April pay roll to the Company Clerk and forward the balance by mail to Corporal Weakley; that the accused paid the \$10.00 to the company clerk, but that the \$5.10 was neither forwarded to nor subsequently paid to Corporal Weakley when he requested it upon his return from school on 5 August. The evidence justifies the further conclusion that prior to his departure on

a furlough in June, First Sergeant Edward L. Dunnings authorized the accused to forward the pay due him to him by mail, but that after withholding the amount from the pay roll accused did not forward it to Sergeant Dunnings and did not pay it to him upon his return from furlough. It was shown that partial payments were made from time to time thereafter by the accused to Sergeant Dunnings. The moneys withheld by accused from the pay roll fund that should have been paid to enlisted men of his organization were never used for that purpose. It was not until the latter part of September that he finally paid all of the men in full out of his personal funds. Despite accused's contention to the contrary, the evidence is convincing that accused did not remit the amount due until after Lieutenant Pistor, his successor as company commander, had written him about the complaints that had been made. No report was ever made by accused that he had lost any of the funds entrusted to him for payment to members of his command, nor that any part of it had been stolen, nor is there any evidence in the record to support accused's statement that he either lost a considerable portion of the funds or that they had been stolen from him.

With regard to the amounts entrusted to accused by various members of his command for repayment of loans to the Red Cross, made the basis of Specifications 1 to 8 of Charge III, the evidence establishes, and the accused admits, that he received the amounts (totaling \$74.00) set forth in the Specifications on approximately the dates alleged, and that he did not pay the Red Cross until 2 October 1944. Accused's statement that these funds were lost or stolen is not supported by any other evidence, nor is there any contention made by him that he reported their loss or theft.

The Board is of the opinion that the record of trial is sufficient to support the findings of guilty of all charges and specifications, which may be grouped into three classes and will be discussed accordingly: (a) Embezzlement of funds belonging to the United States, furnished and intended for the military service; (b) making false official statements; and (c) embezzlement of private funds.

- (a) Embezzlement of funds of the United States, furnished and intended for the military service.

Embezzlement is the fraudulent appropriation of property by a person to whom it has been entrusted or into whose hands it has lawfully come (MCM 1928, par. 149h). The proof required to establish guilt of a charge of embezzlement is (a) that accused was entrusted with certain money or property of a certain value by or for a certain other person, as alleged; (b) that he fraudulently converted or appropriated such money or property; and (c) the facts and circumstances showing that such conversion or appropriation was with fraudulent intent. In addition where the property belonged to the United States and the charge is laid under Article of War 94, there must be proof that the property belonged to the United States and that it was furnished or intended

for the military service thereof as alleged (MCM 1928, par. 1501).

It is not questioned that accused received from the Finance Officer of Camp Rucker, Lieutenant Turner, amounts sufficient to pay the enlisted personnel of his company, as shown on the pay rolls, and that there were included therein the items described in the four Specifications of Charge I. The evidence establishes, and the accused admits, that accused failed to pay the amounts set forth in the Specifications to the members of his command, absent at the time payment was made to the other members of the company. The only questions presented, therefore, are whether accused appropriated or converted the funds with fraudulent intent, and, in the case of the amounts described in Specifications 1 and 2 of Charge I whether the funds belonged to the United States at the time of conversion.

Considering the latter question first, it is the conclusion of the Board of Review that despite any ex parte arrangement between the parties whereby accused should forward to Corporal Weakley and Sergeant Dunnings the amounts due them respectively for the months of April and July, such funds remained Government property furnished and intended for the military service thereof until accused had properly accounted for them.

It is provided in Army Regulations 35-2320, 1 April 1942, that, unless circumstances prevent, troops will be paid every month (par. 1a). Paragraph 4 then lays down the following rule:

"4. Payment of troops. - Troops at posts, camps, stations, or in the field will be paid IN PERSON capitals supplied by disbursing officers or their agent officers assigned to such duty by proper authority."

Paragraph 5 of Army Regulations 35-120, 26 May 1943, emphasizes the necessity for payment directly to the person to whom it is due, as follows:

"5. General responsibility in connection with payments. - a. General - EXCEPT AS OTHERWISE PRESCRIBED BY LAW OR REGULATIONS payments of public money may be made ONLY TO THE PERSON TO WHOM THE MONEY WAS ORIGINALLY DUE. Accountable officers, their deputies or AGENT OFFICERS * * * must personally supervise every voucher paid by them, adopt proper measures to insure that all checks reach the persons in whose favor they are drawn, and MAKE ALL CASH PAYMENTS DIRECTLY TO THE PERSONS TO WHOM THEY ARE DUE." (All capitals supplied.)

Further expression of the necessity for payment of enlisted men in person is found in the following pertinent extracts from Army Regulations 345-155, 15 January 1943:

"7. Signing of pay rolls. - a. Cash payments. Only the original

pay roll will be signed by the men. Those men who for any reason ARE NOT TO BE PAID IN CASH will not sign, but lines will be drawn through the spaces intended for their signatures. If the pay roll is inadvertently signed by such men their signatures will be deleted. [Capitals supplied.]

"b. Witnessing officer. - Cash payments to enlisted men will be witnessed by an officer who is qualified to identify the payee. See AR 35-120.

"8. Supplemental pay rolls. - The names of men joining after the submission of the pay roll to the disbursing office, and those men who were not paid with their organization on the designated pay day, will be entered on a supplemental pay roll and submitted to the disbursing officer for payment."

"11. Payments while on furlough or detached service. - a. Check payments - how stated. - When enlisted men desire payment WHILE ON FURLOUGH [capitals supplied] or detached service, their accounts will be stated on a separate pay roll with the additional remarks, 'Enlisted man on furlough (or detached service) desires payment by check mailed to ----- (designated address)'".

In describing the functions and obligations of "Agent Officers", Army Regulations 35-320, 17 June 1943, quotes 10 United States Code, 173, which specifically stipulates that an agent officer designated by an accountable officer to make disbursements for him is pecuniarily responsible to the United States for the moneys entrusted to such agent officer, and that the accountable officer remains similarly responsible. Paragraph 17a, Changes 4, 28 Apr. 1944, then provides:

"17. Accounts of Class A agent officers. - a. (As changed by C 3, 1 Mar 44) Class A agent officers will make the necessary returns to the accountable officer within 24 hours after completion of the particular payments for which designated. This includes amounts not paid to enlisted men whose names are redlined on pay rolls".

It is apparent from a consideration of these regulations that every provision has been made to assure direct payment to enlisted men in person of the pay due to them. Neither law nor regulations permit payment of an enlisted man's pay to an agent. He is to be paid in person, or by mail when he desires payment while on furlough or detached service and such intention is expressed on a separate pay roll; and all sums not paid in person by the Agent Officer must be returned to the accountable officer. Indicative of the attitude of Congress on this subject is Revised Statutes 1291, 10 U.S.C. 893, which renders invalid any assignment of pay by a "non-commissioned officer or private" previous to his discharge.

The Board of Review has no hesitancy, therefore, in holding that, until the actual payment to the interested enlisted men, moneys received by Class A agent officers for such payment are property of the United States entrusted to the officer in his official capacity. By reason of this view we are of the opinion and hold that the Government funds received by accused for payment to Corporal Weakley and Sergeant Dunnings, regardless of the ex parte arrangement between the parties, remained the property of the United States furnished and intended for the military service thereof and were its property at the time of the two embossments.

The Board is of the opinion that the evidence fully justifies the conclusion reached by the court that accused fraudulently converted the funds described in the four specifications. Admitting, without conceding, that accused retained the amounts due to Corporal Weakley and Sergeant Dunnings for their convenience, at their request, the fact remains that when demand was made on him for these sums he failed to pay them, a far better indication of his intent than his protestations of innocence. As to the amounts described in Specifications 3 and 4 it is not even urged by accused that his actions were based on instructions or requests from the individuals involved. His claim that he was acting for the convenience of the absent enlisted men is belied by his actions, for, as in the case of Sergeant Dunnings and Corporal Weakley, he failed to pay these men when request was made upon him for payment. The court placed, and this Board places, no faith in accused's fantastic stories about his loss of these funds, which he claims so carefully to have earmarked and safely placed aside for the men of his command. Accused's conflicting statements to various men who sought payment; his failure to report the alleged loss of the funds to his commanding officer; his palpably false testimony that he remitted the amount due the men of his command to Lieutenant Pistor before receipt of that officer's letter, reporting the men's complaints, for the exact amount remitted later by the accused by wire, a remittance which was supplemented a few days later by wire in response to one from Lieutenant Pistor, calling his attention to the fact that additional claims had been filed by enlisted men of the company; his oft-repeated retention of pay of men absent on pay day without making prompt settlement; all eloquently attest to the fact that the accused fraudulently appropriated the money intended for the payment of members of his command. Intent in most instances must be determined by a person's actions. These of accused in the present case are not only consistent with guilt but inconsistent with innocence. The Board finds, therefore, that the record of trial is legally sufficient to support the findings of guilty of all four Specifications of Charge I.

(b) False official statements.

In accordance with Changes 4, Army Regulations 35-320, supra, accused was required to make his return to the Finance Officer within 24 hours after receipt of the funds for payment to the members of his command. Under the

standard operating procedure at the Post the time was extended to four o'clock of the afternoon following the receipt of the funds. Accused made his returns within the stipulated period. Paragraph 19 of Army Regulations 35-320, supra, requires an agent officer, in connection with the transfer of paid vouchers and cash balance to the accountable officer from whom he has received funds, to furnish a return on "W.D., P.D. Form No. 45B". It is clear, therefore, that such a return is an official document. In the return for both April and June, accused made the declaration that there was no balance chargeable to him. In view of the conclusions reached in connection with Specifications 1 and 2 of Charge I, this statement was a false one in each instance, made with intent to deceive the Finance Officer. The making of a false official statement with such an intent is an offense under the 95th or 96th Articles of War, depending upon the circumstances. Since accused well knew that he had retained funds belonging to enlisted men, his actions clearly constitute conduct unbecoming both to an officer and a gentleman, and support the findings of guilty under the 95th Article of War.

(c) Embezzlement of Enlisted Men's Funds.

Every element of embezzlement, as detailed in the discussion of Charge I, has been established in connection with each of the eight specifications, charging accused with commission of that offense by fraudulently converting funds turned over to him by enlisted men of his command for the purpose of having him make payments for them to the Red Cross in partial reimbursement of loans made to them by that organization. Accused does not deny the receipt of these funds which he eventually paid the Red Cross on 2 October 1944. He merely protests his good faith and relies upon the alleged loss or theft of the funds as an excuse for his failure to carry out his obligation. As stated in connection with the discussion of the embezzlement of United States property, no reliance can be placed on these protestations of innocence in view of the attendant circumstances. Some slight discrepancies appear in the dates upon which the funds were embezzled, but these are not sufficient to affect the legality of the findings, since the approximate dates are given and accused admitted the receipt of the funds. As in the case of the embezzlement of funds of the United States, accused attempted to show his lack of fraudulent intent by his payment of the funds at a later date. Restitution may be considered in mitigation of an offense, but it is no defense where the crime is otherwise established.

5. War Department records show that accused is 32 years of age and single. He is a graduate of a high school and of the Packard Business School, and attended for one year but did not graduate from the University of Wisconsin. He entered the service on 29 April 1941 as an enlisted man, and served as such until his graduation from the Antiaircraft Artillery Officer Candidate School, Camp Davis, North Carolina, on 22 December 1942, at which time he was discharged in the grade of sergeant. He was commissioned second

lieutenant, Army of the United States (basic arm of service, Coast Artillery Corps) 23 December 1942, and assigned to the 474th Antiaircraft Artillery Battalion, with which he served until 20 August 1943. On 25 June 1943 he was promoted to first lieutenant. From 18 September 1943 to 13 February 1944 he was on duty at Army Ground Forces Replacement Depot No. 1, Fort George G. Meade, Maryland, and on 23 February 1944 was detailed for duty in the Quartermaster Corps, and assigned to the 3797th Quartermaster Truck Company. On 3 March 1944 he was transferred to the 3796th Quartermaster Truck Company, and served as a company commander thereof until relieved, according to the record of trial, on 25 or 26 September 1944. On 10 August 1944 he was promoted to Captain in the Army of the United States. His rating for performance of duty for the entire period from 6 January 1943 until the date of his recommendation for promotion, 22 July 1944, was "excellent".

6. The court was legally constituted and had jurisdiction of accused and the offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and the sentence and to 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 93 or 94.

Wm. A. Zorn, Judge Advocate.

Earl H. Johnson, Judge Advocate.

Norman Mayo, Judge Advocate.

SPJGK - CM 289707

1st Ind

Hq ASF, JAGO, Washington 25, D.C. JAN 25 1945

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 Sidney Wolfsie (O-1049037), Quartermaster Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. War Department records show that accused, at that time 28 years and 6 months of age, entered the military service on 29 April 1941 as an enlisted man. For eight years prior thereto accused had been the manager for the Wolfsie Sportswear Company, a manufacturing enterprise, originally owned by his father, in which accused had become a partner. After receiving his basic Army training, accused served with a medical regiment until he was sent to an Antiaircraft Artillery Officer Candidate School in the fall of 1942. His highest enlisted grade was that of sergeant, in which grade he was discharged upon graduation on 22 December 1942. He was commissioned second lieutenant in the Army of the United States (Coast Artillery Corps) 23 December 1942, and was assigned to the 474th Antiaircraft Artillery Battalion, with which he served until 20 August 1943. On 25 June 1943 he was promoted to first lieutenant. From 18 September 1943 to 23 February 1944 he was on duty at Army Ground Forces Replacement Depot No. 1, and on the latter date was detailed for duty in the Quartermaster Corps. He served as commander of the 3796th Quartermaster Truck Company, 137th Battalion, from 3 March 1944 until he was relieved on or about 25 September 1944. On 10 August 1944 he was promoted to captain. His rating for performance of duty for the entire period from 6 January 1943 until the date of his recommendation for promotion to captain, 22 July 1944, was "excellent". According to a stipulation entered in the record of trial, if five of his former commanding officers and the Executive Officer of the 137th Quartermaster Battalion had been present at the trial they would have testified that his reputation for honesty and integrity and as a law abiding officer was good and that his efficiency in performing his duty was excellent. Testimony to the same effect was given at the trial by accused's last commanding officer, the accuser in these proceedings. In view of accused's excellent record, the definite indications that accused intended to make good his defalcations and acted, not with the idea of enriching himself at the expense of the enlisted men but rather to tide himself over a period of financial embarrassment; and his early repayment in full of the funds which he unquestionably had embezzled, it is believed that, despite the serious nature of accused's offenses and his demonstrated unfitness to continue as an officer in the Army of the United States, a shorter period of confinement than five years would serve the ends of justice. I, therefore, recommend that the

(98)

sentence be confirmed, but that the forfeitures be remitted, the period of confinement be reduced to two years, the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement, and 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.



3 Incls

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

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed but forfeitures remitted and confinement reduced to two years. G.C.M.O. 134, 9 Apr 1945)

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

SPJGN
CM 269717

23 JAN 1945

UNITED STATES)

) WARNER ROBINS AIR
) TECHNICAL SERVICE COMMAND

v.)

) Trial by G.C.M., convened at
) Robins Field, Georgia, 9 Octo-
) ber 1944. Dismissal and con-
) finement for five (5) years.
) Disciplinary Barracks.

Captain PAUL R. EVANS
(O-1000040), Air Corps.

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 Charges and Specifications:

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

Specification 1: In that, Captain Paul R. Evans, 4515 Army Air Forces Base Unit (Staff School), did, at Macon, Georgia, on or about 1 May 1944, with intent to defraud, falsely forge the following indorsement, to wit:

"Ralph J. Wright
Capt. Air Corps

01624013 "

on a certain check, in words and figures, as follows:

"Waukegan, Ill. May 1 1944 No. 7
FIRST NATIONAL BANK 70-159
Established 1852

(100)

PAY TO THE ORDER OF Capt. Ralph J. Wright \$35 50
Thirty five and 50 100 Dollars

Henry R. Simpson,
Major AC - O-410196 "

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

Specification 2: (Withdrawn by order of appointing authority).

Specification 3: In that Captain Paul R. Evans, 4515 Army Air
Forces Base Unit (Staff School), did at Macon, Georgia,
on or about 5 June 1944, with intent to defraud, falsely
make in its entirety a certain check in the following words
and figures, to wit:

No. 16
" First Natl Bank - Macon, Ga.,
Macon, Ga. 5 June 1944
Pay to the order of Cash \$ 210 50
100
Two hundred, ten & 50 100 Dollars

Hal Brown
A.C. "

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

CHARGE II: (Withdrawn by order of appointing authority).

CHARGE III: (Withdrawn by order of appointing authority).

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

Specification 1: In that Captain Paul R. Evans, 4515th Army
Air Forces Base Unit (Staff School), did, at Robins
Field, Georgia, on or about 11 March 1944, wrongfully
and without authority wear on his uniform certain ser-
vice ribbons, to wit: the Purple Heart Service Ribbon,
the Silver Star Service Ribbon, the United States Army
Good Conduct Ribbon, the United States Marine Corps Ex-
peditionary Ribbon, and the Yangtze Campaign Ribbon.

LAW LIBRARY
JUDGE ADVOCATE GENERAL
NAVY DEPARTMENT

(101)

Specification 2: In that Captain Paul R. Evans, 4515th Army Air Forces Base Unit (Staff School), did, at Robins Field, Georgia, on or about 11 March 1944, wrongfully and without authority wear on his uniform the Marine Aerial Gunner's Wings.

Specification 3: In that Captain Paul R. Evans, 4515th Army Air Forces Base Unit (Staff School) did, at Robins Field, Georgia, on or about 12 April 1944, wrongfully take part in a radio broadcast over station WMAZ Macon, Georgia, wherein the said Captain Paul R. Evans, 4515th Army Air Forces Base Unit (Staff School), permitted himself to be portrayed as a returning hero from overseas duty who had been awarded the Silver Star Service Ribbon for gallantry above and beyond the call of duty, the Purple Heart Service Ribbon, and that he was an Aerial Gunner in a Marine Aviation Squadron, which representations were known to be false by the said Captain Paul R. Evans.

He pleaded not guilty to and was found guilty of the Charges and Specifications under which he was tried. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for five 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.

3a. The evidence presented by the prosecution concerning Specification 1, Charge I, shows that on 1 May 1944, accused entered a liquor store in Macon, Georgia, told the proprietor that he, the accused, had "sold a dog", and requested him to cash the personal check in the sum of \$35.50 which the accused presented (R. 8). The proprietor "presumed" that the accused had "sold a dog for the check" (R. 8). The check was made payable to "Captain Ralph J. Wright" and was purportedly signed by "Henry R. Simpson, Major AC, O-410196". The check was indorsed on its back with the purported signature of "Ralph J. Wright, Capt. Air Corps, O-16240132" (Ex. 1). The proprietor, who had seen the accused making purchases on several previous occasions agreed to cash the check but requested the accused to "put the serial number on it" (R. 8). The proprietor did not remember whether or not the check was indorsed in his presence. After the check had been deposited for collection in the regular course of business it was returned to the proprietor of the liquor store in question marked "No Account" (R. 8, Ex. 12). Several

weeks thereafter a woman called at the liquor store and refunded to the proprietor the sum of \$35.50 which he had advanced in the cashing of the accused's worthless check (R. 11-12). The evidence shows further that Major Henry A. Simpson had no account in the bank on which the check was drawn and that there were no such persons in the United States Army as Major Henry R. Simpson and Captain Ralph J. Wright (R. 21, Exs. 4, 12).

In a pretrial statement the accused admitted indorsing the check in question with the name of Captain Ralph J. Wright. He explained that he had met Captain Wright and Major Simpson "over two months ago in the Dempsey Hotel Tavern. * * * About three or four days later he was in the Post Exchange * * * when he spied Major Simpson and Captain Wright at the soda fountain". At that time they told the accused that they were "up from Washington" awaiting new assignments. They then asked the accused if he would get them either a bottle of whiskey or vodka. They also asked the accused if he had a "blank check". The accused told them that he had a check in his office. The two officers thereafter accompanied the accused to his office and he gave them "the check". The accused then excused himself and left them in his office while he went to prepare a lesson. Upon returning he found them in front of the school. They then asked how soon the accused was leaving and when the accused told them in ten minutes they got his car and waited for him. When the accused " * * * got into the car Major Simpson handed him the check made out to Captain Wright and stated that if he couldn't get anything but Gin or Rum not to get anything, and if they wouldn't cash a check to forget it". The accused told him that he thought he could cash the check "okay". The accused further explained that in cashing the check he had thought that he was doing two brother officers a favor. He stated that since Captain Wright had given him the check to be cashed without indorsing it he, the accused, had thought under the circumstances, that he had authority from Captain Wright to indorse it. After cashing the check he had given both the money derived therefrom and the bottle of liquor which he had purchased to Captain Wright. Thereafter he had not seen either Captain Wright or Major Simpson. Subsequently learning that the check had been dishonored it had been redeemed. Prior to cashing the check in question the accused had previously cashed checks of his own in the same liquor store (Ex. 1).

b. The evidence presented by the prosecution concerning Specification 3, Charge I, shows that there was deposited for collection at the First National Bank and Trust Company of Macon, Georgia, a check in the sum of \$210.50, dated 5 June 1944, purportedly signed by "Hal Brown" and indorsed by the accused "for deposit only" (R. 24, Ex. 4). The check was honored upon presentation (R. 24). Thereafter Private Hal K. Brown, the purported maker of the check called at the First National

Bank and Trust Company and complained that a check which he had drawn in the sum of \$600 had been wrongfully dishonored (R. 24). In examining Private Brown's account the officials of his bank discovered that the \$600 check had been dishonored because the bank had previously honored the \$210.50 check described above which had reduced Private Brown's bank balance below \$600. In making this examination and in comparing the purported signature of Hal Brown on the check for \$210.50 with the signature of Private Hal K. Brown as recorded on the Bank's signature card, the bank officials concluded that the check in question was a forgery and Private Brown's account was accordingly credited with \$210.50 (R. 24). Mr. Ernest S. Lee testified that as cashier of the First National Bank and Trust Company of Macon, Georgia, he had had seventeen years of experience in the identification of signatures and handwriting (R. 23). He explained that both the accused and Private Hal K. Brown had accounts in his bank and that he was able to identify their signatures (R. 23). He testified further that the check in question had been indorsed by the accused but that the signature of the maker was not that of Private Brown (R. 24). He based his opinion on this matter upon a comparison of Private Brown's signature as recorded on his signature card in the bank with his purported signature as it appeared upon the check in question (R. 24).

Private Hal K. Brown testified that the signature on the check in question was not his signature and that he had first seen the check in Major Strong's office (R. 28). He explained that he had known the accused since April 1944 and had three conversations with him concerning the purchase of the accused's automobile. In this connection he testified that the accused had desired to borrow \$200 from him but that he had not lent him any money. When he had gone to see the accused at his office about the check in question the accused had said to him, "Don't you remember loaning me that money?", and he had replied, "No, sir, I never loaned you the money" (R. 32). At that time the accused had given him an unsigned instrument written, as follows:

"HEADQUARTERS
AIR SERVICE COMMAND SCHOOL
Robins Field, Georgia

1 June 1944.

TO WHOM IT MAY CONCERN:

I, the undersigned, hereby certify that I will
pay to Private Hal Brown, Air Service Command School,
the sum of two hundred and twenty five (\$225.00) dollars

ninety (90) days from date, in the event said Private Brown does not purchase my automobile. In the event of death of either parties, payment will be made by and to, designated beneficiaries.

PAUL R. EVANS,
Captain, A.C.
Debtor.

HAL BROWN,
Private, A.C.
Loanee." (Ex. 6).

The accused told Private Brown at that time that,

"We made this agreement and I typed this out at the time and I am keeping one and I am giving you one. So he gave it to me and I took it up and gave it to the Provost Marshal's office" (R. 32).

In his pretrial statement the accused asserted that he had tried to sell his automobile to Private Brown but that Private Brown had declined to purchase it because the payment of \$600 for the accused's car would "run him short". According to the statement, the accused then suggested,

"* * * that he let me have two hundred dollars on the car, and if he decided not to buy it, I would consider it as a loan and pay him interest on the money. Private Brown later post-dated a check to 5 June 1944 for two hundred and ten dollars, stating that he would have plenty of money in the bank at that time. I gave this check to my wife, indorsing it on the back "for deposit only", and she deposited it in the bank, 5 June 1944" (Ex. 1).

The accused then describes in this statement an incident in which Private Brown wrongfully took an electric fan from a hotel and thereafter had no recollection of having taken it (Ex. 1).

c. The evidence presented for the prosecution concerning Specifications 1, 2, and 3, Additional Charge, shows that on 11 March 1944, the accused, without authority, wore on his uniform the Purple Heart ribbon,

the Silver Star ribbon, the United States Army Good Conduct ribbon, the United States Marine Corps Expeditionary ribbon, the Yangtze Campaign ribbon and the Marine Aerial Gunner's wings (R. 34-37, Exs. 1, 7, 8, 9, 10). On 12 April 1944, the accused participated in a radio broadcast over station WMAZ, Macon, Georgia, which portrayed him as a former aerial gunner in a Marine Aviation Squadron which had served in China where the accused had been wounded in the hand and in the foot by a Japanese bayonet while attempting to rescue a comrade from a Japanese attack (R. 34-43, Ex. 11). The broadcast recited that the accused had been awarded the Silver Star for this act of gallantry and the Purple Heart for the wounds which he had received in his heroic efforts to rescue his comrade. The evidence further shows that all the information for that part of the broadcast pertaining to the accused was furnished by him and that the radio script concerning it had been read and approved by the accused prior to the broadcast (R. 38-40). The accused himself read part of the script concerning his experience in China (R. 40). The record shows that the accused has had no military service beyond the continental limits of the United States and has never been awarded any of the service ribbons or medals mentioned above (R. 37, Exs. 9, 10).

The accused admitted in his pre-trial statement that he had worn the Marine gunner's aerial wings but explained that in 1937 he had fired the aerial gunner's course and although he was not officially given wings at that time, his pilot gave him a small pair of wings. He admitted further, however, that he was not entitled to wear them in the Army, but stated that he had worn them in order to aid him "to get into a combat unit". Concerning the foreign service ribbons he stated that he had been told in Washington that he was entitled to wear any unit decoration that was awarded to the Fourth Marines because at one time he had been a part of that organization (Ex. 1).

4. Major Leonard W. Hadley testified for the defense that he was in charge of the Administrative section of the Air Service Command school and that during this time Private Brown was under his direction and supervision for about three weeks. During this period of time he had an opportunity to observe Private Brown in the course of his work and to observe that Private Brown's memory was "very poor" (R. 53, 54).

Captain Peter Burnett testified that he was the adjutant of the 4515th Army Air Forces Base Unit and that he had known Private Hal K. Brown since the organization's activation on 1 April 1944. He also testified that he knew Private Brown's reputation for truth and veracity and that he would say that it was "bad" (R. 68).

Lieutenant Colonel Charles H. Haas testified that the accused

had served under him and rendered faithful service and that he had given the accused a rating of "excellent" (R. 67).

Mrs. Paul R. Evans, wife of the accused, testified that she had been married to the accused for about a year. She explained that in the last week of May, Private Harold K. Brown was in her home and discussed with her husband the sale of her husband's automobile. During the course of this discussion Private Brown stated that he would give the accused \$200 as a down payment on the car or as a loan in the event he did not purchase the car. Thereupon, accused gave Private Brown his blank check which the latter filled out and signed. The accused then gave the check to her, endorsing it a few days later, after which he deposited it in their bank. In addition she testified that she had taken a list of ribbons which accused had given her and had sent it to her mother and that her mother had purchased three rows of ribbons and returned them to her. When the ribbons were received accused had mentioned to her that there were "two ribbons on one bar that he was not entitled to and they were attached to one he was entitled to wear". Thereafter she had pinned the ribbons on accused's khaki blouse and on his "OD blouse" (R. 87-90).

The accused, after his rights relative to testifying or remaining silent had been explained to him, testified at considerable length concerning each of the charges against him. His testimony however, merely reaffirmed his previous statements herein presented (R. 56-66, 68-86).

4a. Specification 1, Charge I, alleges that the accused did, at Macon, Georgia, on or about 1 May 1944, with intent to defraud falsely forge an indorsement to a check dated 1 May 1944 in the sum of \$35, signed by Major Henry R. Simpson as maker, by indorsing on the back of said check the name "Ralph J. Wright, Capt. Air Corps, O-16240132".

The following elements of proof are essential to the establishing of the offense charged:

"(a) That a certain writing was falsely made or altered as alleged; (b) that such writing was of a nature which would, if genuine, apparently impose a legal liability on another, or change his legal liability to his prejudice; (c) that it was the accused who so falsely made or altered such paper; and (d) the facts and circumstances of the case indicating the intent of the accused thereby to defraud or prejudice the right of another person" (MCM, 1928, par. 149j).

The writing of a false indorsement is forgery in that the act of writing

the indorsement is part of the making of a completed instrument. In Hamil v. United States (298 F. 369), the court stated:

"We are of opinion that section 148 punished the forgery of an indorsement of such an obligation or security. The obligation to pay a genuine check does not become complete until it is properly indorsed. The forgery of the indorser's name is as effective a method of defrauding as is the forgery of the name of the drawer of the check."

Similarly the court in the case of United States v. Jolly (37 Fed) stated that:

"* * * the writing the name of the payee falsely and fraudulently on the back is just as much a forgery of the instrument as any other false writing concerning it would be. It is in every legal sense a part of the instrument itself."

The evidence shows that on 1 May 1944, the accused indorsed the name of Captain Ralph J. Wright, AC, O-16240132, on the back of the above described check and uttered it to the proprietor of a liquor store in Macon, Georgia. The evidence further shows that the check was dishonored by the bank upon which it was drawn and that there exists in the United States Army no such persons as Major Henry R. Simpson, the purported maker of the check, or Captain Ralph J. Wright, whose name the accused employed in indorsing the check. Although the accused admitted indorsing the check with the name of Captain Wright followed by the serial number "O-16240132", he testified that the check had been given to him by a person representing himself as Captain Wright with the request that the accused have the check cashed and purchase a bottle of liquor for him, and that under the circumstances he, the accused, believed that he had the right to indorse the check with Captain Wright's name. The admitted conduct of the accused in cashing the check by indorsing it with another person's name without adding his own name thereto combined with his statement to the proprietor in presenting the check that he had "sold a dog" was an implied representation that he was the payee of the check and indicates that his explanation is untrue.

b. Specification 3, Charge I, alleges that the accused did, at Macon, Georgia, on or about 5 June 1944, with intent to defraud, falsely make in its entirety a check in the sum of \$210.50, signed Hal Brown. The evidence concerning the Specification shows that the check was duly presented for payment, indorsed by the accused "for deposit only". The bank upon which the check was drawn, after first debiting Private Hal K. Brown's account with the amount designated in the check, thereafter credited his account with that sum. The cashier of the bank upon which the check was

drawn testified that the purported signature of Hal Brown appearing on the check was not the signature of Hal K. Brown as recorded on the bank's signature card. Furthermore, Private Hal K. Brown testified that the signature on the check was not his signature and the inference is warranted from all his testimony that he had never authorized the accused to sign for him. The Manual for Courts-Martial states that "the falsity of a written instrument may be proved by calling as a witness the person whose signature was forged, and showing that he did not sign the document itself and that he did not authorize the accused to do so for him" (MCM, 1928, par. 149j). Although the accused and his wife both testified that the check in question had been delivered to him by Private Hal K. Brown, in connection with a contingency purchased by Brown of the accused's automobile, their testimony is contradicted by the evidence presented by Brown and the cashier of the bank upon which the check was drawn. In fact, the court was very liberal in permitting the defense to present evidence showing that Private Brown had a poor memory and that he had been involved in the wrongful taking of an electric fan. The court also heard testimony that Brown had a bad reputation for truth and veracity. The court had a full opportunity, therefore, to weigh and evaluate the trustworthiness of the testimony presented by the prosecution with that as presented by the defense, and the record, beyond a reasonable doubt, sustains its finding of guilty of Specification 3, Charge I.

c. Specification 1, Additional Charge, alleges that the accused did, at Robins Field, Georgia, on or about 24 March 1944, wrongfully and without authority wear on his uniform the Purple Heart Service ribbon, the United States Marine Corps Good Conduct ribbon, the United States Marine Expeditionary ribbon and the Yangtze Campaign ribbon. Specification 2 of the same charge alleges that the accused did on the date above stated wrongfully and without authority wear on his uniform the Marine Aerial Gunner's wings. Specification 3 alleges that the accused did on 12 April 1944, wrongfully take part in a radio broadcast in which he permitted himself to be portrayed as a returning hero from overseas, who had been awarded the Silver Star Service ribbon for gallantry, the Purple Heart Service ribbon, and that he was an aerial gunner in a Marine Aviation Squadron.

The evidence shows that except for the allegation in Specification 1 concerning the United States Marine Corps Good Conduct ribbon of which the accused was found not guilty, the three Specifications establish beyond a reasonable doubt the guilt of accused. Although the accused had sought to justify his conduct in part by showing that he had formerly been in the Fourth Marines, had unofficially qualified as a Marine aerial gunner and that his wife had pinned on certain of the unauthorized ribbons, he presented no valid defense for the wearing of the unauthorized ribbons and decorations. In addition, the accused contended that he was under the impression that the radio broadcast was for propaganda purposes and that he never intended to falsely represent

himself as a hero. Such excuses do not, however, alleviate the false representations which he made both by the wearing of the various ribbons and by his participation in the radio broadcast previously described. The wrongful wearing of service ribbons and false representations concerning one's prior service and the military decorations which he has been awarded are clearly conduct to the prejudice of military discipline and conduct of a nature to bring discredit upon the military service.

5. The accused is approximately 30 years of age. The records of the War Department show that prior to entering the service he was "arrested or received" on 14 September 1929, upon the charge of "B and E" and on 19 September 1929 he was received as a "delinquent" at "St. Tr. School for Boys, Eldora, Iowa". He "attended" Oxford Institute, Chicago, Illinois, for 1½ years, receiving a degree in business administration. He also attended the Washington School of Art in 1934 where he studied cartooning. On 23 May 1934 he enlisted in the United States Marine Corps from which he was honorably discharged on 22 May 1940. He was inducted into the military service of the United States on 7 September 1940. He was thereafter assigned to Officers' Candidate School of the Adjutant General's Department and was discharged from the Army on 13 May 1942 to accept a commission as a second lieutenant. He served as an instructor at the Adjutant General's school, Fort Washington, Maryland, from 1 June 1942 to 8 October 1943, during which time he received ratings of "excellent" and "superior".

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

Abner E. Lipscomb Judge Advocate.

Robert J. Cannon Judge Advocate.

Gabriel H. Golden Judge Advocate.

(110)

SPJGN-CM 269717

1st Ind.

Hq ASF, JAGO, Washington 25, D. C. **JAN 31 1945**

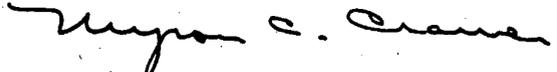
TO: The Secretary of War.

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 Paul R. Evans (O-1000040), 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, that the period of confinement be reduced to two years, that the sentence as thus modified be ordered executed and that a United States Disciplinary Barracks be designated as the place of confinement.

3. Consideration has been given to three letters from the accused addressed to the President, The Judge Advocate General and Mr. D. A. Smith; to one letter from the Honorable B. R. Maybank, member of the United States Senate; to four letters from Vernon J. Kertzinger, attorney of Columbus, Ohio, addressed to The President, the Secretary of War, the Inspector General and The Judge Advocate General; and to two letters from Mrs. Paul R. Evans, wife of accused, addressed to the President and General Knudsen.

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



MYRON C. CRAMER
Major General
The Judge Advocate General

7 Incls

- Incl 1 - Record of trial
- Incl 2 - Dft. of ltr. for
sig. Sec. of War
- Incl 3 - Form of Executive
action
- Incl 4 - 3 letters from accused
- Incl 5 - 1 letter from Hon. B. R.
Maybank, member of Senate
- Incl 6 - 4 letters from Vernon J.
Kertzinger, attorney
- Incl 7 - 2 letters from Mrs. Paul R.
Evans, wife of accused

(Sentence confirmed but forfeitures remitted and confinement reduced to two years. G.C.M.O. 127, 9 Apr 1945)

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

SPJGN
CM 269771

11 JAN 1945

UNITED STATES)

SAN FRANCISCO PORT OF EMBARKATION)

v.)

) Trial by G.C.M., convened at
) Camp Stoneman, California, 19-20
) October 1944. Moss: dishonorable
) discharge and confinement for life,
) Penitentiary. Roulhac: confine-
) ment for six (6) months, Post
) Stockade, and forfeiture of \$14 of
) his pay per month for six (6) months..

) Privates DELMOS MOSS
) (34632861), and WILLIAM D.
) ROULHAC (34454422), both of
) Quartermaster Corps Detach-
) ment, Station Complement,
) Camp Stoneman, California.)

REVIEW by 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 Private Delmos Moss, one of the soldiers named above.

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

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

Specification: In that Private Delmos Moss, Quartermaster Corps Detachment, Station Complement, Camp Stoneman, California, and Private William D. Roulhac, Quartermaster Corps Detachment, Station Complement, Camp Stoneman, California, acting jointly and in pursuance of a common intent, did, at Camp Stoneman, California, on or about 25 August 1944, forcibly and feloniously, against her will, have carnal knowledge of Private First Class Emma A. Crockford, 110th WAC Detachment.

CHARGE II: (Applicable to accused Roulhac only and not under consideration).

(112)

Specification: (Applicable to accused Roulhac only and not under consideration).

The accused Moss pleaded not guilty to Charge I and its Specification but guilty of the lesser included offense of assault and battery in violation of Article of War 96, and the accused Roulhac pleaded not guilty thereto and was so found. The accused Moss was found guilty of the Specification, Charge I, excepting therefrom the words "and Private William D. Roulhac, Quartermaster Corps Detachment, Station Complement, Camp Stoneman, California, acting jointly and in pursuance of a common intent" and guilty of Charge I. The accused Moss was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The evidence for the prosecution shows that Private (then sergeant) Neal S. Harris, Casual Detachment, Camp Stoneman, California, on the evening of 25 August 1944 had a social engagement with Private First Class Emma Crockford, Women's Army Corps, whom he had just met, and that they, at about 2000 o'clock, after parting from some friends, went to one of the baseball diamonds in the camp area where they sat upon a bench along the third base line (R. 14-16, 65). According to Private Harris they had been seated about five minutes when he was struck a blow on the head (R. 17). He fell to the ground, arose in a dazed condition to find himself confronted by a negro whom he identified as Private William D. Roulhac. He recalled a conversation in which he used the word "nigger" but could not recall anything else that was said (R. 21-23). He heard his companion scream, heard her scuffling with someone but, thinking that Roulhac had a knife, he faintheartedly departed and did not stop until he reached his barracks some distance away, where, at about 2030 o'clock, he reported the occurrence to Master Sergeant Spradley (R. 25-27, 35, 36-39, 41).

According to Private Crockford her companion had encountered three men, with whom he took a drink, as they approached the baseball diamond (R. 65-66). She sat on one of the benches where Harris joined her and soon they were approached by three negroes (R. 66). She attempted to leave across the diamond but one of them "grabbed her arm and started pulling her" (R. 66). She attempted to escape and screamed but her assailant throttled her (R. 66-70, 84-86). She screamed and saw that Harris was standing with his hands upraised between two of the colored soldiers but she had seen no blows struck and did not thereafter see Harris (Id).

According to Private First Class Johnnie L. Childers, he, accompanied by Moss and Roulhac, had been to nearby Pittsburg where they had done some drinking and were returning to their quarters when, in passing the baseball diamond, they observed a "WAC" and a soldier sitting on a bench (R. 45, 46, 62). The accused Moss addressed them but the witness did not stop. He "heard a sound, sounded like a blow. [He] heard a lick pass" and looking back over his shoulder as he started to run he saw either Moss or Roulhac grab the "WAC" who, while attempting to escape, was shouting for help but her cries became progressively weaker (R. 47-50, 51, 52, 54). The witness ran away because he thought the "WAC" was going to be raped (R. 63).

Private Crockford in the meantime was being forcibly dragged by her assailant across the diamond; her cries were stifled; her strength was exhausted; and she was vulgarly told that her assailant intended to have intercourse with her (R. 66-69, 84-86, 130). Reaching some benches along the first base line of the diamond, she was thrown down between them, where, notwithstanding her utmost resistance and entreaties, her assailant, while still holding her throat with one hand, raised her dress and unbuttoned his trousers with the other hand, and using his thumb and forefinger of his free hand to force an opening, accomplished penetration with his penis past her clitoris and labia majora at least to the vaginal orifice (R. 68-72, 82-84). She was 49 years old and had previously been married (R. 88, 130). She was unable to identify her assailant (R. 88).

Second Lieutenant Irving B. Steinhouse, Assistant Provost Marshal, Camp Stoneman, and Second Lieutenant Virgil V. Vansteel were seated in an automobile which was parked at an Officers' Club about 150 yards away. They heard Private Crockford's screams and drove to the baseball diamond where within five minutes they located her upon the ground with the accused Moss still lying upon her (R. 90-92, 99, 102-103, 108). They pulled Moss off of her and subdued him when he attempted to escape (R. 92-93, 103-104). Aid was summoned and both Moss and Private Crockford were taken to the Provost Marshal's office where it was observed that Moss' trousers were unbuttoned and that Private Crockford was bruised, nervous, shocked and disheveled (R. 93-99, 104-108). Moss refused to make any statement except to name Roulhac and Childers as his companions (R. 101).

The investigating officer interviewed Roulhac on 26 August 1944 in the presence of Moss. He voluntarily admitted that he "slapped" Harris and knocked him down, that Childers left followed by himself and Harris who amicably composed their differences (R. 112-114) and that, as he and Harris were leaving, Moss was dragging the "WAC", who was calling

(114)

for help, toward the benches across the baseball diamond (R. 115-117, 119-125).

4. The accused, after explanation of his rights as a witness, testified in his own behalf. He admitted that he and his companions encountered Private Harris and Private Crockford and that Roulhac struck Harris. When Private Crockford screamed the third time, he grabbed her and took her to the benches to let her sit down but, upon reaching the benches, she staggered and fell causing him to fall on his knees beside her (R. 169-172). He was then seized by the two lieutenants (Id.). He denied all other acts and explained that he had grabbed her because he was afraid that her screams would bring the military police and that his trousers became unbuttoned while he was struggling with the two lieutenants (R. 172-179).

5. Captain M. W. Garrison, Medical Corps, a witness for the court, testified that he had examined Private Crockford at about 2347 o'clock on 25 or 26 August 1944 and found no traumatic injuries of her genitals, no "spermite substance" in her vagina or upon her body or clothes but that she was quite bruised about the face, neck and shoulders (R. 209-211).

6. The Specification, Charge I, as alleged and found by the court, charges that the accused Moss on or about 25 August 1944 at Camp Stoneman, California, forcibly and feloniously, against her will, had carnal knowledge of Private First Class Emma A. Crockford, 110th WAC Detachment. The offense charged is that of rape 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 as found by the court. The testimony of the prosecutrix is clear and convincing, with many parts thereof abundantly corroborated by the testimony of other witnesses. Her resistance was overcome but her screams for help brought to her assistance two officers who apprehended the accused in the act. Such officers definitely identified the accused Moss as her assailant and related circumstances from which no other conclusion can be reasonably reached except that of the accused's guilt. The prosecutrix, while not asserting that the accused secured full penetration, definitely and specifically testified that the accused's penis entered her clitoris and labia majora at least to the vaginal orifice which is penetration within the meaning of law. The accused's testimony in view of the attendant circumstances and the other evidence is wholly incredible. The evidence, therefore, establishes the accused's guilt of the commission of the offense of rape as found by the court and fully supports the court's findings of guilty, as made, of Charge I and its Specification.

7. The accused Moss is about 25 years of age. He was inducted at Camp Shelby, Mississippi, on 26 May 1943. His record shows no prior service.

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

Abner E. Lipscomb, Judge Advocate.

Robert J. Hamner, Judge Advocate.

(On Leave), Judge Advocate.

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

(117)

SPJGQ
CM 269772

10 JAN 1945

U N I T E D S T A T E S	)	NEWFOUNDLAND BASE COMMAND
)	
v.	)	Trial by G.C.M., convened at
	)	APO 863, 6-7 November 1944.
First Lieutenant THOMAS H.	)	Dismissal and total forfeit-
ROMP (O-1542138), Medical	)	ures.
Administrative Corps.)	

OPINION of the BOARD OF REVIEW
ANDREWS, FREDERICK and BIERER, 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 94th Article of War.

Specification 1: In that First Lieutenant Thomas H. Romp, 309th Station Hospital, being at the time Medical Supply Officer, did, at Army Post Office 863, care of Postmaster, New York City, from on or about 16 October 1943 to on or about 29 June 1944, feloniously embezzle by fraudulently converting to his own use funds consisting of checks and monies to the value of Thirty-eight Dollars and Nineteen Cents (\$38.19), Canadian currency, property of the United States intended for the military service thereof, entrusted to him, the said First Lieutenant Thomas H. Romp, by Captain Ferdinand H. Flick, the custodian of the company funds of Area Headquarters Detachment, Army Post Office 863, care of Postmaster, New York City, for the purpose of applying the same to the use and benefit of the United States.

Specification 2: Identical with Specification 1 except embezzlement from on or about 17 December 1943 to on or about 4 August 1944 of Fifty-six Dollars and Seventy-six Cents (\$56.76), entrusted to him by custodian of company funds, First Lieutenant Charles N. Veatch, Junior.

- Specification 3: Identical with Specification 1 except embezzlement from on or about 6 March 1944 to on or about 4 August 1944 of Ninety-two Dollars and Ninety-five Cents (\$92.95), entrusted to him by custodian of company funds, Captain Robert B. Stevens.
- Specification 4: Identical with Specification 1 except embezzlement from on or about 22 November 1943 to on or about 11 April 1944 of Fourteen Dollars and Nineteen Cents (\$14.19), entrusted to him by custodian of company funds, First Lieutenant Stephen Fowler.
- Specification 5: Identical with Specification 1 except embezzlement from on or about 21 March 1944 to on or about 22 March 1944 of Fourteen Dollars and Nineteen Cents (\$14.19), entrusted to him by custodian of battery funds Captain Loring R. Guibord.
- Specification 6: Identical with Specification 1 except embezzlement from on or about 10 June 1944 to on or about 24 June 1944 of Thirty-one Dollars and Forty-six Cents (\$31.46), entrusted to him by custodian of battery funds Captain Santo Chiodo.
- Specification 7: Identical with Specification 1 except embezzlement from on or about 19 July 1944 to on or about 20 July 1944 of Twenty-six Dollars and Seventy-three Cents (\$26.73), entrusted to him by custodian of battery funds Captain Abram Fulkerson.
- Specification 8: Identical with Specification 1 except embezzlement from on or about 10 June 1944 to on or about 11 June 1944 of Four Dollars and Seventy-three Cents (\$4.73), entrusted to him by custodian of battery funds Captain Abraham M. Friedland.
- Specification 9: Identical with Specification 1 except embezzlement from on or about 28 May 1944 to on or about 11 September 1944 of Thirty-four Dollars and Sixty-five Cents (\$34.65), entrusted to him by custodian of company funds Captain Quinn H. Scott, Junior.

He pleaded not guilty to and was found guilty of the Specifications and Charge, except that the amounts involved in Specifications 1 and 3 were reduced to \$28.73 and \$45.65, respectively, by appropriate exceptions and substitutions. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

The accused, a member of the military service (R. 9), was detailed as Medical Supply Officer, 309th Station Hospital, APO 863, by orders 1 September 1943, vice Captain Joseph A. Coyle, relieved (R. 10; Pros. Ex. A), and as Custodian of the Hospital Fund, vice Captain James T. Metcalfe, relieved, 2 September 1943 (R. 10; Pros. Ex. B).

Major (then Captain) Francis E. Utley, Medical Corps, was assigned to Station Hospital from September 1943, and was Area Surgeon from June 1944. He received his majority 18 October 1944 (R. 10). The accused was Medical Supply Officer and Custodian of the Hospital Fund when Major Utley arrived, and so remained until about 11 October 1944 (R. 11). On 10 October 1944, Major Utley, as chairman of the Hospital Fund Council, called the accused before a council meeting, told him that the council was making a check on the sale of prophylactics, and asked the accused to show his records of such sales (R. 12). The accused produced some "vouchers" (shipping tickets) and a copy of War Department Form Number 322, Abstract of Sales, dated 1 October 1943, for the month of September 1943 (R. 12; Pros. Ex. C). He was asked to furnish later records or any monies received from sales of prophylactics, and brought forth some other records of unauthorized character, and no money at that time (R. 12). Asked whether those were all of the records and money covering the total sales of prophylactics, the accused said they were all he could produce at that time. Asked where the money was, he said he had loaned out some of it, \$90 to Private Malanson (R. 13, 14). On 13 October, Major Utley, in the presence of Captain Sharlin, a member of the council, warned the accused of his rights under Article of War 24 and told him they were investigating officially the sale of prophylactics. Since 10 October, the accused had gathered together all the records he could find, and said there were no others. There were only some unauthorized papers, shipping tickets and property issue slips, no Forms 322. Asked if he could produce any money, the accused turned over to Major Utley \$450 in American money, \$35 in Canadian money, and two checks for sales 3 and 9 October, which the accused said were from sales of prophylactics through the Medical Supply Office. The accused said that he did not know exactly how much was due and had no authorized records to cover the transactions that had taken place. He showed no reluctance to answer questions. No threats or promises were used (R. 14, 17). Major Utley went through the safe used by accused, in the office adjoining that of the accused, and found nothing pertinent to the investigation (R. 16). On 11 October, the day following the first interview, the accused told Major Utley that he had been working on his records and wanted to prepare a consolidated voucher covering all or many of his sales subsequent to those reported in Exhibit C. Major Utley told him that such consolidation would not be in order, and that vouchers should cover each transaction. The accused had no vouchers at that time. He had only the property issue slips which he had had the day before, made by himself (R. 19).

The foregoing testimony by Major Utley was corroborated by Captain Joseph A. Coyle (R. 54), Medical Corps, member of the Hospital Fund Council, as to the events of 10 October at the council meeting. Other than the Form 322 of October 1943 (Pros. Ex. C), the accused had only a slip of paper on which he said that there were numbers corresponding to the numbers of vouchers which he was unable to produce (R. 55). The accused said that he did not have the money for sales of prophylactics. Asked what he had done with the money, the accused said that he "lent it out to some other fellows, and mentioned \$90 to Private Malanson. Asked if he did not think he was "sticking his neck out" in saying that he did not have the money, the accused stated that he realized he was (R. 55). Major Utley had asked the accused where "the money" was. No reference was made to checks, and the accused did not say anything about any checks or cash that he might have had (R. 57). He did not say that he had any check or money in the safe (R. 58).

Technical Sergeant Gerard A. LaFrance, Medical Supply Sergeant (R. 19), showed the accused a letter of The Adjutant General's Office dated 9 January 1943 and a circular of Eastern Defense Command, on the proper way to handle sales of prophylactics, when the accused came on duty. The accused said that at the Base, APO 862, they were handling such sales through the Hospital Fund and from then on that was the way they would do it here (R. 20). Prophylactics were sold by the Medical Supply Office. Part of the proceeds were turned in to Hospital Fund, and that is all that witness knows about. Witness never heard the accused say what he was doing with the money until just before this court-martial; then the accused said that he had been turning the money in through the Administrative Office on Form 1044, but it would thereafter be turned over directly to the Finance Officer (R. 20). Witness went right over and checked the Form 1044s, and there were no entries (R. 21).

Stock record accounts were kept for prophylactics. Prosecution's Exhibit D (R. 22) is the stock record of mechanical prophylactics from 1 April 1943 to 29 February 1944. The accused came on duty in September 1943. Prosecution's Exhibit E (R. 22) is the stock record card from 1 March 1944 to 22 September 1944. Together, Exhibits D and E cover the entire period from the first date on Exhibit D to the last on Exhibit E. On Exhibit D, all entries are signed by the officers who received the prophylactics on shipping tickets. On Exhibit E, they are not all signed (R. 21). Sergeant LaFrance tried to keep check on the sales. The accused never furnished him with vouchers for the entries on Exhibit E. The sergeant made the entries himself "to keep these things straight". Prosecution's Exhibit F (R. 23) is the stock record of chemical prophylactics from April 1943 to February 1944; Prosecution's Exhibit G (R. 23) from March 1944 to September 1944. The witness had personal knowledge of the receipts and issues shown on Exhibit F and of the receipts, but not the issues, on Exhibit G (R. 22). An entry of 13 gross of chemical prophylactics transferred to the Base was made when the inventory showed 13

gross short. Witness received a shipping ticket showing the transfer on 21 September 1944, by entry in the stock record (R. 23). About 31 gross of chemical and 7 gross of mechanical prophylactics were on hand 10 October 1944 (R. 24). Either 22 or 18 gross of mechanical and either 24 or 8 gross of chemical prophylactics were received in March 1944 (R. 28). There were no vouchers to show what had become of prophylactics received and not on hand. Figures shown for issue and transfer were put there by the witness, Sergeant LaFrance, to "put some sense in those records". The only way he could actually tell the number of prophylactics on hand was by going out and counting them (R. 26). The stock records (Pros. Exs. D, E, F, G) do not accurately reflect the true stock on hand after the time of the joint inventory (September 1943), but are more nearly correct than if witness had not made the entries which he did make (R. 26). Witness had no authority to change the inventory figures. He made the entries in an effort to keep a record of the balance of stock actually on hand to meet requests for prophylactics (R. 26-27). He issued no prophylactics without the permission of the accused, but did make record entries without such permission (R. 27). He has expressed fear that he would be charged with the shortage (R. 26). Sergeant LaFrance identified the signature of the accused on Prosecution's Exhibits F, W, X, Y, Z, AD, AA, AL, K, L, I, J, (R. 42), N, O, P, Q, R, S, AT, AV, BB, BC (R. 43), BD, AY, AZ, BA, AO, AQ, AS, AR, C, AI, AJ (R. 44).

Specification 1.

Captain Ferdinand H. Flick, commanding Area Headquarters Detachment, Army Post Office 863, and custodian of the unit fund of that detachment (R. 29), identified the unit fund records showing his purchase of prophylactics from Station Hospital on 16 October 1943, 27 February 1944 and 24 June 1944 (R. 30; Pros. Ex. H; R. 31, Pros. Exs. I, J), and testified from personal knowledge (R. 33) and cancelled checks (R. 32; Pros. Exs. K, L) to payments to the Hospital Fund of \$16.00, \$4.73, and \$12.73. (Findings of guilty were limited to \$28.73, corresponding to the October and June transactions, in the absence of voucher for the February purchase.)

Specification 2.

Captain George B. Martin, commanding Company A, 471st Infantry Battalion, took custody of the company fund and its records upon relieving Captain (lately First Lieutenant) Charles N. Veatch, Jr., at the end of September 1944. Lieutenant Blankner identified the signature of Captain Veatch (R. 36, 37). The Council Book showed purchases of prophylactics from Station Hospital 17 December 1943, 8 March 1944, 2 June 1944 and 4 August 1944 (R. 34, 36; Pros. Ex. M). Vouchers and checks showed four payments to the Hospital Fund for these items of \$14.19 each, aggregating \$56.76 (R. 34-38; Pros. Exs. N, O, P, Q, R, S, T, U). Signatures of the accused were identified by Sergeant LaFrance (R. 43). Private O'Connor signed the voucher for the accused (Ex. T) for the item 4 August, as he was authorized to do, and turned the check over to the accused (R. 40).

(122)

Specifications 3-9, inclusive.

Certain records and documents were admitted in evidence upon stipulation, Appendix I, between the prosecution, the accused and defense counsel, to have the same force and effect as though each were properly authenticated and identified. These were as designated in Appendix I, and included Pros. Ex. V through BD, consecutively, all inclusive (R. 38).⁷

Specification 3.

The council book of the company fund of Company B, 471st Infantry Battalion, of which fund Captain Robert B. Stevens was then custodian, showed purchases of prophylactics from the Medical Supply Officer on 6 March, 31 May and 4 August 1944 (Pros. Ex. V). Checks and vouchers showed payments to the accused for these items of \$26.73, \$9.46 and \$9.46, aggregating \$45.65 (Pros. Exs. W,X,Y,Z,AA,AB). Private O'Connor signed the voucher for the accused (Ex. AB), with authority, for the item 5 August 1944, and turned the check over to the accused. (R. 41).

Specification 4.

The council book of the company fund of Company D, 471st Infantry Battalion, of which First Lieutenant Stephen Fowler was then custodian, showed purchases of prophylactics from the accused on 22 November 1943, 1 March 1944 and 11 April 1944 (Pros. Ex. AN). Checks and vouchers showed payments to the accused for these items at \$4.73 each, aggregating \$14.19 (Pros. Exs. AY,AZ,BA,BB,BC,BD).

Specification 5.

The council book of the battery fund of Battery A, 24th Coast Artillery Battalion, of which fund Captain Loring R. Guibord was then custodian, showed purchase of prophylactics from Hospital Fund on 21 March 1944 (Pros. Ex. AC); payment to accused of \$14.19 per voucher (Pros. Ex. AD).

Specification 6.

The council book of the battery fund of Battery B, 24th Coast Artillery Battalion, of which Captain Santo Chiodo was custodian, showed purchase on 24 June 1944 of prophylactics (Pros. Ex. AE). Check (Pros. Ex. AF) and voucher (Pros. Ex. AG) showed receipt by Major Utley of a check to the hospital for \$31.46. Major Utley delivered the check to the accused on the return of the accused from leave (R. 45).

Specification 7.

The council book of the battery fund of Battery B, 422nd Anti-Aircraft Artillery Battalion, of which Captain Abram Fulkerson was the custodian, showed purchase of prophylactics 19 July 1944 from the Hospital Fund (Pros. Ex. AH). Check (Pros. Ex. AI) and voucher (Pros. Ex. AJ) showed payment to the accused of \$26.73.

Specification 8.

The council book of the battery fund of Battery C, 422nd Anti-Aircraft Artillery Battalion, of which Captain Abraham M. Friedland was then custodian, showed purchase on 10 June 1944, from the Hospital Fund, of prophylactics (Pros. Ex. AK). Check (Pros. Ex. AL) and voucher (Pros. Ex. AM) showed receipt by Major Utley of a check to the Hospital Fund for \$4.73. Major Utley delivered the check to the accused on the return of the accused from leave (R. 45).

Specification 9.

Council book entries of 13 May, 14 June, 19 July, 14 August and 11 September, 1944, of the company fund of Company D, 471st Infantry Battalion, of which Captain Quinn H. Scott, Jr. was then custodian, show purchases of prophylactics (Pros. Ex. AN). Checks (Pros. Exs. AO,APA,QA,AR, AS) and vouchers (Pros. Exs. AT,AU,AV,AW,AX) show payment to the accused of \$4.73, \$4.73, \$15.73, \$4.73 and \$4.73, aggregating \$34.65. Major Utley received the check for the item 14 June 1944, while the accused was on leave, and later delivered it to the accused (R. 45). Private O'Connor signed the vouchers for the accused (Pros. Exs. AW,AX) for the items 14 August and 11 September, with authority from the accused so to do, and turned the checks over to the accused (R. 41).

* * *

Private Richard C. O'Connor (R. 39), for fourteen months clerk in the Medical Supply Office, typed a shipping ticket (Pros. Ex. BE) showing two items shipped to Fort Pepperrell. Witness put these items on the ticket because the accused told him to, not knowing whether they were in fact so shipped (R. 39, 40).

Corporal Robert P. Enright, warehouse man for thirteen months, had packed all supplies for shipment during that time. He had never shipped any prophylactics to the Base or elsewhere on the island (R. 52).

Captain Joseph A. Coyle, Medical Corps (R.54), was the immediate predecessor of the accused as Medical Supply Officer (R. 55; Pros. Ex. A). When relieved, the witness turned over to the accused the stock of prophylactics on hand. Neither officer checked the amounts, but Sergeant LaFrance and the enlisted men made a check, which the witness and the accused accepted. A certificate of transfer and acceptance of Medical property was signed by both officers (Pros. Ex. BF).

Captain Ralph Adams, Finance Department (R. 47), in Base Finance Office since July 1943, had not received from the accused since 1 October 1943 any monies, checks or funds purporting to be proceeds of sales of prophylactics (R. 48). Major Milo C. Morgan, Finance Department (R. 48), Assistant Base Finance Officer for two and a half years and familiar with

the records of the finance office, had examined those records for War Department Forms No. 322 and 1044 purporting to show proceeds of sales of prophylactics by the accused, and found none on either form after 1 October 1943 (R. 48). By regulations Form 1044 is required at the end of each month (Par. 17g, AR 40-590). There is no specific time requirement as to Form 322, which is merely required "to be deposited with the Disbursing Officer" (R. 49).

Captain Max F. Stern, Dental Corps (R. 45), shared quarters with the accused. On 10 October 1944, the accused said that he needed about \$400 cash. The next day, after the arrest of the accused, the accused said he had some difficulty on his books at the hospital (R. 46). On 13 October the witness cashed the accused's personal check for \$400 (American: \$440 Canadian money). The check (R. 47; Pros. Ex. BG) was dated 1 September 1944. The accused said it was a check he had in the safe (R. 47).

A voluntary statement in writing by the accused, signed and sworn, to the Investigating Officer, 18 October 1944 (R. 49,50; Pros. Ex. BH), stated that the money had always been on hand, kept in the safe, to cover the sales of prophylactics; that correct vouchers were not entered in the voucher file, so the accused was unable to send the money to the Finance Officer in the usual manner; that his intentions were to send the money to the Finance Officer by money order, showing on one shipping ticket all prophylactics sold; that he cashed the checks received from the purchasing organizations so the checks would not remain outstanding, and put the money in the safe; that it was not wrongful for him to cash the checks, as he was responsible for the money, anyway; that at no time had there been a shortage of money.

Private Lewis E. Malanson (R. 50) borrowed \$96 and some cents from the accused, to go on furlough. The accused loaned him \$30 of it at one time in September 1944 and the balance about two and a half weeks later. The accused took the money out of his pocket, not out of the safe (R. 52).

Captain Herbert S. Sharlin (R. 58), Medical Corps, relieved the accused as custodian of the Hospital Fund on 12 October 1944. The witness had checked the records of the fund, in his custody (R. 59). The Hospital Fund Statement and vouchers from 1 September 1943 to 1 October 1944 showed sales of prophylactics as follows:

30 September 1943, \$9.72 (Pros. Exs. BI, BJ),

7 December 1943, \$29.76, to Headquarters Battery, 24th Separate Coast Artillery Battalion (Pros. Exs. BK, BL),

31 March 1944 (sales to Headquarters Detachment, 15 March, \$4.73 and 30 March, \$22.00) \$26.73 (Pros. Exs. BM, BN), and

29 February 1944 (sales 8 and 23 February to Battery C, 422d Coast Artillery Battalion, \$36.19 and \$14.19; 27 February to Headquarters Detachment, \$4.73) \$55.11 (Pros. Exs. BO, BP).

Captain Sharlin identified the signature of the accused on these Exhibits (R. 60).

The statements showed cash on hand in various amounts for each month concerned. The accused turned over to the witness \$269.67 cash on transfer of the fund. Witness would say it had been kept in the hospital safe in Major Utley's office, as that is where it "used to be" kept. There is a safe, identical in appearance, in Lieutenant Romp's office (R. 63).

4. The defense recalled Major Utley, Captain Stern and Captain Sharlin as defense witnesses. Major Utley had no criticism of the accused's work, efficiency or character until the present development (R. 64). Hospital orders No. 13, relieving the accused, were dated 24 October 1944, but he was in fact relieved on 11 October (R. 65). Witness told the accused after the meeting on 10 October to get to work on his records and straighten the matter out as well as he could (R. 67).

Captain Stern testified to the efficiency and good character of the accused (R. 67).

Captain Sharlin testified (R. 68,69) to the events at the council meeting on 10 October substantially the same as Major Utley and Captain Coyle had testified for the prosecution. The accused was asked to produce records and money, and said he could not. He did not say that his records were not in proper order, but brought in records of sales only within the last month or two, "possibly". He said he did not know exactly how much was due. He did not say anything about having any money or checks on hand. He had with him a check from Captain Flick, that had not been cashed. There was no discussion of money being in the safe (R. 69).

The accused testified (R. 71). He was custodian of the Hospital Fund from about 1 September 1943 to 14 October 1944, when it was transferred to Captain Sharlin. At his previous station, APO 862, the accused was likewise custodian of the Hospital Fund, and there sold prophylactics through that fund. He believed that such sales were authorized procedure. When he came to APO 863, he changed the practice there prevailing, of handling such sales through Medical Supply, to that to which he was accustomed, handling them through the Hospital Fund (R. 71). He inserted a notice in the Daily Bulletin, advising that such sales would be so handled. In some cases, purchasers sent in checks payable to the Hospital Fund (R. 72). The accused believed that his method was an alternative method. He found that the prophylactics were the property of Medical Supply and not of the Hospital Fund; that before he arrived, the hospital had purchased a large stock of prophylactics from Medical Supply. He found that the statement showed the number in units instead of in gross, and that he was accounting incorrectly (R. 72).

The proceeds of some of his sales were picked up on the Hospital Fund account. The others were not picked up at once because of delay by the purchasing organizations in making payment. The sales would be entered when payment was received. He kept a "chronological checking" on purchases and entries (R. 72). He received checks and some cash (R. 73). He cashed the checks and kept the cash in the safe in his office, except in some cases where he deposited the checks in the bank. He thought it was his right to keep the funds in that fashion, as he was accountable for them (R. 73). He found that there was a difference between Medical Supply and Hospital Fund property and that he was doing it wrong and it was all mixed up. He was keeping check on Hospital Fund prophylactic sales, but not on those of Medical Supply. He recognized his responsibility as Medical Supply Officer, and knew that he would have to have the supplies or the money when he was checked up (R. 73).

There were two safes in the hospital. One was in Major Utley's office. The Hospital Fund cash was kept in the other, in the office of the accused. He kept the proceeds of sales there from the time he found that he had the procedure mixed up. He thought that he would straighten out the mixup or else replace the money for Medical Supply out of his own funds and leave the money as it was in the Hospital Fund, to avoid a mark on his efficiency record (R. 74).

The accused continued making sales from the Hospital Fund to exhaust the stock and clear the record. He cashed checks so that they would not remain outstanding and so that he would not have the organizations calling him up to see why their checks remained out. He thought he would correct the records by checking on sales with the various organizations, as the prosecution has done, but expected to have more time than he had (R. 74).

On 10 October, the accused was called into Major Utley's office. Captain Coyle and Captain Sharlin were there. They asked whether prophylactic sales were being made through the Hospital Fund. The accused told them they were not, at that time; that such sales were stopped in March 1944. The officers checked and found no such sales for the past few months (R. 75). That satisfied Captain Coyle and Captain Sharlin, but Major Utley felt it his responsibility to check further, and asked about sales records. The accused went to his office for his records. He had been working on them and they were better than when they were turned over to him, but, with his other duties, he had not had time to get them all in shape, so he "kept the money in the safe so that at least the money would be in the safe" (R. 75).

Asked to produce further records of his sales, the accused told Major Utley that his records were mixed up and that he could not give any correct explanation on the records. He was not asked to produce the money. He told them that he had cash and checks in the safe. The inquiry did not then appear to the accused to be an official investigation. He thought

they were just talking about the office. By saying that he could not account for it, he meant that he could not follow the particular sales. At that time he was just told to get his accounts straightened up. He was not asked why they were mixed up, and gave no explanation (R. 75).

The accused worked on his records that night. The next day he told Major Utley that he could get the information on each sale, but that it would take quite a while, and suggested that the money he sent to the Finance Officer on a consolidated shipping ticket instead of a Form 322, as the money was there and that would straighten the matter up. Major Utley thought that would look suspicious. The accused said it might but at least the return would be made. Major Utley disapproved the consolidated shipping ticket idea, wanted the accused to show each individual sale, and told the accused he would wait a couple of weeks for the accused to "go ahead". That afternoon Colonel James placed the accused in arrest (R. 76).

On 14 October, the accused was called before the council for an investigation. Major Utley warned him under Article of War 24, showed him his records, and asked if he had any further records on sales of prophylactics. The accused checked through his records to give any information he could. Major Utley then asked if the accused had any money or checks or anything further to produce. The accused had two checks at the time, and reminded Major Utley that he had told him on 10 October that he had money and checks in the safe. The accused gave Major Utley all the money he had on him; his own money and the proceeds of his sales. The amount was "about exactly" \$450 in American money, with \$35 in Canadian currency, and two checks: one for \$22 from Captain Martin and one for \$29.55 from Captain Flick. Those were received before he was put in arrest. He told Major Utley, as before, that he could not account for where the money had come from by individual vouchers. Major Utley took the money, gave the accused a receipt (R. 76), and told him to draw up a transfer statement (R. 77). The accused was "pretty certain" that other money was turned over to Captain Sharlin for sales, in the money of the Hospital Fund. Major Utley had received a couple of checks, and there was money from Newfoundland nationals for hospitalization. All of this money was accounted for in the Hospital Subsistence Fund, and there was cash on hand in the Hospital Fund (R. 77).

The accused loaned Private Malanson \$94 in three separate parts: \$10, \$20 and \$64, out of his own pocket. That had nothing to do with this case. If the prosecution witnesses thought he said that this was money from sales, that was not what he said (R. 77).

On cross-examination, the accused testified that the signatures on all prosecution exhibits were his own, except in the particular cases where they purported to be, and were, signed or initialled by others (R. 78) and that he personally received the proceeds of all the checks exhibited, and cashed the checks at the Post Exchange or at the bank (R. 80).

He received prophylactics from Base Medical Supply after the joint inventory made by the sergeant. He told Private O'Connor to add the items, 13 and 21 gross prophylactics, to the shipping ticket to Base Medical Supply, APO 862, but there was a notation that they did not go (R. 80). He did not try to borrow money from Captain Stern, but asked him to cash a check. The accused wrote his personal check for \$400 around 1 September. He wanted \$400 for a trip which he intended (R. 81). The \$450 American money that the accused turned over to Major Utley was the proceeds of this check plus some extra money. The accused put the check in the safe and took out \$400 of the money from sales, but not with fraudulent intent. On 10 October, this check and about \$200 were in the safe. The accused denied telling the council that he was unable to produce such money (R. 82). He could not answer yes or no to whether he told the council that he had loaned out the money to "fellows". He explained at the time that the conversation was not strictly pertaining to the money in the safe. They did not ask him what he had done with the money from sales. The entire conversation was about prophylactic sales and the Hospital Fund. Asked why in such conversation he told of his loaning money to Private Malanson and others, he replied: "Because ... they asked me about availability and accountability of the money which I had received. They asked me about it, not to produce it." He told them that cash had been loaned out, but not that the cash was from the fund. The money he loaned was from the \$400 which he had taken from the safe when he put in his check (R. 83).

Although the sales shown in the council books were entered there on the same dates as made, the transactions were not complete until the purchasing organizations received the vouchers and the accused received payment, and they dated the two the same date in the council book. If cash or checks were deposited in the bank, it was picked up on the Hospital Fund (account) (R. 83).

Sometime while the accused was there as Medical Supply Officer, he read and was familiar with the directive concerning sale of prophylactics (R. 83).

The Form 322 of 1 October 1943 (Pros. Ex. C), with vouchers for September sales, is the only one he recalled signing. The one early in September was signed by him, but was made up for him beforehand (R. 84).

He did not recall whether or not he told Sergeant LaFrance that he had turned in the money from prophylactic sales to the Finance Officer. He did not transmit any money on Form 1044 to the Finance Officer (R. 85).

He accounted for the fact that there were entries in the Hospital Fund for sales of prophylactics in September but not for sales for October or November by the assertion that some of the checks had not been received or had been cashed or were in the safe. It was not necessary for him to report it. The voucher would be made up later and given the date of the check (R. 85).

The \$400 check was put in the safe to replace cash which the accused took out for an intended shopping trip to Fort Pepperrell and St. Johns. The accused was responsible for the money, anyway, and could see no wrong in exchanging his check for the cash (R. 85). He left the check there to make sure there was no shortage. If he had intended to embezzle the money he would not have put in the check (R. 86).

The first few months, the accused thought that the prophylactics he was selling belonged to the Hospital Fund, so the sales amounts appear there. Then he found that they belonged to Medical Supply. He thought they were from Hospital Fund, so turned the proceeds over to Hospital Fund (R. 86).

Each transaction should be entered the day it is made, but the accused ordinarily would just put the money in the safe (R. 86). In the delivery of articles sold, somebody from the purchasing organization just came in and took them away. They did not sign anything (R. 87).

5. The period of time stated in Specification 9 began on 28 May 1944. The first item in proof thereunder was on 13 May 1944. No objection was raised and apparently the defense was not misled. The variance was immaterial.

The accused expressed a desire to place in evidence a further statement to the Investigating Officer, claiming that the prosecution had omitted part of his statement (R. 69). His right to do so was not questioned, but it does not appear that he offered any such further statement. He was required to elect whether he would testify before introducing any form of statement (R. 70). He expressed a wish to read a prepared statement free from cross-examination and then testify. The court announced that he would be permitted to make an unsworn statement after testifying if he so desired. This he was entitled to do (Par. 76, MCM 1928, p. 61), but he did not then offer such statement. The rights of the accused were fully accorded him in the matter of his election.

The signatures of the accused on the prosecution's exhibits were identified by witnesses very doubtfully qualified, but were all admitted without objection, most of them by stipulation (R. 38; App. I), and all were later acknowledged in his testimony. He further acknowledged that he cashed the checks exhibited and received the proceeds (R. 80). All the checks appear to bear his indorsement. This renders unnecessary any discussion of irregularities in the spelling of the name of the accused on the face of certain exhibits (Pros. Exs. AN, AR, AP, AS).

That the accused was the responsible and accountable officer for the proceeds of sales of prophylactics through the time and at the place specified is admitted and undisputed. It is also undisputed that he made the sales established by the evidence and received the proceeds thereof in the amounts stated in the specifications, as modified in some

instances by the findings. It is undisputed that he made no remittances of these proceeds from 1 October 1943 to 14 October 1944, when, under investigation, he turned over a sum of money to his superior officer and his successor, which he claims to represent the proceeds of all his sales plus an undetermined amount of his own money. Admittedly, he had maintained no orderly records to justify the amount nor to account for the sales.

The logical inferences arising from these facts, unexplained, are sufficient to establish a case of embezzlement as charged. An officer who receives funds for which he is accountable and fails to account for them when called for by proper authority cannot complain if the natural presumption that he has embezzled them outweighs his uncorroborated explanation, however plausible. The return of the money post litem motam proves only that he was responsible for it, and does not negative nor excuse the offense. (CM 123488 (1918); CM 123492 (1918); CM 203849 (1935), Dig. Op. JAG 1912-40, Sec. 451 (17)).

The defense offered is that the accused did not embezzle the money; that he had it all the time, but that he was a bad bookkeeper and his accounts were mixed up. That defense rests primarily on his assertion that he kept the sales proceeds segregated at all times in his safe, but cashed his personal check therefrom for \$400 about 1 September 1944, leaving the check in place of the money withdrawn. The presence of the check in the safe rests upon the unsupported assertion of the accused. His statement to his roommate, Captain Stern (R. 47), on 13 October, after his arrest, that he had the check in the safe, is self-serving and incompetent as affirmative proof and lends no independent corroboration to the declarations of the accused. That assertion is discredited by the testimony of all three council members that the accused made no reference to such check or fund in his safe when they examined him on 10 October 1944, but, as Captain Coyle and Captain Sharlin testified, said he could not produce the money.

The check is payable to the accused himself, indorsed by him in blank. It is dated 1 September, but could have been written, dated and indorsed at any time. It remained at all times within the full control of the accused until he handed it over to Captain Stern for cash two days after his arrest. The question arises, how did he get it out of the safe, and when? He was placed in arrest of quarters and relieved from control of the Hospital Fund on 11 October, which should have kept him out of the safe. If he could and did remove the check from the safe after the council called him to account on 10 October and before his arrest on 11 October, then the check, or, for that matter, the money it was said to represent, was very insecurely segregated to represent the proceeds of a year's sales, in lieu of all other record. If, on the other hand, the check was written by the accused after his arrest in the hope of avoiding punishment, then it was never in the safe and there is little left of his theory of segregated funds.

The segregated fund defense is further discredited by the testimony of Sergeant LaFrance (R. 20), that the accused told the witness that he had been turning in the sales proceeds through the Administrative Office on Form 1044, which testimony is met only by that of the accused (R. 85), that he cannot recall whether or not he told Sergeant LaFrance that he had turned in the money to the Finance Officer, and that he did not transmit any money on Form 1044.

The court was fully justified in rejecting the theory that the accused kept the proceeds of his sales segregated in any form, and in reaching its findings upon the inferences from the failure of the accused to remit the proceeds of his sales to proper authority and his failure to keep any recognizable records of his transactions. The evidence is ample to sustain the findings of guilty.

6. War Department records show that the accused officer is 25 years of age, married, a resident of Troy, New York. He has a high school education and one year college. From 1937 through 1939, prior to military service, he was employed as a packer for a mail order house and as a machine operator in a paper mill. The term of his prior enlisted service is not clear from the record. He has been in the army since 1940. From enlisted status, he was commissioned as second lieutenant 17 October 1942, through Officer Candidate School, Medical Administrative Corps, Camp Berkeley, Texas. He was promoted to the grade of first lieutenant 29 December 1943.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 94.

Fletcher R. Andrews, Judge Advocate.

Herbert H. Frederick, Judge Advocate.

Abel R. King, Judge Advocate.

(132)

SPJGQ-CM 269772

1st Ind

Hq ASF, JAGO, Washington 25, D. C., FEB 2 1945

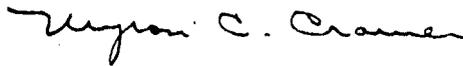
TO: The Secretary of War.

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 Thomas H. Romp (O-1542138), Medical Administrative Corps.

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

3. Consideration has been given to a copy of a letter from Father William S. Bowdern, Area Headquarters Chaplain, accompanying the record.

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



4 Incls

1. Rec. of Trial
2. Drft. ltr. for sig.
S/W
3. Form of Action
4. Copy of ltr fr
Father Bowdern

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed but forfeitures remitted. G.C.M.O. 142, 11 Apr 1945)

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

(133)

SPJGH
CM 269791

6 JAN 1945

UNITED STATES)

v.)

Second Lieutenant CHARLES)
E. SUMMERFORD (O-1302382),)
Infantry.)

FIELD ARTILLERY REPLACEMENT TRAINING CENTER
CAMP ROBERTS, CALIFORNIA

Trial by G.C.M., convened at
Camp Roberts, California, 17
November 1944. Dismissal and
confinement for ten (10) years.

OPINION of the BOARD OF REVIEW
TAPPY, GAMERELL 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 58th Article of War.

Specification: In that Second Lieutenant Charles E. Summerford, Company A, 80th Infantry Training Battalion, Camp Roberts, California, did, at Camp Roberts, California, on or about 12 June 1944 desert the service of the United States and did remain absent in desertion until he was apprehended at Detroit, Michigan on or about 18 September 1944.

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

Specification: In that Second Lieutenant Charles E. Summerford, *** did, without proper leave, absent himself from his ward at Hoff General Hospital, Santa Barbara, California, from about 5 April 1944 to about 3 May 1944.

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

Specification: In that Second Lieutenant Charles

E. Summerford, *** did, at Phoenix, Arizona, on or about 25 December 1943, feloniously take, steal, and carry away a negotiable instrument, to-wit: One (1) check Number 4644, in the face amount of \$250.00 dated December 25, 1943, drawn upon Salinas National Bank, Salinas, California, signed by Lyell H. Howard, value of \$250.00, the property of Lyell H Howard.

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

Specification: In that Second Lieutenant Charles E. Summerford, *** having acknowledged receipt in writing of the lawful order of J. S. Holmes, Captain, Corps of Military Police, Provost Marshal, Tulsa, Oklahoma, at Tulsa, Oklahoma, on 15 April 1944, to report to the Commanding Officer, Santa Barbara, California, without delay, did willfully disobey the same.

He pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence of any previous conviction was introduced. He was sentenced to dismissal and confinement for ten years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution:

While a patient at Hoff General Hospital, Santa Barbara, California, the accused absented himself without leave on 5 April 1944. He was returned to military control on 3 May 1944 (R. 7; Pros. Ex. 2). During his absence, on 15 April 1944, he was given a written order by Captain J. L. Holmes, Corps of Military Police, at Tulsa, Oklahoma, to report to "the Commanding Officer at Santa Barbara, California, without delay" (R. 8; Pros. Ex. 3). Upon the foot of such written order the following indorsement appears

"I, 2nd Lt. Charles E Summerford, O-1302382, acknowledge that the above order was read to me, that I was furnished a copy thereof, and that I fully understand the contents thereof.

Charles E Summerford
2nd Lt. Charles E Summerford O-1302382
Hoff General Hospital
Santa Barbara, California."

It was stipulated that the signature "Charles E Summerford" appearing at the end of such indorsement is the signature of the accused (R. 8).

On 12 June 1944 the accused absented himself without leave from the Infantry Officers Replacement Pool, Infantry Replacement Training Center, Camp Roberts, California (Pros. Ex. 1). It was stipulated that "the accused was apprehended at Detroit, Michigan, on or about 19 September 1944" and that he was at that time in uniform (R. 7).

On Christmas Eve, 1943, a civilian named Lyell H. Howard, a guest at the San Carlos Hotel, in Phoenix, Arizona, saw accused sleeping in a chair in the lobby. The lobby was crowded with soldiers, who were resting on whatever they could find. Howard wakened the accused and invited him to share his (Howard's) room. Accused accepted the offer and he and Howard became friendly and spent the next two weeks together, drinking and visiting friends of Howard. On Christmas Day (25 December 1943) Howard, thinking that he might need some cash, started to draw a check on the Salinas National Bank, Salinas, California (Pros. Ex. 4). He wrote the date and his signature but "realizing my signature was illegible on performing my signature, I did not complete the check and put it aside in my room" (R. 9-11). He next saw the check early in February 1944 when he received his bank statement from Salinas National Bank. The check had been filled out for \$250 and made payable to "Cash". It was stipulated that the accused had indorsed the check with his own signature and that the sum of \$250 had been paid on the check by the bank. Howard did not write the word "Cash" or the figures "\$250" or the words "two Hundred & Fifty Dollars" on the check (R. 12-13). On 8 February 1944, Howard wrote to the accused, addressing him at the Station Hospital, Luke Field, Arizona, and demanded reimbursement of the \$250. This was followed by three further demands upon the accused, but although he received three telegrams from the accused the money was not reimbursed (R. 14-16). Howard did not deliver the check to the accused (R. 15).

4. Evidence for the defense:

The accused, after being advised of his rights as a witness, elected to testify under oath in his own behalf. He has been in the military service seven years and eight months. In an enlisted status he rose to the grade of sergeant and received two honorable discharges. During his entire period of military service he has not previously had any difficulty. While a patient at Hoff General Hospital he obtained a 20-day emergency leave on 7 March 1944 to visit his invalid father in Missouri. Upon arrival home he found his father in a more serious condition than he had expected and he thereupon wired to the hospital for and obtained a 15-day extension of his leave (R. 18-19).

He commenced his return trip to the hospital by train to St. Louis, Missouri, and from there traveled by bus to Little Rock, Arkansas, then by bus to Tulsa, Oklahoma. Between Little Rock and Tulsa the bus was delayed by flood waters. He reported to the military police at Tulsa on 14 April 1944, advising that he was "one day AWOL", and asked for transportation to

his proper station. The military police obtained transportation for him. On arrival in Los Angeles he visited "some kinspeople". He signed a paper for the military police at Tulsa (Pros. Ex. 3), but was not told why his signature was wanted (R. 19, 20). He left Tulsa on 15 April and arrived at Hoff General Hospital on 3 May. It took him 19 days to go from Tulsa, Oklahoma to Santa Barbara, California (R. 23, 24). On cross-examination, accused admitted that he was AWOL from "the 5th or 6th of April" (R. 23).

On or about 1 June 1944 he was transferred to Company A, 80th Infantry Training Battalion, Camp Roberts, California. He left Camp Roberts on 12 June to report to another hospital to get medical treatment which he felt he needed. He had no VOCO or written authority to be absent, only the authority of his battalion adjutant to leave the post for the weekend (R. 20, 25).

With respect to the check, the accused testified that on Christmas Day 1943 Howard received a telephone call from Los Angeles about a death in his family. Howard and the accused were the only persons in the room at the time. Accused could not help hearing the conversation. Following the telephone call accused offered to give Howard financial assistance, which accused "was able to do at that time". Howard declined this offer of financial assistance, saying "he didn't know whether he would need it yet or not". Later, accused received a wire that his father would have to be admitted to a hospital again and was in need of financial assistance (R. 21, 24). Accused further testified as follows (R. 21):

"* * * At the time I was more or less financially embarrassed myself. Both of us were drinking. Mr. Howard made a comment that he would make a loan to me and said he would write a check for me to fill in if I saw fit, which he gave me."

Later, in January 1944, accused needed cash and felt free to use the check "as a loan" (R. 22). He wrote the word "Cash" on the check, filled in the amount of the check, \$250, indorsed it and received \$250 for it (R. 25). Accused admitted, on cross-examination, that Howard signed the check on Christmas Day (R. 24). It was noted on the record that the \$250 was repaid to Howard at the trial, during a recess of the court (R. 22, 25).

5. With respect to the Specification of Charge I, the accused admitted that he left his proper station at Camp Roberts, California, on 12 June 1944, without authority. It was stipulated that he was apprehended in Detroit, Michigan, on or about 18 September 1944. No satisfactory explanation of this unauthorized absence was given by the accused. The protracted absence from 12 June until 18 September and the apprehension of accused at a point more than 2,000 miles from his station compel the inference that he intended to desert the service and amply sustain the finding of guilty of desertion.

6. The absence without leave alleged in the Specification of Charge II is admitted by the accused. No satisfactory excuse was offered by him. His only explanation of the fact that he spent 19 days in making the trip from Tulsa, Oklahoma, to Santa Barbara, California, was that he visited "some kinspeople" in Los Angeles. The evidence required accused's conviction of this Specification.

7. The Specification of Charge III alleges that the accused did, at Phoenix, Arizona, on or about 25 December 1943, feloniously take, steal and carry away "a negotiable instrument" of the "value of \$250" the property of Lyell H. Howard. The proof shows, however, that the instrument taken by the accused was a form of check which was dated and signed but which otherwise had not been completed. Neither the space provided therein for setting out the name of the payee nor the spaces provided therein for setting out the amount of the check had been filled in. An instrument to be negotiable must conform to the following requirements: (1) must be in writing and signed by the maker or drawer; (2) must contain an unconditional promise or order to pay a sum certain in money; (3) must be payable on demand or at a fixed or determinable future time; (4) must be payable to order or to bearer; and (5) where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty (Brannon's Negotiable Instruments Law, Sixth Edition, Section 1). It is obvious, therefore, that the instrument taken by the accused was not, at the time it was taken, a negotiable instrument. Moreover, it is evident that the instrument was not, at that time, of the value of \$250, or of any value whatever other than scrap value.

While negotiable instruments, complete in form, but not issued, may be the subject of larceny, incomplete instruments ordinarily are not. In Wharton's Criminal Law, Twelfth Edition, Section 1118, it is stated:

"Bank bills, complete in form, but not issued, are the property of the bank, and may be so treated in criminal proceedings for receiving them with knowledge of their having been stolen. On the other hand, an incomplete engagement — is not the subject as such of larceny."

In Corpus Juris, Vol. 36, page 745, it is stated:

"A paper writing which requires the signature of a person to give it validity is not the subject of larceny as an instrument, nor is it larceny of an instrument for a person to write a bill of exchange above the signature of another written upon a sheet of paper which he steals. But if an instrument is complete and properly signed, the fact that it requires a forged indorsement to obtain money or goods upon it does not render it any the less a subject of larceny."

It follows that, in the instant case, the proof does not establish the commission of the offense alleged.

(138)

8. With respect to the Specification of the Additional Charge, the evidence shows that the accused, while absent without authority, applied at the military police station at Tulsa, Oklahoma, on 14 April 1944 for transportation to his proper station, Hoff General Hospital, Santa Barbara, California. He was supplied with transportation, and on 15 April 1944 was given a written order (Pros. Ex. 3) by Captain J. L. Holmes, Corps of Military Police, to report to the Commanding Officer at Santa Barbara without delay. It took him 19 days to reach Santa Barbara. His only explanation for the delay was that he was visiting "some kinspeople" in Los Angeles. The court undoubtedly took judicial notice of the fact that Tulsa is only approximately 1500 miles from Santa Barbara and that three or four days would be ample time within which to make the journey either by train or by bus. The accused has not questioned the lawfulness of the order, nor has he denied receiving the order. His indorsement on the foot of the order that he had received it and understood its contents removes any doubt that the order was duly received by him. Nor can there be any doubt that the order was a lawful one. It was given by a captain of the Corps of Military Police to a second lieutenant who was admittedly AWOL at the time. The order was simply a direction to the accused to return to his proper station at Santa Barbara without delay. One of the important functions of the Corps of Military Police is to assist in returning to their proper stations military personnel who are AWOL.

The Specification alleges willful disobedience of the order in violation of the 95th Article of War. The proof falls short of showing willful disobedience but does establish a failure to obey, in violation of the 96th Article of War (CM 22336, Wills; 1 Bull. JAG 159).

9. The records of the War Department show that the accused is 30 years of age and married. His formal education extended through two years of high school. He was a gasoline filling station attendant and a helper on a chicken farm for short periods of time before enlisting in the Regular Army in March 1937. He had five years of service in an enlisted status, rising to the grade of sergeant, before being admitted to The Infantry School, Fort Benning, Georgia, in 1942. Upon graduation from The Infantry School he was commissioned a second lieutenant of Infantry on 3 December 1942.

10. The court was legally constituted and had jurisdiction over the accused and the subject matter. Except as above noted, no errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally insufficient to support the findings of guilty of Charge III and its Specification; legally sufficient to support only so much of the findings of guilty of the Additional Charge and its Specification as involves a finding that accused did fail to obey the order described in said Specification in violation of the 96th Article of War; and legally sufficient to support all other findings of guilty and the sentence, and to warrant confirmation

of the sentence. The sentence imposed is authorized upon a conviction of a violation of Article of War 58 or of a violation of Article of War 61 or of a violation of Article of War 96.

Thomas N. Jaffey, Judge Advocate.

William H. Lambell, Judge Advocate.

Robert C. Treviston, Judge Advocate.

(140)

SPJGH-CM 269791

1st Ind

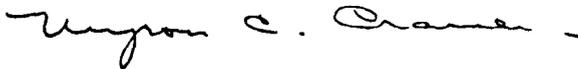
Hq ASF, JAGO, Washington 25, D. C. JAN 19 1945

TO: The Secretary of War

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Charles E. Summerford (O-1302382), 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 Charge III and its Specification; legally sufficient to support only so much of the findings of guilty of the Additional Charge and its Specification as involves a finding that accused did fail to obey the order described in said Specification in violation of the 96th Article of War; and legally sufficient to support all other findings of guilty and the sentence, and to warrant confirmation of the sentence. There appear to be no mitigating or extenuating circumstances. While the finding of guilty of larceny charged in the Specification of Charge III has been disapproved, such disapproval is based solely upon technical grounds and it in no way exonerates the accused of the moral dishonesty imputed to him by the charge. The evidence clearly showed that he wrongfully obtained, by forgery (for which he was neither charged nor tried) the sum alleged, \$250. I recommend, therefore, that the sentence be confirmed but that the period of confinement be reduced to five 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. 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 recommendation meet with approval.



3 Incls

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

MYRON C. CRAMER
Major General
The Judge Advocate General

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but confinement reduced to five years. G.C.M.O. 141, 11 Apr 1945)

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

(141)

SPJGK
CM 269792

CONFIDENTIAL

11 Jan 1945

*12 Sept 45
with P. B. G.*

UNITED STATES)

92ND INFANTRY DIVISION

v.)

Trial by G.C.M., convened at Fort
Huachuca, Arizona, 5 September 1944.
Dismissal, total forfeitures, and
confinement for five (5) years.

Second Lieutenant WILEY B.
MOORE (O-1577591), Quarter-
master Corps.)

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant Wiley B. Moore, Headquarters Company 92d Infantry Division did at Fort Huachuca, Arizona, on or about 26 June 1944, with intent to deceive proper authority officially state, in writing, delivered to Captain James G. Glymph, acting assistant adjutant General, 92d Infantry Division, its representative, that he had settled all his personal indebtedness, or made arrangements to effect settlement thereof on or prior to the 10th day of July 1944, which statement was known by the said Second Lieutenant Wiley B. Moore to be untrue in that at the time he was indebted to:

Capt C. C. Heizer	Due	\$200.00
T/4 Joseph Reid	Due	120.00
Pvt Sinclair Johnson	Due	90.00
Pvt Maurice G. Shauntee	"	20.00
Cpl Odie B. Paulette	"	30.00
Cpl Clarence W. Roberts	"	4.60
T/4 Samuel B. Mitchell	"	63.00
Pfc Eugene B. Questel	"	35.00
S/Sgt Lester T. Clayton	"	40.00
1st Sgt Robert L. Millender	"	24.65
WOJG J. S. Mackenzie	"	60.00
2d Lt. Jaon P. Lovette	"	30.00
Western Union (Tel Toll)	"	2.63

CONFIDENTIAL

(142)

92d Div Staff Officer's Mess	Due	\$39.75
Fort Huachuca Branch Red Cross	"	101.45
WOJG Earl W. Madison	"	93.00
Cpl Willie Strickland	"	40.00
T/4 Irving C. Peoples	"	2.00
1st Lt John F. Evans	"	230.00
WOJG Chester B. Carr	"	200.00
Capt. J. Woodruff Robinson	"	253.30

which same debts he had not then settled or made arrangements to effect settlement thereof, on or prior to the 10th day of July, 1944.

Specification 2: In that Second Lieutenant Wiley B. Moore, * * *, being indebted to Warrant Officer (JG) Earl W. Madison in the sum of \$93.00, representing a loan made by the latter to him, the said Second Lieutenant Wiley B. Moore, which amount became due and payable on or about 24 May 1944, did at Fort Huachuca, Arizona from on or about 24 May 1944 to on or about 22 August 1944, dishonorably fail and neglect to pay said debt.

Note: Specifications 3, 5, 6, and 7 are identical in form with Specification 2 above except for the dates and the amounts and the names of the creditors. These differences were as follows:

<u>Spec.</u>	<u>Creditor</u>	<u>Amount</u>	<u>Debt due</u>
3	WOJG Chester B. Carr	\$200.	1 March 1944
5	Tech. 4 Samuel B. Mitchell	63.	1 April 1944
6	Tech. 4 Joseph H. Reid	120.	1 March 1944
7	Pvt Sinclair Johnson	90.	25 March 1944

Specifications 4 and 8: (Findings of not guilty).

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

Specification 10: In that Second Lieutenant Wiley B. Moore, * * *, did at Fort Huachuca, Arizona on or about 1 March 1944, wrongfully borrow the sum of \$120.00 from Tec 4 Joseph Reid, an enlisted man also of Headquarters Company 92d Infantry Division.

Note: Specifications 11, 14, 15, and 17 are identical in form with Specification 10 above except for the dates, the amounts and the names of the enlisted men from whom the moneys were borrowed. These differences were as follows:

<u>Spec.</u>	<u>Enlisted Man</u>	<u>Amount</u>	<u>Date</u>
11	Pvt Sinclair Johnson	\$90.	25 March 1944
14	Cpl Clarence W. Roberts	4.	28 May 1944
15	Tec 4 Samuel B. Mitchell	63.	1 April 1944
17	S/Sgt Lester T. Clayton	40.	10 April 1944

Specifications 12, 13, 16 and 18: (Findings of not guilty).

He pleaded not guilty to the Charge and all of its specifications. He was found not guilty of Specifications 4, 8, 12, 13, 16, and 18. He was found guilty of the remaining Specifications and the Charge except the words in Specification 1 "Capt C. C. Heizer, due \$200.00, Pvt Maurice G. Shauntee, due \$20.00, Cpl Odie B. Paulette, due \$30.00, Cpl Clarence W. Roberts, due \$4.60, Pfc Eugene B. Questel, due \$35.00, 1st Sgt Robert L. Millender, due \$24.65, WOJG J. S. Mackenzie, due \$60.00, 2d Lt. Jaon P. Lovette, due \$30.00, Western Union (Tel Toll) due \$2.63, 92d Div Staff Officer's Mess, due \$39.75, Cpl Willie Strickland, due \$40.00, T/4 Irving C. Peoples, due \$2.00, 1st Lt. John F. Evans, due \$230.00, Captain J. Woodruff Robinson, due \$253.30" and substituting therefor the words, "Cpl Clarence W. Roberts, due \$4.00," of the excepted words, not guilty, of the substituted words, guilty. 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 ten years. The reviewing authority disapproved of the findings of guilty of Specification 9, approved the sentence, reduced the period of confinement to five years, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution pertaining to the approved findings of guilty may be summarized as follows:

At the times set forth in the Specifications and at the time of the trial the accused was in the military service of the United States on duty with the 92nd Infantry Division stationed at Fort Huachuca, Arizona (R. 12, 40, 46, 49, 59).

Specification 1.

On or about 26 June 1944, the accused, having been notified that pursuant to orders he was about to be transferred from the 92nd Division to another station reported to the Division Headquarters "to clear his indebtedness" (R. 12). Prior to this time certain officers had complained to the headquarters that the accused owed them money (R. 16). When the accused appeared at the headquarters the acting Assistant Adjutant General, Captain James L. Glymph, acting for the Adjutant General, furnished him with a form entitled "Certificate of Clearance" (R. 13, Pros. Ex. A). According to

Captain Glymph he "drew up a certificate of clearance that all indebtedness, all claims of Government agencies and of personal debts were cleared", and "had Lt. Moore to take this certificate around to the various agencies on the Post and have it initialed, which he did" (R. 13). Accused signed the certificate of clearance in Captain Glymph's presence (R. 13,14). The face of the certificate, as offered, shows two additions in ink, one the words, "Hq 92d Inf. Div." at the top, and the other the word "AND" interlined in the third paragraph. With this latter interlineation, the third paragraph reads as follows:

"I further certify that I have settled all my official and personal indebtedness AND (interlined) with all government and post activities, or have made arrangements to effect settlement of debts listed below, on or prior to the 10th of next succeeding month."

After accused had signed the certificate, Captain Glymph asked accused to whom he owed personal debts. Thereupon accused furnished the names of "four or five people" and the amounts of indebtedness to them. As will appear from the testimony hereinafter summarized in connection with other specifications, accused was indebted to a number of others in the military service stationed at the Post. The names and amounts furnished by accused were written on the back of the certificate by Captain Glymph, and accused was directed by Captain Glymph "in the name of the Commanding General", before complying with his transfer orders to have these individuals sign the certificate, and personally to sign the following additional statement which Captain Glymph had likewise written on the back (R. 13):

"Certificate

I hereby certify that I have either Paid or have made satisfactory arrangements for Payment with the above Officers and Warrant Officers.

Wiley B. Moore
2d Lt. Q.M.C."

A few days later Captain Glymph found this document in his "in" basket. The certificate on the back was not signed by accused. The four creditors whose names were listed on the back had signed (R. 13,14). Captain Glymph testified that when he wrote the "Certificate" on the back of the document he intended it to be an additional certificate that would not supersede the certificate on the front nor have any relation to the accused's indebtedness, if any, to the Government agencies (R. 18). Before the document (Pros. Ex. A) was produced and admitted in evidence Captain Glymph was permitted to testify that the document "said that all indebtedness was clear, that all of

his personal accounts had been paid" (R. 14).

Specification 2.

Warrant Officer, Junior Grade, Earl Madison testified that the accused had borrowed money from him in April 1944. On 24 May 1944 accused still owed him a balance of \$8.00. On that date, at the accused's request, and upon his promise to repay him in full that night, he loaned the accused an additional \$85.00. The accused did not repay the money that night, nor has he ever repaid it. Madison made numerous attempts to collect the money due him from the accused, but the accused would say that he did not have it or was expecting it. Upon one occasion the accused gave him a check which "bounced back" (R. 43-45).

Specification 3.

Warrant Officer, Junior Grade, Chester B. Carr testified that he loaned the accused \$200 about "five or six months ago", at which time the accused promised to repay the loan "within the next pay day". The accused did not repay it as promised and has not as yet repaid it. Carr tried to collect it from him, but the accused told him that he did not have the money (R. 40-41).

Specifications 5 and 15.

Technician 4th Grade Samuel B. Mitchell testified that he was a member of Headquarters Company of the 92nd Infantry Division. The accused was also a member of that organization. About 1 February 1944 he turned over to the accused \$60 for safekeeping for him in the company's safe. Several months later he spoke to the accused about it. In the meantime the accused owed him \$3 in "making change or something". The accused told him that he had borrowed the \$60 and that Mitchell would receive it back at the end of the month. Mitchell said that that would be all right. Accused has never repaid it, but has made numerous promises to do so (R. 60-62).

Specifications 6 and 10.

Technician 4th Grade Joseph Reid, also a member of Headquarters Company, 92nd Infantry Division, testified that when the accused was the Executive Officer of that company he asked Reid to loan him some money. On 16 February 1944 Reid loaned him \$120. Accused at the time promised to repay him the following pay day which was 1 March. Accused has never repaid it, although Reid has requested payment (R. 46-48).

Specifications 7 and 11.

(146)

Private Sinclair Johnson, also of Headquarters Company, 92nd Infantry Division, testified that on 25 March 1944 the accused, who was a member of the same company, asked him to loan him \$90. Johnson loaned it to him. Nothing definite was said about its repayment and he has never asked for its return (R. 57-58).

Specification 14.

Sergeant Clarence Roberts of the same organization testified that the accused, when he was the executive officer of the company, on 28 May 1944 asked him if he had \$20 "on him". Roberts told him that he had only \$4.00 and offered it to the accused. The accused took it and said that he would return it "in a few days". He has never returned or repaid it (R. 50-51).

Specification 17.

Technical Sergeant Lester T. Clayton, a member of the same organization, testified that on 10 April 1944, at the accused's request, he loaned him \$40. At first the accused had asked for only "a couple of bucks", but when he observed that Clayton had \$20 bills in his possession he asked for "a couple of those". At the time the accused promised to repay Clayton "in a few days". He has never repaid the money, although he did make numerous promises to do so (R. 53-54).

4. The accused, having been advised as to his rights, elected to testify under oath. He testified, "Well, I have nothing further to say. The testimony that has been brought out, and in most instances, is correct". He stated that he had communicated with all of his creditors and made a verbal arrangement with each to settle the debt at some indefinite future time (R. 62-63). His pay as a second lieutenant is not sufficient to enable him to pay all of his indebtedness in one month. He did not believe that his creditors desired to prosecute him, but that they only wanted to be paid. He would like the opportunity to pay them (R. 64). He concluded with the statement, "I am not denying that I owe any of these men who have come here that I have cross examined" (R. 68).

5. Discussion. The accused stands convicted of offenses, all charged under Article of War 98, that may be classified as follows:

- a. Making a false official statement.
- b. Dishonorable failure to pay his debts.
- c. Borrowing from enlisted men.

a. Making a false official statement.

Specification 1 falls within this class and sets forth all elements of the offense, namely, (1) the making with intent to deceive by one in the military service (2) of a false official statement (3) with knowledge that it is false. Accused is specifically charged in the present case with having made a statement in writing to the effect that he had paid all of his personal debts, or had made arrangements to effect settlement thereof within a specified time, which statement was a false and official one, known by accused to be false, and that the accused intended "to deceive proper authority" in making this statement.

It was clearly shown by the evidence and admitted by accused that on the date alleged (26 June 1944) he was indebted to the persons named in the findings of the court in the amounts alleged and that he had neither paid them nor made any arrangements to pay them within any definite time. It was also clearly shown that the transaction between accused and Captain Glymph was an official one, intended to insure the clearance by accused of his indebtedness, both to government agencies and to individuals, before leaving for his new station. Any statement made in or on the certificate with regard to the indebtedness is unquestionably to be classified as official and if material and false, to the knowledge of accused, may properly be said to have been made with intent to deceive "proper authority".

Had the word "AND" not been interlined in the second line of paragraph 3 of the certificate, conviction of this specification could and would not be maintained. As originally typed (or mimeographed) this paragraph read as follows:

"3. I further certify that I have settled all my official and personal indebtedness with all government and post activities, or have made arrangements to effect settlement of debts listed below, on or prior to the 10th of next succeeding month".

It is clear that, as thus originally written, the only indebtedness sought to be covered was that of an official or personal character to government and post activities. The matter of personal indebtedness to private individuals was not involved. However, because of complaints made by members of the military service, accused's organization desired to have his private affairs adjusted before his departure from the station. The certificate, as offered in evidence, shows clearly that the word "AND" was added for the purpose of assuring this adjustment. With this addition, accused was called upon to certify that he had settled (1) all his official indebtedness, (2) all his personal indebtedness, and (3) with all government and post activities, or that he had made arrangements to effect settlement of the debts "listed below" on or before a designated date. Had this not been the intention, the

addition of "AND" would have been meaningless and superfluous, serving no purpose whatsoever.

The certificate was received in evidence without any objection by accused that "AND" had been interlined after he had signed it. Captain Glymph testified that he had prepared the document and had seen it signed by accused. A person is presumed to know the contents of a document signed by him (Wharton's Criminal Evidence, 11th Ed., Sec. 99). Accused at no time suggested that the certificate had been altered after its execution by him, nor is there any contention that he was misled by any of its provisions. Since the regularity of the certificate has not been questioned and since there is no implication of impropriety in its preparation, the Board naturally concludes that there was no alteration or addition after its execution by accused.

While a written document is the best proof of its contents, and while the meaning of paragraph 3 appears to be perfectly clear, if any ambiguity exists, resort may be had to the circumstances attending its execution to clarify such ambiguity. (Wigmore on Evidence, 3rd Ed., Sec. 2470; Jones on Evidence (Civil Cases) 4th Ed., Sec. 450. See also Wharton's Criminal Evidence, 11th Ed., Sec. 825). All extrinsic evidence merely emphasizes the correctness of the interpretation placed on the plain language of this paragraph. Reports had been received by headquarters of accused's personal indebtedness to individuals at the post. It was the desire on the part of headquarters that this indebtedness as well as that to government agencies be cleared before accused's departure. In furtherance of this purpose, Captain Glymph testified that he prepared the certificate. Certainly where the document as prepared carried out the intended purpose the Board would not be justified in striking from it a word which gives vitality to the end sought to be attained.

The addition of the certificate on the reverse of the sheet does not alter the situation. The record leaves no doubt that when accused returned with the certificate and signed it in the presence of Captain Glymph, that officer, in his desire to "make assurance doubly sure" interrogated accused as to his indebtedness to individuals. When accused gave the names of only the "four or five" persons to whom he claimed he was indebted (a statement which itself was false) and the amounts due to them, Captain Glymph added their names and the amounts on the back of the sheet, prepared an additional certificate to be signed by the accused in connection therewith, turned the document over to accused again with instructions to obtain the signatures of these creditors and personally to sign the additional certificate as well. In the opinion of the Board the record of trial shows conclusively that this second certificate was not intended to and did not supersede the first certificate but was resorted to merely as an added precaution. In short, accused had committed the offense of which he stands

convicted before the preparation of the second certificate.

The Board is of the opinion, therefore, that the record of trial is legally sufficient to support the finding that, with intent to deceive proper authority, accused made the false official statement that he had settled all his personal indebtedness, well knowing that this statement was false. However, there must be eliminated from the finding of guilty of Specification 1 the words "or made arrangements to effect settlement thereof prior to the 10th day of July 1944". By the express terms of paragraph 3, the alternative declaration as to the making of arrangements for the payment of debts, not already settled, prior to the 10th of the next succeeding month applies only to the "debts listed below", that is, on the face of the "Certificate of Clearance". As no debts were so listed the plain language of the paragraph may not be so extended as to make it apply to the debts described in the findings. The exception of these words, however, in no way affects the legality of the finding of guilty of this specification.

b. Dishonorable failure to pay his debts.

Within the second class above fall Specifications 2, 3, 5, 6 and 7. The dishonorable failure to pay a debt by one in the military service has long been held to constitute a violation of Article of War 96. Such conduct brings discredit upon the service. The mere failure to keep a promise to pay a debt is not a dishonorable act, however, unless the failure to pay is characterized by a fraudulent design to evade payment. A failure to pay is properly so characterized where, under all the facts, the effect of the failure is to compromise the honor of the officer concerned and the honor or credit of the military service. False promises, evasion, and unconscionable delay, when combined with failure to pay, have been held to constitute "dishonorable neglect" (CM 245026, 29 B.R. 108; CM 220760, 13 B.R. 61; CM 246905, 30 B.R. 209).

The evidence for the prosecution clearly showed that the accused borrowed various sums of money from enlisted men in his command. The amounts involved were considerable in comparison with the usual pay of an enlisted man. Accused admitted under oath that at the time of trial he still owed these enlisted men the amounts originally borrowed. Although these obligations were overdue at various times dating as far back as 25 March 1944 (the trial took place 5 September 1944), he made no apparent effort to repay any of them. This was true notwithstanding the receipt by him of his pay during this period of time. He continually made false promises of payment. His whole course of conduct was such that it was a fair and reasonable inference that he never intended to repay any one of these men, and that he was taking advantage of his superior rank to get money from his military inferiors. Such conduct was clearly prejudicial to good order and military

(150)

discipline. The evidence was ample to support the findings of guilty of these Specifications.

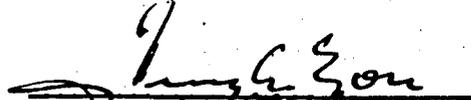
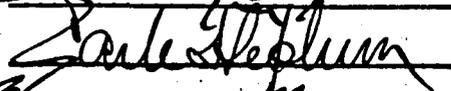
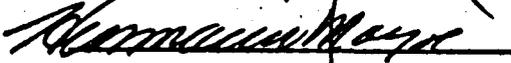
c. Borrowing from enlisted men.

Within the third class mentioned above fall Specifications 10, 11, 14, 15, and 17. The mere act of an officer borrowing money from an enlisted man is a violation of the 96th Article of War. Such an act is considered prejudicial to good order and military discipline (CM 122920, CM 130909; CM 246905, 30 B.R. 209; CM 230938, 18 B.R. 131).

The undisputed evidence showed beyond doubt that the accused on the dates and from the enlisted men named in the specifications borrowed the various sums alleged. All of these men were in the same military organization with the accused and subject to his command. Obviously they were in an unfavorable position either to refuse the loans or to enforce their repayment. All of the essential elements of the offense were shown by the evidence adduced as to each of the specifications under discussion.

6. War Department records show the accused to be 28 years of age and single. He graduated from high school and attended college for two years. He served in the Quartermaster Corps as an enlisted man from 10 August 1940 until 14 August 1942 when he was commissioned second lieutenant, Quartermaster Corps, Army of the United States.

7. The court was legally constituted and had jurisdiction of the accused and the offenses. 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 1 except the words "or made arrangements to effect settlement thereof on or prior to the 10th day of July, 1944," and legally sufficient to support the approved findings of guilty of the remaining Specifications and the Charge and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 96.

 , Judge Advocate.
 , Judge Advocate.
 , Judge Advocate.

SPJGK - CM 269792

1st Ind

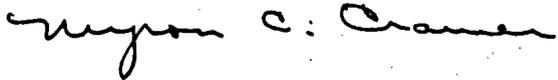
Hq ASF, JAGO, Washington 25, D. C., JAN 18 1945

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 Wiley B. Moore (O-1577591), Quartermaster Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty except the words in Specification 1 of the Charge "or made arrangements to effect settlement thereof on or prior to the 10th day of July, 1944," and the sentence as approved by the reviewing authority, and to warrant confirmation of the sentence. I recommend that the findings of guilty of the excepted words be disapproved, that the sentence as approved by the reviewing authority be confirmed, but that the confinement be reduced to two years; that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement, and that the sentence as thus modified be carried into execution.

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



3 Incls

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

MYRON C. CRAMER
Major General
The Judge Advocate General

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but confinement reduced to two years. G.C.M.O. 101, 24 Mar 1945)

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

(153)

SPJGN - CM 269866

2 APR 1945

UNITED STATES)

SIXTH SERVICE COMMAND
ARMY SERVICE FORCES

v.)

Second Lieutenant CHARLES
BURTON KUNZ (O-369519),
Infantry.)

Trial by G. C. M., convened at
Fort Sheridan, Illinois, 17-
19 August 1944. Dismissal,
total forfeitures and confine-
ment at hard labor for fifteen
(15) years.

OPINION of the BOARD OF REVIEW
LIPSCOMB, O'CONNOR and MORGAN, Judge Advocates

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Second Lieutenant Charles Burton Kunz, Infantry, 164th Infantry, did, at San Francisco Port of Embarkation, Fort Mason, California, on or about 19 April 1942, desert the service of the United States and did remain absent in desertion until he was apprehended at Chicago, Illinois, on or about 17 March 1944.

The accused, after stating that he desired to be defended by the defense counsel, the assistant defense counsel, and Mr. John D. Bleeker, attorney of the Minneapolis, Minnesota, bar, as individual defense counsel, elected to stand mute, whereupon the president of the court directed that a plea of not guilty be entered for him as to both the Charge and the Specification thereunder. The accused then entered a special plea of the statute of limitations to the offense of absence without leave which was a lesser included offense within the Specification alleging desertion. This plea was overruled by the court and the accused was found guilty of both the

Charge and the Specification 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 the term of his natural life. The reviewing authority approved the sentence, but reduced the period of confinement to fifteen years, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that the accused was an emotionally immature individual, who had read widely and indiscriminately in the fields of philosophy, economics, and political science and had in the process acquired a confused, unorthodox, and radical philosophy of government and society (R. 119, 160-162, Pros. Ex. 1-P, 1-Q, 1-X, 1-Y, and 1-Z). He was a second lieutenant in the Officers Reserve Corps and was called to active duty in February of 1942. After completing a five weeks' refresher course at Santa Rosa, California, he was ordered, about mid-March, 1942, to report to Fort Ord, California. He went to San Francisco instead and was there joined by a young lady who, accompanied by her mother, had come from Minnesota to marry the accused. The marriage took place on 21 March 1942 and several days thereafter the accused reported to the military authorities, not at Fort Ord, but at Santa Rosa. In view of his unauthorized absence, he expected to be tried by court-martial and was disappointed when the only punishment meted out was a two weeks' period of restriction. He believed that a court-martial trial might provide an audience before whom he could state his conscientious political objections to participating in "this type of war" and his desire to be assigned to a branch of the service which could make use of his scientific training. (R. 24, Pros. Ex. 1-R, 1-cc; R. 306, Pros. Ex. 10). From Santa Rosa he was sent to Fort Ord and, on 4 April 1942, was ordered to proceed to the San Francisco Port of Embarkation, Fort Mason, California. After reporting there, he absented himself without leave from that station on 19 April 1942 (R. 277, Pros. Ex. 6; R. 278, Pros. Ex. 7; R. 306, Pros. Ex. 10). He and his wife traveled by bus to Chicago, Illinois, and while en route, the couple stopped at Davenport, Iowa, where the accused removed his uniform and dressed in civilian clothes (R. 278, Pros. Ex. 7; R. 306, Pros. Ex. 10). Later, in recounting these events, the accused said:

" * * * I had fully made up my mind to leave the armed forces and to remain a civilian until my awaited and expected apprehension should take place. My decision to remain a civilian was due to my reasoning that if I returned voluntarily, it would only be a repetition of the two previous instances at which times I was incarcerated and at which times I was unable to obtain a trial. My further reason for leaving camp was that I knew that Fort Mason was an embarkation port and that as such I would soon be going overseas without having received the benefit of trial. At the time I did not see my way clear of continuing as a soldier because

it appeared that I would not be successful in obtaining a hearing * **." (R. 306, Pros. Ex. 10).

After arriving in Chicago, the accused obtained employment as a research physicist with the Visking Corporation. In his application for this position, he stated that his military status was "Reserve Officer - Rejected on physical examination". His physical disabilities were listed as "flat feet" and "allergies affecting sinuses" (R. 286, Pros. Ex. 8). The accused worked for the Visking Corporation from 25 May 1942 until 16 March 1944 and during this period he dressed in civilian clothes, but made no apparent effort to hide his identity. His services were regarded as "very satisfactory" and he received two increases in salary (R. 238, 289). In the early morning hours of 17 March 1944 the accused was apprehended by Special Agents of the Federal Bureau of Investigation at his residence in Chicago. He was attired in pajamas and bathrobe at that time but dressed in civilian clothes. The day following his arrest the accused was placed in the custody of military authorities (R. 295-301).

4. The Defense Counsel, at the outset of the trial, raised the question of accused's sanity "at the time of and throughout the continuation of the offense charged, or on 19 April 1942, and from 19 April 1942, up to and including 17 March 1944" (R. 14). This issue had been anticipated by the prosecution and considerable evidence was adduced pertinent thereto.

The medical experts who examined the accused considered his background and the events of his early life of primary importance in their diagnosis, relying for their information upon a so-called "Psychiatric Social History," which was concededly accurate and which was admitted into evidence without objection (R. 24, Pros. Ex. 1-r, 1-cc). This comprehensive report shows that the accused was one of four brothers and the son of a prominent banker in Minneapolis, Minnesota. His early home life was clouded when the accused's mother began to manifest symptoms of mental disorder in the form of delusions and hallucinations. By the time the accused was eight years of age she was admitted to the Minnesota State Hospital as a victim of dementia praecox. There followed an unhappy period for the accused during which he was lonesome for the affection of his mother. This desire for a mother was supplied neither by the housekeepers, whom his father employed, nor by his father, who apparently devoted more attention to his business than to his home. The accused lived at home while attending preparatory school and the University of Minnesota. From this latter institution he was graduated with the degree of Bachelor of Physics in December 1941. His home had become an increasingly unhappy place, particularly since the remarriage of his father in 1937. While a student at the University of Minnesota, he had few friends and declined to join a social fraternity. He took no part in extra curricular activities and became completely absorbed in his studies which included the social sciences as well as difficult courses in Physics, Engineering, Mathematics, and Chemistry. Apparently the only person with whom he became friendly while at college was the young lady to whom he was subsequently married. A devout member of the Catholic Church in his early years, the accused while in college rejected his religion for

agnosticism and took the position that his scientific mind would allow him to accept only those precepts which could be substantiated by proof. Always the serious-minded student, he made a study of social reforms and developed many so-called "radical" ideas in the fields of political science and sociology. He became "aloof, hypercritical and markedly introverted" (R. 24, Pros. Ex. 1-P). His commission in the Officers Reserve Corps came as a result of his training as a cadet in his preparatory school.

A few days after his arrest as an alleged deserter he was admitted to the Station Hospital at Fort Sheridan, Illinois, for a mental and neurological examination and for observation. The clinical record there reveals that at the time he entered the hospital the accused was suffering from no delusions or hallucinations; that he was well oriented for time, place, and person; that his insight and his memory for recent and remote events were good; and that his intellect was commensurate with his education (R. 24, Pros. Ex. 1-p). The Board of Medical Officers which convened at Fort Sheridan to examine the accused initially found, however, that on 19 April 1942 the accused was not free from mental derangement so as to be able to distinguish right from wrong and adhere to the right concerning the offense of desertion and that this condition prevailed until some time after his admission to the Fort Sheridan Hospital. His mental condition was found to be "Schizophrenia, Simple Type" from which he had so far recovered that, at the time of the examination on 2 June 1944, he was free from mental defect (R. 24, Pros. Ex. 1-k). The Board subsequently announced that its original diagnosis was possibly based on "false premises" and modified its findings to state that the accused, when he left the Army and throughout the period of alleged desertion, was "probably" unable to distinguish between right and wrong or adhere to the right (R. 27; R. 24, Pros. Ex. 1-e). However, Major Perry V. Wagley, who was Chief of Psychiatry at Fort Sheridan and who acted as President of the Board, testified that his original opinion as to the mental incompetence of accused remained unchanged (R. 26). Conceding the difficulty of accurate diagnosis in the absence of examination at the time of the alleged offense, Major Wagley pointed out that dementia praecox or schizophrenia, which are interchangeable terms, may result either from intellectual or emotional illness. In its "simplex type", from which the accused suffered, the disease is characterized by emotional rather than intellectual deterioration (R. 58). Having never recovered from the emotional shock caused by his mother's insanity and absence from home, the accused underwent a personality change and began to develop certain schisoid tendencies manifested by his inclination toward reclusion and the transition of his interest from religion to science. Other symptoms significant to Major Wagley when he observed the accused were his slovenly habits, his disorganized thinking, his dull emotional reactions, his moist hands, and the dilated pupils of his eyes (R. 25, 27; R. 24, Pros. Ex. 1-g).

Major Wagley apparently conceded that the accused was unimpaired intellectually when he testified that the disease "does not affect his

mind in so far as intelligence is concerned" and "intellectually this boy is as normal as he has ever been, as far as mentality is concerned, but emotionally he has definitely shown deterioration" (R. 35, 50). A person so suffering may appear to be normal for an extended period, during which the disease is in a state of remission, but the occurrence of a disturbing situation may bring a repetition of the "schizophrenic episode" (R. 56). Major Wagley believed that the accused was going through such an episode at the time he turned from the Catholic Church. A period of remission was experienced soon after the accused entered the Station Hospital at Fort Sheridan, when the symptoms of the disease disappeared and the accused "was clear, oriented and seemed to be controlling his emotional makeup" (R. 62).

On 14 June 1944, the accused was transferred to Gardiner General Hospital, Chicago, Illinois, for further examination and observation. He took several tests there which indicated a high degree of intelligence and "good contact with reality". His performance "I. Q." score was 138. Contrary to the findings of the Board at Fort Sheridan, a board of officers at Gardiner General Hospital found that there was no evidence indicating that the accused was ever insane or unable to distinguish right from wrong, but that he was mentally competent and responsible for his acts both presently and at the time of the alleged offense (R. 24, Pros. Ex. 2c-2g).

Returning to Fort Sheridan, he again came under the observation of Major Wagley who noted that the symptoms of dementia praecox had reappeared and that the accused had "reverted to his same pattern and he has been that way since" (R. 62). This recurrence could be explained, according to Major Wagley, by possible dissatisfaction at the treatment received at Gardiner General Hospital or by the imminent prospect of facing trial (R. 65).

Colonel William J. Bleckwenn, Neuropsychiatric Consultant for the Sixth Service Command, personally observed and examined the accused and also studied the clinical data, hospital records, and other informational documents comprising the history of his case. Conceding that Major Wagley's diagnosis of schizophrenia is suggested by the accused's medical and social history, Colonel Bleckwenn believed that the events in accused's life which were pointed to in support of the diagnosis were not, in reality, schizoid in character. Thus, it was not necessarily abnormal that the accused should want to escape from an unhappy home and that he should seek refuge in an absorbing study of the natural sciences, philosophy, and sociology. His departure from the faith of his youth might be explained not only by a growing interest in other intellectual pursuits but also by the fact that the young lady of his choice was not a member of the Catholic Church. The accused believed that life with his prospective wife would be normal and wholesome and would thus supply the deficiencies of his early years at home. This prospect was abruptly

ended by accused's call to active duty and "real conflict" began to develop, principally because he faced service in the Infantry, which was not only obnoxious to him, but which would fail to utilize his scientific and technical training. In an attempt to escape from such service, the accused called himself a "conscientious objector", stating that his philosophy had no place for "narrow nationalism" and that "war never solved any international problem permanently". Disappointed at his failure to obtain a release from the Infantry, and despondent at the prospect of imminent overseas duty and of separation from his bride, the accused, according to Colonel Bleckwenn, deliberately left the service and established himself in a civilian position, which he filled successfully. He was living happily with his wife and baby when, some twenty-three months after he left the army, he was apprehended and returned to military control.

All of the foregoing events, in the opinion of Colonel Bleckwenn, merely indicated a desire by the accused to avoid unpleasant and un congenial situations. This was not attributable to schizophrenia or any form of psychosis, but rather to emotional immaturity resulting from the experiences of an unhappy home life (R. 93, 95, 119; R. 24, Pros. Ex. 3a-3d). Colonel Bleckwenn pointed out that the recovery of accused, which was stated to have been effected soon after his admission to the Fort Sheridan Hospital and apparently without treatment, was so spontaneous as to indicate that he had never suffered from dementia praecox (R. 103, 104). Colonel Bleckwenn therefore concluded that both presently, and at the time of the alleged desertion, the accused was sane, could distinguish right from wrong, and could adhere to the right (R. 87).

This opinion was shared by Lieutenant Colonel Willoughby P. Richardson, chief of psychiatry at Gardiner General Hospital (R. 144, 145, 169). The accused, according to Lieutenant Colonel Richardson, was mal-adjusted to society, but this condition was due, not to psychosis or any mental derangement, but rather to the inadequacy of home and social environment and was "within normal limits" (R. 171).

5. Appearing as the first witness for the defense on the issue of the accused's sanity was his father, Mr. Jacob A. Kunz. His evidence indicated that the accused as a child played with other boys, but developed a tendency toward seclusion as he grew older so that by the time he attended college "he would always want to be by himself" (R. 191). The accused studied so hard at the University of Minnesota that his eyes often became "poppy" with the pupils dilated and at times he had a "staring look" (R. 191).

Doctor William H. Haines and Doctor Harry R. Hoffman, both eminent psychiatrists of Chicago, are convinced that the accused was, on 19 April 1942 and is now, a victim of dementia praecox. They put no little weight on the tendency of the disease to run in families and pointed significantly to the condition of the accused's mother which had persisted

for many years. They, too, considered his absorption in studies and reading and his apostasy from the Catholic Church, and agreed with Major Wagley that these acts indicated a schizoid make-up. Given this schizoid pattern, the "powder and fuse" being present, a deep emotional disturbance was set off by the prospect of extensive service overseas in the Infantry (R. 218). Whereas Colonel Bleckwenn considered that the accused's flight from this unpleasant situation was merely the result of emotional immaturity, Drs. Haines and Hoffman concluded that, when the accused left the Army, he was suffering from an "episode of schizophrenia" which was manifested chiefly by emotional dullness. Thus, significance is attached to the strange behavior of the accused when his intended bride came to California for their marriage. Instead of greeting her when they met, he merely "stared in her face" and seemed to be "in a trance" (R. 24, Pros. Ex. 1-aa; R. 253). Dr. Haines noted that the accused, while being examined, was "practically emotionless" showing no regard for his present serious situation. When Dr. Hoffman informed the accused that the death penalty might be imposed in his case, "there was no show of emotion" (R. 208, 261).

Dr. Haines and Dr. Hoffman, following the same rationale as did Major Wagley, considered the accused emotionally rather than intellectually sick. Thus, Dr. Hoffman thought the accused "perfectly well oriented for time, place and person. He knew where he was at. He knew the charge against him. He knew the fate impending, but it is the feeling, the emotional side" (R. 271). According to Dr. Hoffman, an emotional disturbance may be sufficiently severe to cloud the intellect or reasoning, otherwise normal, to such an extent that the power of choice is materially reduced. The behavior of the accused was a matter of choice but it "was not the power of choice that is fitting to a boy in his standard of life; of a family of culture; a college man; never came in conflict with the law; temperate in his habits; and of average and superior intelligence by psychological tests" (R. 272). Both Doctor Haines and Doctor Hoffman considered the symptoms of dementia praecox so strong at the time the accused allegedly deserted the service on 19 April 1942 that, in their opinion, he could not distinguish between right and wrong and adhere to the right (R. 205, 245). Dr. Haines believed that this condition persisted throughout the period of the alleged desertion, pointing out that the accused made no effort to conceal his identity while posing as a civilian, but that nevertheless he preferred to work alone and engaged in no social activities, but spent his evenings reading and studying at home (R. 206, 207). It never occurred to the accused, in the opinion of Doctor Hoffman, that a big city was the best place to hide, because "his intelligence was so colored by his emotional state that he could not exercise that". The accused could nevertheless work successfully as a physicist for nearly two years (R. 273). Agreeing with Dr. Haines that the accused suffered from dementia praecox throughout the period of the alleged absence, Dr. Hoffman, when asked whether the accused was then able to distinguish and choose between right and wrong, stated "That would be difficult to answer without reservations" (R. 246). When questioned further, however,

(160)

he testified that in his opinion the accused could not, during the time in question, adhere to the right as to the offense charged (R. 268).

6. The specification of the Charge alleges that the accused "did, at San Francisco Port of Embarkation, Fort Mason, California, on or about 19 April 1942, desert the service of the United States and did remain absent in desertion until he was apprehended at Chicago, Illinois, on or about 18 March 1944". This offense was set forth as a violation of Article of War 58.

The record clearly established the absence of the accused from military service during the period alleged. Admitting that the absence was unauthorized, the accused made it clear that he did not intend to return voluntarily but would remain a civilian until his "expected apprehension" should be effected (R. 306, Pros. Ex. 10). Pursuant to this avowed purpose, the accused went to Chicago and obtained residence for himself and his wife. After falsifying his military status, he procured civilian employment and worked in civilian clothes at the same job until his apprehension which ended a period of 23 months' absence from the Army.

Conceding the truth of these facts, the defense maintained that the accused, because of mental disease, was not accountable for his acts and should not now be held legally responsible for the alleged desertion. In view of this contention and the testimony concerning the accused's mental condition the burden devolved upon the prosecution to prove, beyond a reasonable doubt, and as an incident to the ultimate issue of guilt, that the accused was "so far free from mental defect, disease or derangement as to be able concerning the particular acts charged both to distinguish right from wrong and to adhere to the right" (5th sub-paragraph, 78a, p. 63, MCM, 1928).

There are persuasive circumstances which suggest to the lay mind that the accused, at the beginning of and throughout the period of the alleged desertion, was in full possession of his faculties and quite able to determine his course of conduct. Prior to 19 April 1942, upon returning from a period of unauthorized absence, he expected to face trial by court-martial for his dereliction. This state of mind indicated a realization that he had committed a breach of the military code and contemplated punishment therefor. When, two weeks later, he allegedly deserted the service, it appears that his thoughts on the subject were just as clear. Stating that he had "fully made up his mind" to leave the armed forces, the accused spoke of his "decision" to remain a civilian and reviewed the "reasoning" upon which he reached that decision. He explained that he left the service because he was about to be sent overseas without an opportunity to state his objections to "this type of war" and his case as a "conscientious objector". The accused meant his conscientious political objections against participating in the war rather than religious objections. This explanation was consistent with his political views. Significant also to the layman is the fact that the accused misrepresented his military status when he applied for civilian employment, thus reveal-

ing a design to cover up his absence from the service and to preclude further inquiry on that score. He adjusted himself to life in Chicago, working successfully as a physicist, and apparently encountering and resolving the problems usually incident to one's home and one's work.

In the face of the foregoing facts, which are strongly indicative of sanity and mental accountability, three psychiatrists maintained that the accused suffered from dementia praecox and, as a result, could not distinguish between right and wrong and adhere to the right. Their testimony, however, revealed that the mere presence of the disease did not necessarily have such a disabling effect on its victim as to relieve him of mental accountability for his acts. Dr. Haines indicated that dementia praecox, in its simplex type, is very prevalent and so difficult to diagnose that the average physician, other than the psychiatrist, will not detect its presence. Furthermore, Dr. Haines believed that those who became apostates after having been reared as devout members of the so-called "ritualistic" Churches, such as the Catholic, Episcopal, and Lutheran, will in "practically 100% of those cases, turn out to be praecoxes". It is difficult to accept the conclusion that a person is relieved from responsibility for his acts by a mental disease which cannot be detected by the ordinary medical doctor and which can manifest itself simply by a change of religion.

According to Dr. Haines, a person may suffer from dementia praecox and, at the same time be mentally competent. His diagnosis of the accused at the time of trial was: "Dementia praecox. He knows the nature of the charge and is able to cooperate with his counsel". There was no contention that the disease was in a more acute phase at the time the accused left the service on 19 April 1942 than at the time he was examined by Dr. Haines and Dr. Hoffman. At both times a primary symptom, that of emotional dullness, was present and, according to their testimony, the lack of emotional response by the accused when his betrothed came to California indicated the presence of the disease. The same significance was apparently attached to his emotional inertia after his apprehension, and before trial. Since the disease was present, in the same degree, at both periods and since the accused was able to understand the nature of the charge against him at the time of trial and to participate in his defense, it seems logical to conclude that he could also have appreciated the nature and quality of his act at the time he allegedly deserted the service.

Dr. Hoffman believed that the reasoning powers of the accused were so affected by emotional illness that, on 19 April 1942, he "did not have the power of choice between right and wrong". When called on to explain this opinion, Dr. Hoffman conceded that the behavior of the accused in leaving the Army involved the exercise of choice. The fact that his behavior revealed a choice of conduct that would hardly be expected of one of his educational background and "superior intelligence" does nothing to weaken the proposition that the act of the accused in leaving,

and remaining absent from, the army was nevertheless the result of deliberate choice on his part. He realized that if he remained in the service he faced a future of duty overseas in the Infantry and separation from his wife. He also gave some thought as to what awaited him if he deserted the service, that is, civilian life and association with his wife until the time of apprehension for his act of desertion. The choice was his and, after considering the advantages and disadvantages, he elected to follow what seemed to him to be the more pleasant and attractive course. The fact that he expected to be discovered and punished for his infraction reflects a knowledge not only of what he was doing, but that it was wrong. The conclusion is warranted, therefore, that his deliberations show freedom of intellectual choice and an ability to adhere to the right.

Diametrically opposed to the opinions expressed by Major Wagley and Doctors Hoffman and Haines, were the opinions expressed by Colonel Bleckwenn and Lieutenant Colonel Richardson. The latter two witnesses, although ready to admit that the accused was maladjusted to society, expressed the definite opinion that the accused's maladjustment was within normal limits. Colonel Bleckwenn expressed the opinion that the events in the accused's life which were particularly pointed to by Doctors Hoffman and Haines and Major Wagley in support of their diagnosis, were not, in reality, schizoid in character. He explained that it was not necessarily abnormal that the accused should want to escape from an unhappy home and that he should seek refuge in the absorbing study of natural sciences, philosophy, and sociology. Similarly, the accused's departure from the faith of his youth might be explained not only by his developed interest in intellectual pursuits but also by the fact that the young lady of his choice was not a member of the Catholic Church. In his opinion the accused's belief that life with his prospective wife would offer escape from the deficiencies and unhappiness of his earlier years at home caused him to face a "real conflict" when called upon for military service abroad. The evidence shows that the accused regarded service in the Infantry not only as obnoxious to him because of his political philosophy but as a service which failed to recognize and utilize his scientific and technical training. In the opinion of Colonel Bleckwenn the accused's disappointment because of his failure to obtain a release from the Infantry, his despondency at the prospects of imminent overseas duty, and his reluctance to leave his bride, caused him deliberately to desert the service. This explanation appears to be sound in logic and in accord with common experience in life.

When the expert testimony is reviewed as a whole, and considered in the light of all the attending circumstances, we are compelled to the conclusion that it shows beyond a reasonable doubt that the accused at the time of his alleged desertion and during the time that he remained in desertion was "so far free from mental defect, disease, and derangement as to be able concerning the particular acts charged both to distinguish right from wrong and to adhere to the right". Accordingly, the record is legally sufficient to sustain the findings of guilty and the sentence.

7. The records of the War Department show that the accused is approximately 28 years of age. He attended St. Thomas Military Academy at St. Paul, Minnesota, for four years and became qualified there for a commission in the Officer's Reserve Corps which he received on 31 May 1938. He thereafter attended the University of Minnesota for four years. On 16 March 1942 he was assigned to the 164th Infantry, Fort Ord, California. On 6 April 1942 he was transferred to San Francisco Port of Embarkation, Fort Mason, California.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence. Dismissal is authorized upon conviction of a violation of Article of War 58.

Abner E. Lipscomb, Judge Advocate.

Robert J. Clann, Judge Advocate.

Samuel Morgan, Judge Advocate.

(164)

SPJGN-CL 269866

1st Ind

6 APR 1945

Hq ASF, JAGO, Washington 25, D. C.

TO: The Secretary of War

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Charles Burton Kunz (O-369519), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but that the forfeitures be remitted and the period of confinement be reduced to ten years and 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. In view of the difficult question which was raised in the trial of this case concerning the sanity of the accused, the entire record was transmitted to the Surgeon General with the request that it be examined in his office and that he give me his opinion concerning the sanity or insanity of the accused. In response to this request a report was received from the Surgeon General, as follows:

"1. The record of trial including the reports of the two boards of medical officers and other evidence in the case of Second Lieutenant Charles B. Kunz was carefully reviewed in this office. The following opinions are rendered on the basis of the evidence presented:

a. The accused at the time of the alleged offense was so far free from mental defect, disease or derangement as to be able, concerning the particular acts charged, to distinguish right from wrong.

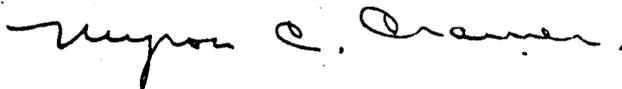
b. The accused at the time of the alleged offense was so far free from mental defect, disease or derangement as to be able, concerning the particular acts charged, to adhere to the right.

c. The accused at the time of his trial was sufficiently sane to intelligently conduct or cooperate in his defense."

4. Mr. John D. Bleeker, civilian counsel for the accused, accompanied by Mr. Jacob A. Kunz, the father of the accused, presented an argument

to the Board of Review on behalf of the accused. Honorable Joseph H. Ball of the United States Senate also presented an argument on the accused's behalf to the Board of Review. Consideration has been given to a letter from Honorable Harold Knutson and to a letter from his Secretary, and to a letter from Mr. J. A. Kunz.

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



MYRON C. CRAMER
Major General
The Judge Advocate General

6 Incls

1. Rec of trial
2. Drft of ltr for sig
S/W
3. Form of Action
4. Ltr fr Hon Harold Knutson
5. Ltr fr Sec to Hon Knutson
6. Ltr fr Mr J A Kunz

(Sentence confirmed but forfeitures remitted and confinement reduced to ten years. G.C.M.O. 208, 11 Jun 1945)

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

(167)

SPJGQ
CM 270040

27 DEC 1944

U N I T E D S T A T E S)	CAMP HAAN, CALIFORNIA
)	
)	Trial by G.C.M., convened at
)	Camp Haan, California, 28
)	November 1944. Dismissal,
First Lieutenant RODERICK)	total forfeitures, and con-
MALCOLM McKINNON (O-1533630),)	finement for two (2) years.
Medical Administrative Corps.)	

 OPINION of the BOARD OF REVIEW
ANDREWS, FREDERICK and BIERER, Judge Advocates.

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

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

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

Specification: In that 1st Lieutenant Roderick Malcolm McKinnon, SCU 1967, Camp Haan, California (then Army Service Forces Personnel Replacement Depot, Camp Beale, California) did without proper leave absent himself from his station at Camp Beale, California, from about 15 June 1944 to 12 October 1944.

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

Specification: In that 1st Lieutenant Roderick Malcolm McKinnon, SCU 1967, Camp Haan, California (then Army Service Forces Replacement Depot, Camp Beale, California) did at Laguna Beach, California, on or about 7 June 1944, wrongfully, unlawfully, and bigamously marry Martha Elliott Hudgins, having at the time of his said marriage to Martha Elliott Hudgins, a lawful wife then living, to-wit: Frederica Mozart Whitworth McKinnon.

He pleaded not guilty to and was found guilty of the Charges and Specifications. No evidence of previous conviction was introduced. He was sentenced to dismissal, forfeiture of all pay and allowances due or to

(168)

become due, and confinement at hard labor for five years. The reviewing authority approved the sentence, remitted three years of the confinement, 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 is as follows:

Accused is a member of the military forces of the United States (R. 7). On 15 March 1942, he and Frederica Mozart Whitworth were married in Pulaski County, Arkansas (Ex. 6). At the time of trial and during the month of June 1944, she was his lawful wife, the marriage being in force and not dissolved (Ex. 9).

In May 1944 accused was on duty at the Prisoner of War Camp, Papago Park, Arizona, and on the twentieth of that month he was relieved from duty there and assigned to shipment RP-222(d). He was ordered to proceed to the Army Service Forces Personnel Replacement Depot, Camp Beale, California, so as to arrive there by 15 June 1944, to await the call of the commanding officer of a port of embarkation for transshipment to a permanent station, tropical climate, outside the continental limits of the United States (Ex. 1). Evidently in contemplation of his overseas assignment, he was granted a leave of absence for fourteen days by orders emanating from the headquarters of the Prisoner of War Camp, effective on or about 1 June 1944. At the expiration of the leave he was to report to Camp Beale (Ex. 2).

The morning report of the Officer Replacement Battalion, Army Service Forces Personnel Replacement Depot, Camp Beale, California, shows accused absent without leave 16 June 1944 (Ex. 3). He was returned to military control at the Presidio of San Francisco, California, on 12 October 1944 (Ex. 4).

Martha Elliott Hudgins, referred to by accused and in this opinion as "Mrs. Hudgins", resided in Laguna Beach, California (R. 10). Apparently she was either a widow or a divorcee. She first met accused during the afternoon of 2 June 1944 at the Rendezvous Room, a cocktail lounge in the Biltmore Hotel, Los Angeles, California (R. 10, 12, 15). In her opinion there was nothing to indicate that accused had been drinking prior to their meeting (R. 12). Later in the day, accused asked her to marry him and she accepted (R. 10, 14). She did not testify with reference to the details of the proposal. Her testimony relating to accused's consumption of liquor and his condition is somewhat vague and confusing. She testified that while they were having "this discussion", she did not notice any drinking "from time to time" by accused. On the other hand, she testified that on the day of the proposal, accused had some drinks, but that she did not know the "exact amount" (R. 12). Asked whether accused was drunk

when he proposed, she replied: "Nothing could be further from my opinion", yet in answer to the question, "Then your opinion is that he was not drunk?", she stated: "That I cannot tell. I do believe that his judgment may have been affected by alcohol" (R. 15). However, his walk was "straight" and his talk "cohesive" (R. 15).

Mrs. Hudgins did not see accused on the morning of Saturday, 3 June, but they met in the afternoon, at which time she did not notice anything indicating that he had been drinking. In the afternoon they went to Laguna Beach to speak to Mrs. Hudgins' mother about the contemplated marriage (R. 10-12). Apparently referring to that day, Mrs. Hudgins testified that "at all times" accused's "personal demeanor and dignity" were such that she never questioned his sobriety (R. 18). After the interview with Mrs. Hudgins' mother, the details of which do not appear in Mrs. Hudgins' testimony, the couple went to an attorney's office, where accused executed a will and power of attorney in Mrs. Hudgins' "favor" (R. 11).

On Sunday, 4 June, they went to Mrs. Hudgins' physician for the purpose of having blood tests made (R. 11). Accused was not drunk at that time (R. 15). In the afternoon they attended several cocktail parties in Laguna, given by various friends of Mrs. Hudgins, at which affairs accused "partook of considerable quantities of alcohol" (R. 16). They were invited to dinner that evening, but accused was unable to go because of "illness". In retrospect, Mrs. Hudgins thought that perhaps accused's inability to attend the dinner party resulted from "intoxication" (R. 13).

On Monday, 5 June, they went to the county clerk's office and obtained a marriage license (R. 11, 15). Accused was not drunk at that time (R. 15). Then they returned to Los Angeles, where Mrs. Hudgins wanted to buy some clothes (R. 14).

Mrs. Hudgins testified rather vaguely that accused was "under the influence of alcohol" between 2 and 7 June (R. 17), but it is apparent from her more specific testimony that she did not consider this a continuous condition.

On Wednesday, 7 June, they drove back to Laguna Beach, where, in the evening, they were married by Captain Robert E. Carroll, Chaplain, United States Naval Reserve. The ceremony took place at Manzanita Gardens, a hotel (R. 11, 13, 14; Exs. 5, 7). Mrs. Hudgins believed that "on the way back" (apparently referring to the drive to Laguna Beach), accused "had a couple of drinks". Directly before the ceremony, he "seemed to be very jittery and upset" (R. 13). At the time, Mrs. Hudgins did not think that accused was "under the influence of alcohol", although looking back on the occasion, she thought that he might have been. However, in her opinion a normal

(170)

individual consuming the amount of liquor which she saw accused drink, should not have been drunk (R. 14). Mrs. Hudgins asked the chaplain whether accused was "all right", and the chaplain replied that the bridegroom is frequently very nervous (R. 13).

After the wedding ceremony, there was a reception given by the Service League of St. Mark's Church (R. 11). The couple spent the night at the Manzanita Gardens, and on the next day, 8 June, went to the Hollywood Plaza Hotel, Hollywood (R. 13). During the period subsequent to the wedding, they "lived together" as husband and wife (R. 11, 15), and accused was "drunk on many occasions", "showed many evidences of being intoxicated", "was practically under the influence of alcohol continuously" from 8 June to 11 June, and "was very much upset" (R. 15, 16). He "absented himself for periods during the daytime" (R. 16).

On 11 June, accused left Hollywood, telling Mrs. Hudgins that he was under orders to report to Camp Beale (R. 13, 14). That was the last time she saw him (R. 16). In her opinion, at the time of his departure he "might well have been suffering from the effects of alcohol" (R. 15).

On 17 October 1944, the marriage between Mrs. Hudgins and accused was declared null and void by the Superior Court of California for Orange County (in which Laguna Beach is located), on the ground that, at the time of the marriage, accused had another wife living and undivorced (Ex. 8).

4. The defense did not question accused's sanity (R. 18). It was stipulated that Captain Charles Selden, Medical Corps, was "a qualified expert" and "head of the neuropsychiatric section in the absence of Major Jones", and that had he been called as a witness, he would have testified as follows:

"This officer worries readily over his work if it doesn't go right. He appears rather tense & anxious & shows marked vasomotor instability with cold and clammy hands with a coarse tremor of the extended hands & protruded tongue. The knee jerks & ankle jerks are equal & hyperactive. He is rational, friendly, cooperative, but is very restless & circumstantial in his speech. There are no obsessions or compulsions.

"Diagnosis: Psychoneurosis, unclassified, moderate, manifested by tension, vasomotor instability, chronic alcoholism & restlessness. If it can be determined that the officer was deeply under the influence of liquor at the time, he would be irresponsible for his acts. He was a model soldier & officer up to that incident." (R. 18, 19).

It was also stipulated that "Lieutenant" M. D. McFarland, Medical Corps, Hammond General Hospital, Modesto, California, was a qualified expert, and that on 8 March 1943 he made the following diagnosis of accused:

"Psychoneurosis, anxiety type, moderate, manifested by anxiety and the use of considerable alcohol;"

and that this diagnosis was made on the basis of treatment at the Hammond General Hospital from 22 February 1943 to 8 March 1943 (R. 19).

Accused testified as follows:

Frederica McKinnon is alive and at all pertinent times, including the time of trial, was accused's lawful wife (R. 21, 26).

In the early part of May 1944, accused requested "overseas assignment" (R. 20, 25). His request was not official, but took the form of a "personal letter" to a friend in the Ninth Service Command Surgeon's Office, stating that accused would appreciate it if his friend "could do anything towards effecting the transfer". Between 15 and 20 May, accused received orders assigning him for overseas shipment and directing him to report at Camp Beale on 15 June 1944 (R. 20, 25). He thought that he was "destined to overseas duty" (R. 25), and made an allotment of \$175 per month to his wife (R. 20-21, 26). Granted a leave of absence effective on or about 1 June and terminating at midnight 14 June, accused left Papago Park on 1 June and proceeded to Los Angeles, where he arrived on the morning of 2 June (R. 20, 21). He felt "rather jittery", "had a few drinks", engaged a room at the Lankershim Hotel, and had "another bottle of whiskey" brought to his room (R. 21).

After a few more drinks he went over to the Rendezvous Room at the Biltmore (R. 21). After leaving his hotel room, he had nothing stronger than beer, because it was "out of hours" (R. 22). He noticed two girls and a man sitting at a table. Subsequently, the man and one of the girls left (R. 21). Accused was "looking for an unattached girl", and the girl remaining at the table "seemed to be the only one" (R. 26). As a consequence, he went to her table and asked her for a dance. The girl in question was Mrs. Hudgins (R. 21). This meeting occurred between 3 and 4 p.m. (R. 22, 26).

Asked whether he was "under the influence of liquor" at the time, accused testified, "I had been drinking". With reference to the effect of liquor upon him, he testified that "on occasion" it affects his "memory for incidents and details", and that he has been told that he becomes "extremely dignified, and walk(s) straight and talk(s) straight" (R. 22).

At accused's suggestion, Mrs. Hudgins and he repaired to his hotel, where they drank some whiskey (R. 22). Although accused testified that the rest of the evening was "pretty hazy" and that he did not remember "the details" (R. 26), other parts of his testimony disclose a recollection of at least some of the events of the evening.

Accused "talked" Mrs. Hudgins "out of" an engagement which she had that evening, and she spent the evening with him. They "ordered up" another bottle and drank some more. Accused did not recall proposing marriage to, or having his proposal accepted by, Mrs. Hudgins (R. 22, 23). However, he testified that it was "obvious" that he must have proposed and that she must have accepted (R. 23). He remembered going to bed at a late hour (R. 26).

On 3 June, between noon and 3 p.m., he and Mrs. Hudgins went to Laguna Beach (R. 22, 26). Before leaving the hotel, he "had a couple" of drinks, and he put the bottle in his suitcase (R. 22). Asked the purpose of the trip to Laguna Beach, he testified that, at the time, it "sounded like a good idea" and that he "thought it would be fun down there" (R. 27). He did not remember their conversation en route and did not recall any conversation about getting married or about interviewing Mrs. Hudgins' mother "relative to" their marriage. His only recollection of the trip was that "it was a long time between drinks" (R. 27).

Arrived at Laguna Beach, accused waited in a hotel bar while Mrs. Hudgins went home and got her car, in which she then drove accused to the Manzanita Gardens Hotel, where she had reserved a room for him (R. 22, 27).

Concerning his consumption of liquor between 3 June and 7 June, accused testified that he "took a drink whenever circumstances permitted", that he consumed "considerable" alcohol, and that drinking was his "major consideration" (R. 23).

During the evening of their arrival at Laguna Beach, they visited the home of "Mr. and Mrs. Beach" (evidently friends of Mrs. Hudgins), where they had highballs and where, about 10 p.m., at accused's request, Mr. Beach "typed up" a will and power of attorney for accused (R. 23).

On 4 June, in the late morning, accused and Mrs. Hudgins called upon the latter's mother and talked to her about their contemplated marriage. Although Mrs. Hudgins' mother did not approve, by reason of the brief acquaintanceship of the couple, it was finally decided that they should go ahead with the wedding (R. 28-29). They had no drinks at the residence of Mrs. Hudgins' mother (R. 28).

Accused remembered going to the doctor's office for the blood test, but did not remember whether this occurred in Laguna Beach or in Santa Ana. He remembered obtaining the license but did not remember who "actually issued" it. He had been "drinking pretty steady all that time", and, so far as he recalled, remained at Laguna Beach until 8 June (R. 27, 29). The "next thing" he remembered about the marriage was that Captain Carroll, the chaplain, came into his bedroom and asked accused whether he "thought he could make it", to which accused replied that he thought he could if "Beach" would bring him another drink. Beach did so (R. 29).

Accused and Mrs. Hudgins were married at the Manzanita Gardens, Laguna Beach, on 7 June 1944 (R. 25, 30). Although accused remembered "going through" the ceremony, and "believed" that he knew he was being married, "there was great difficulty" in "prompting" him "for the correct answers" (R. 30).

After the marriage, the couple lived together as man and wife (R. 25). On 8 June, in the morning, they went to Los Angeles, where, after a day at the Chapman Park Hotel, they stayed at the Hollywood Plaza (R. 23, 27).

On 11 June, accused left Mrs. Hudgins and boarded a bus for Sacramento on the way to Camp Beale (R. 24, 30). However, he did not go to Camp Beale, because he "got cold feet" and the things he had done "began looming larger and larger", and although on two or three occasions he started toward the camp, he "didn't quite make it" (R. 24, 25). He did not turn himself in, but was apprehended (R. 30). His return to military control occurred on 12 October 1944 (R. 25).

Accused realized that there was no excuse or condonation for what he had done "as an officer of the United States Army", but hoped to be given an opportunity to continue in the Army, if necessary as a "private" (R. 24).

5. The evidence clearly supports the findings of guilty of the Charges and Specifications. While on leave, accused "picked up" Mrs. Hudgins in a cocktail lounge, proposed to her on the same day, and entered into a ceremonial marriage with her five days later despite the fact that he already had a wife, who was known by him to be living at the time and to whom he was still lawfully wed. After a four-day honeymoon, accused left for Camp Beale, where he had been directed to report pursuant to orders assigning him to duty outside the continental limits of the United States. However, through fear engendered by a realization of what he had done, he failed to report to Camp Beale or elsewhere, and eventually was apprehended. He was returned to military control on 12 October 1944. The record contains no account of accused's activities from the day of his departure for Camp Beale until his return to military control; but it is clear that from 2 June until the time of his departure

for camp on 11 June, he drank heavily and reached a stage described colloquially as the "jitters". Although there may have been times when his indulgence in alcoholic beverages resulted in temporary oblivion, it is clear that at various periods he was perfectly aware of what he was doing and entirely cognizant of events leading up to and including his "marriage" to Mrs. Hudgins. Indeed, there is evidence that during a substantial portion of the time he was not intoxicated at all. Neither the fact that his judgment may have been blunted by his excessive drinking, nor the fact that he suffers from psychoneurosis, constitutes a defense, and without doubt the offense of bigamy is properly charged in this case under Article of War 95 as conduct unbecoming an officer and a gentleman.

6. Some hearsay testimony was erroneously admitted in evidence, but the substantial rights of accused were not prejudiced thereby.

7. Attached to the record of trial is a letter recommending clemency. It is signed by five of the six members of the court and by the trial judge advocate, defense counsel, and assistant defense counsel. In the letter it is recommended that the confinement and forfeitures be remitted. The reasons prompting the recommendation appear in paragraph 3 of the letter, which reads as follows:

"The accused apparently indulged to excess in the use of intoxicating liquor during the period covered by the offenses of which he was convicted. While not a defense, this fact may properly be considered an extenuation. He apparently attained an excellent record as an enlisted soldier. In view of all the circumstances in the case, it is believed that clemency to the extent recommended, should be extended to the accused."

A letter from Martha Elliott (Mrs. Hudgins) is also attached to the record of trial. She asks for clemency because of accused's "excellent Army record"; of the contribution to the war effort which his record proves him able to make if allowed to re-enlist; of the fact that his judgment was "seriously and progressively impaired by the use of alcohol"; and of "his sincere resolve to rehabilitate himself and make all possible restitution".

A letter by accused, asking for clemency, is also attached to the record, seeking remission of the confinement in order that he may re-enlist in or be inducted into the Army of the United States. He asks further that the forfeiture of pay "be remitted in whole or in part", in order that he may "make restitution, in so far as possible, to all parties injured by" his "actions".

8. War Department records disclose the following information pertaining to accused: He is 35 years of age and married. He attended Fresno State College for 2½ years and the University of Southern California Dental College for three years, but was not graduated from either institution, although he received the degree of Bachelor of Science from the latter upon completing his sophomore year. In civilian life he did clerical and accounting work. He served as an enlisted man in the Army from 8 July 1940 until 25 July 1942, when, upon graduation from the Medical Field Service School, Carlisle Barracks, Carlisle, Pennsylvania, he was appointed second lieutenant, Army of the United States. He was promoted to first lieutenant on 11 August 1943. In recommending him for promotion, his commanding officer stated that his performance ratings from 8 August 1942 to 14 June 1943 were excellent and that he had "demonstrated initiative, force, and thoroughness in the dispatch of all duties assigned him". In 1941, while serving as an enlisted man, he was convicted by summary court-martial of absence without leave for four days in violation of Article of War 61.

9. The court was legally constituted and had jurisdiction of the person and of the subject matter. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty, to support the sentence as modified by the reviewing authority, and to warrant confirmation thereof. Dismissal is mandatory under Article of War 95 and authorized under Article of War 61. Penitentiary confinement is authorized for bigamy under Article of War 42 and Title 22, section 601, District of Columbia Code.

Fletcher R. Andrews, Judge Advocate.

Herbert B. Frederica, Judge Advocate.

(on leave), Judge Advocate.

(176)

1st Ind.

War Department, J.A.G.O., JAN 9 1945 - 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 Roderick Malcolm McKinnon (O-1533630), Medical Administrative Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty, to support the sentence as modified by the reviewing authority, and to warrant confirmation thereof.

3. Attached to the record of trial is a communication signed by five of the six members of the court, by the trial judge advocate, and by the defense counsel and assistant defense counsel, recommending that the forfeitures and confinement be remitted. There are also attached to the record of trial a letter from Martha Elliott Hudgins, with whom accused contracted the bigamous marriage, requesting clemency, and a letter from accused, requesting remission of the forfeiture of pay and the confinement, and expressing a desire to re-enter the Army. In a letter, a copy of which accompanies the record of trial, the reviewing authority expresses the opinion that adequate clemency has been extended to accused by the reduction of the period of confinement from five to two years. From the review of the Staff Judge Advocate it appears that on 29 July 1944 accused was apprehended in San Francisco, California, by the civil authorities, for issuing "bad checks" in the amount of "at least" \$300. He was placed on probation on 12 October after his father had made restitution. Psychiatric diagnoses of accused indicate that he is psychoneurotic and a chronic alcoholic. He has received ratings of "excellent" in the performance of his duties. Although undoubtedly he was drinking excessively from time to time during the period in question, he fully realized that he was contracting a bigamous marriage. This fact and his extended unauthorized absence at a time when he was under orders for foreign service disclose a lack of appreciation of the responsibilities and standards of conduct required of a commissioned officer. I therefore recommend that the sentence as modified by the reviewing authority be confirmed, but that the forfeitures be remitted, and that the sentence as thus modified be carried into execution. I recommend further that the United States Penitentiary, McNeil Island, Washington, be designated as the place of confinement.

4. In addition to the communications referred to above, consideration has been given to letters from R. M. McKinnon, Sr. (accused's father), Frederica Mozart McKinnon (accused's lawful wife), and Honorable Bertrand W. Gearhart, House of Representatives of the United States.

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

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

6 Incls.

- 1 - Record of trial
- 2 - Dft. ltr. for sig. S/W
- 3 - Form of action
- 4 - Ltr. fr. R. M. McKinnon, Sr.
dated 3 Dec. 1944
- 5 - Ltr. fr. Frederica Mozart
McKinnon, dated 19 Dec. 1944
- 6 - Ltr. fr. Congressman Gearhart
dated 11 Dec. 1944 with incl.

(Sentence as modified by reviewing authority confirmed but forfeitures remitted. G.C.M.O. 88, 22 Mar 1945)

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

(179)

SPJGH
CM 270061

8 JAN 1945

UNITED STATES)

FOURTH AIR FORCE)

v.)

First Lieutenant EUGENE
SHERIDAN (O-301574),
Air Corps.)

Trial by G.C.M., convened at
McChord Field, Washington,
6 and 9 November 1944. Dis-
missal, total forfeitures and
confinement for fifteen (15)
years. Disciplinary Barracks.

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

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

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

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

Specification: In that First Lieutenant Eugene Sheridan, Squadron "A", 464th AAF Base Unit, McChord Field, Washington, did, at McChord Field, Washington, between 29 April 1944 and 14 August 1944 feloniously embezzle by fraudulently converting to his own use Three Hundred Eight Dollars and Twenty-nine Cents (\$308.29) lawful money of the United States, the property of Squadron "A", 464th AAF Base Unit, entrusted to him by William G. Prince, Major, Air Corps, Commanding Officer of the aforesaid Squadron "A", 464th AAF Base Unit.

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

Specification: In that First Lieutenant Eugene Sheridan, * * *, did, without proper leave, absent himself from his command and station at McChord Field, Washington, from about 14 August 1944 to 9 October 1944.

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

Specification 1: In that First Lieutenant Eugene Sheridan, * * *, did, at McChord Field, Washington, on or about 12 August 1944, with intent to defraud, wrongfully and unlawfully make and utter to the Non-Commissioned Officers' Mess of McChord Field, Washington, a certain check, in words and figures substantially as follows, to wit:

NO. _____

FORT-LEWIS, WASH. 12 August 19

Pay to
the Order of Cash - - - - - \$100.00
100 and NO/100 - - - - - DOLLARS

To FORT-LEWIS-BRANCH
NATIONAL-BANK-OF-WASHINGTON
Fort-Lewis, Wash, 98-401

/s/ Eugene Sheridan
0301574

PUGET SOUND NAT'L BANK OF WASH.

and by means thereof did fraudulently obtain from the Non-Commissioned Officers' Mess, McChord Field, Washington, One Hundred Dollars (\$100.00), lawful money of the United States, he, the said First Lieutenant Eugene Sheridan, then and there well knowing that he did not have and not intending that he should have sufficient funds in or credit with the said bank for the payment of said check in full upon its presentation and that said check would not be paid by said bank upon presentation for payment.

Specification 2: Same allegations as Specification 1, except check dated 2 September 1944, payable to self for \$50, and uttered to Wacker Drive Currency Exchange, Chicago, Illinois.

Specification 3: Same allegations as Specification 1, except check dated 9 September 1944, payable to self for \$20, and uttered to City National Bank and Trust Co., Chicago, Illinois.

Specification 4: Same allegations as Specification 1, except check dated 16 September 1944, payable to cash for \$20, and uttered to First National Bank of Chicago, Chicago, Illinois.

Specification 5: Same allegations as Specification 1, except check dated 23 September 1944, payable and uttered to Knickerbocker Hotel Co. for \$15.

Specification 6: Same allegations as Specification 1, except check dated 24 September 1944, payable to cash for \$15, and uttered to Knickerbocker Hotel, Chicago, Illinois.

Specification 7: Same allegations as Specification 1, except check dated 14 September 1944, payable to cash for \$15, and uttered to Cosmopolitan National Bank of Chicago, Chicago, Illinois.

Specification 8: Same allegations as Specification 1, except check dated 11 September 1944, payable to cash for \$15, and uttered to Continental Illinois National Bank and Trust Company, Chicago, Illinois.

Specification 9: In that First Lieutenant Eugene Sheridan, * * *, did, at Chicago, Illinois, from on or about 21 September 1944 to on or about 9 October 1944, wrongfully and without authority, wear the insignia of a captain upon his uniform, thereby falsely representing himself to be a captain in the Army of the United States.

Specification 10: In that First Lieutenant Eugene Sheridan, * * * did, at Chicago, Illinois, on or about 10 September 1944, wrongfully and without authority appear in public in civilian clothes.

Specification 11: In that First Lieutenant Eugene Sheridan, * * *, did, at Chicago, Illinois, on or about 2 September 1944, unlawfully, knowingly, willfully and feloniously make and use a false certificate, in substance as follows, to wit:

PERSONAL AFFAIRS OFFICE
Room 1639 - Civic Opera Bldg.
20 No. Wacker Drive
Chicago 6, Illinois

To: Wacker Drive Currency Exchange
30 North Wacker Drive

Date: 2 September 44
Time: 4:00 PM

The (~~XXXXXXXXXX~~) (officer) whose signature appears below has presented himself to this office in order to get a check cashed. He has established the need for the funds requested. His military

credentials have been examined and appear to be in order. Any consideration that you may give to him will be appreciated. Should you encounter any difficulty in the collection of this item, we will use our best efforts to aid you in collecting this check by contacting his Commanding Officer. No financial responsibility is or can be assumed by this office.

NAME, RANK, SERIAL NUMBER 1st Lieut. Eugene Sheridan, O-301574

ARMY ADDRESS: Sqdn A, 464th AAF Base Unit, AAB, McChord Field, Wash.

new-

BANK OR EXCHANGE Puget Sound National Bank

CITY AND STATE Tacoma, Washington

AM'T OF CHECK \$50.00 NO. OF CHECK _____ DATE OF CHECK 2 September 1944

PERMANENT HOME ADDRESS 5021 South Sheridan, Tacoma, Washington

NAME AND RELATIONSHIP OF RELATIVE LIVING THERE c/o Wife - Alice Sheridan

REASON FOR NEEDING MONEY Money needed while on leave

MILITARY CREDENTIALS: Under S.O. 240, par 12, AAB, McChord Field, Wash., dtd 27 Aug 44, granting officer 13 days leave eff o/a 1 Sept 44. Also identified by AGO card

For the purpose of obtaining this letter from the Personal Affairs Office, Hq. Dist #3, 6th Service Command, to aid me in cashing the check mentioned herein, I certify that I have a checking account with the bank upon which the check is drawn, with sufficient balance to assure payment.

/s/ Eugene Sheridan
APPLICANTS SIGNATURE

/s/ J. F. Carpenter
J. F. CARPENTER, 1st Lieut., A.U.S.
INTERVIEWING OFFICER, RANK, BRANCH

which, as the said First Lieutenant Eugene Sheridan, then and there well knew contained a fraudulent and fictitious statement, to wit, "I certify that I have a checking account with

the bank upon which the check is drawn, with sufficient balance to assure payment", which said statement was then and there fraudulent and fictitious in that, as the said First Lieutenant Eugene Sheridan then and there well knew, he had no sufficient balance in said bank to assure payment.

Specification 12: In that First Lieutenant Eugene Sheridan, * * *, did, at Chicago, Illinois, on or about 2 September 1944, with intent to deceive First Lieutenant J. F. Carpenter, Interviewing Officer, Personal Affairs Office, Headquarters District #3, 6th Service Command, Chicago, Illinois, officially state to the said First Lieutenant J. F. Carpenter that he, the said First Lieutenant Eugene Sheridan, was then and there present in Chicago, Illinois, under authority of Special Order No. 240, paragraph 12, Army Air Base, McChord Field, Washington, dated 27 August 1944, granting officer thirteen (13) days leave effective on or about 1 September 1944, which said statement was known by the said First Lieutenant Eugene Sheridan to be untrue.

Specification 13: Same allegations as Specification 1, except check dated 20 September 1944, payable and uttered to U.S.O. Council of Chicago for \$15.

Specification 14: Same allegations as Specification 1, except check dated 4 October 1944, payable and uttered to Gardiner General Hospital Exchange, Chicago, Illinois, for \$25.

Specification 15: Same allegations as Specification 1, except check dated 5 October 1944, payable and uttered to Gardiner General Hospital Exchange, Chicago, Illinois, for \$25.

The accused pleaded not guilty to, and was found guilty of, all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to dismissal, total forfeitures and confinement for fifteen 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. In support of the various Charges and Specifications, the prosecution introduced the following evidence:

a. Charge I, Specification:

In April 1944, accused was appointed custodian of the Unit Fund of Squadron A, 464th Army Air Forces Base Unit, by his commanding officer, Major William G. Prince (R. 41, 47, 48). All organization funds were collected, in the first instance, and held by the Post Trust Fund and thereafter proportionate distribution of the assets of this central fund was made to all Unit or Squadron

Funds (R. 103). On 27 April 1944, a distribution of \$308.29 in cash was made to the Unit Fund of Squadron A and it was turned over to accused as custodian thereof (R. 42-44, 82, 83; Pros. Ex. 19). There was a Unit Fund bank account established in the National Bank of Washington, Fort Lewis Branch, on which accused, as custodian, was the only person entitled to draw (R. 22-25; 51, 62; Pros. Ex. 15). Major Prince told accused to deposit this sum of \$308.29 in that account but accused placed it in a safe to which he, Major Prince and Sergeant Max E. Fly had access (R. 44, 45). Accused continued as custodian of the Unit Fund, through a succession of commanding officers following Major Prince, until the latter part of August 1944. He never did deposit this cash of \$308.29 in the bank account of the Unit Fund, the only deposit that he made therein being a deposit of \$293 on 31 July 1944 which represented a distributive share sent from the Post Trust Fund on 23 July 1944. All of the successive commanding officers and Sergeant Fly testified that they had not taken any of this cash of \$308.29 (R. 24-27, 44-46, 64-66, 68, 69, 75, 95, 108, 110; Pros. Ex. 14). Although this account should have been audited monthly by the Base Air Inspector's Office and although that office during May, June and July 1944 repeatedly requested accused to bring the fund's books to it for examination, accused never did so (R. 99-102).

About 10 August 1944 Major Prince obtained a statement from the bank as to the balance in the fund's account, discovered a shortage existed and so stated to accused. Accused replied that there was money in the safe he had not as yet deposited (R. 46, 47). When Major Harold B. Snyder assumed command shortly thereafter he told accused that he, personally, would take over the Squadron Fund and act as custodian thereof. Accused replied that after he paid a few bills he would balance his account and turn over the fund. Within a day or two thereafter, however, accused absented himself without leave and without delivering over the funds (R. 71-73). Major Lambert C. Walsh, the Base Air Inspector, was promptly notified of the situation. He made a thorough search of the safe in which accused had originally placed the cash of \$308.29 and of all of accused's desks but he found neither the money nor any records accounting for it (R. 74, 83, 84). Although Major Prince eventually paid \$308.29 to the Squadron A Fund, he did so not because he had taken the money but only because of the recommendation made by a board of officers and a letter from the Base Commander (R. 110).

b. Charge II, Specification:

On 14 August 1944, accused absented himself without leave from his station at McChord Field, Washington (R. 73; Pros. Ex. 20). It was stipulated by the prosecution, defense and accused that he was arrested in Chicago, Illinois, by military authorities on 9 October 1944 (R. 76).

c. Charge III, Specifications 1-8 incl., 13, 14, 15:

It was stipulated by the prosecution, defense and accused that on or about the dates thereof, the accused made and uttered the following described checks and received the face amounts thereof in cash, viz (R. 9-17, 29-31; Pros. Exs. 1-10, 16):

<u>Spec.</u>	<u>Pros. Ex. No.</u>	<u>Date of Check</u>	<u>Amount</u>	<u>Payee</u>	<u>Drawee Bank</u>	<u>Cashed By</u>
1	#16	12 Aug 44	\$100	Cash	Puget Sound Nat'l Bank, Tacoma, Wash.	NCO Mess, McChord Field
2	#1	2 Sep 44	\$50	Self	"	Wacker Drive Currency Exchange
3	#2	9 Sep 44	\$20	Self	"	City Nat'l Bank & Trust Co., Chicago, Ill.
4	#3	16 Sep 44	\$20	Cash	"	First Nat'l Bank of Chicago, Illinois
5	#4	23 Sep 44	\$15	Knickerbocker Hotel	"	Payee
6	#5	24 Sep 44	\$15	Cash	"	Knickerbocker Hotel, Chicago, Illinois
7	#6	14 Sep 44	\$15	Cash	"	Cosmopolitan Nat'l Bank of Chicago, Ill.
8	#7	11 Sep 44	\$15	Cash	"	Continental Ill. Nat'l Bank & Trust Co. of Chicago, Ill.
13	#8	20 Sep 44	\$15	U.S.O. Council of Chicago	"	Payee
14	#9	7 Oct 44	\$25	GGH Exchange	"	Gardiner General Hospital Exchange
15	#10	9 Oct 44	\$25	"	"	" "

All of these checks were forwarded to the drawee bank for collection and all of them were returned unpaid and had not been redeemed by the accused at the time of trial (R. 9-17, 30).

Accused and his wife, Alice M. Sheridan, had a joint account in the Puget Sound National Bank, Tacoma, Washington, which was closed on 15 September 1944. The sum of \$343, the proceeds of a loan made by the bank to accused was deposited in the account on 12 August 1944, but a withdrawal of \$300 the same day left the account with a balance of \$78.18 at the close of business on that day. The balance was thereafter gradually reduced to \$2.06 by 28 August 1944 and it remained at that figure until the account was closed on 15 September 1944 (R. 33-37; Pros. Ex. 17). Most of the deposits made previously in this account were by checks issued by the United States Treasury (R. 40).

d. Charge III, Specification 9:

It was stipulated by the prosecution, defense and the accused that from 21 September 1944 to 9 October 1944, in Chicago, Illinois, accused wore the insignia of a captain on his uniform (R. 20).

e. Charge III, Specification 10:

It was stipulated by the prosecution, defense and the accused that on 10 September 1944, accused appeared in public in Chicago, Illinois, dressed in civilian clothes (R. 20). He had received no permission from the Commanding Officer of Squadron A so to appear in such clothing (R. 77).

f. Charge III, Specifications 11 and 12:

It was stipulated by the prosecution, defense and the accused that one of the functions of the Personal Affairs Office, Headquarters District No. 3, Sixth Service Command, Chicago, Illinois, was to assist Army officers in cashing checks in the city of Chicago. When an officer exhibited his AGO card and the orders permitting his presence in Chicago and executed a certificate to that office certifying that he had a checking account with the bank upon which he was about to draw a check with sufficient balance to assure payment thereof, that office would prepare a letter to Wacker Drive Currency Exchange, or other similar check cashing agency, identifying the officer and stating that any consideration extended the officer would be appreciated. On 2 September 1944 accused visited that Personal Affairs Office to obtain such assistance in cashing a check (Pros. Ex. 1) for \$50 (R. 18, 19). Accused informed a clerk in that office that he was on leave from McChord Field under the authority of paragraph 12, Special Orders No. 240, AAB, McChord Field, Washington, granting him 13 days leave effective on or about 1 September 1944. He exhibited to her orders purporting to grant this leave and stated that the check he wished to cash was for \$50 drawn on the Puget Sound National Bank, Tacoma, Washington. After this information had been typed on the form letter, accused signed the certificate at the bottom thereof stating that he had a checking account with the drawee bank and a sufficient balance on deposit to

assure payment of the check. Accused furnished this information and signed the certificate in order to induce First Lieutenant J. F. Carpenter of the Personal Affairs Office to sign the form letter of recommendation and the latter did so relying on the contents of the letter (R. 19, 20; Pros. Ex. 11). Accused then went to the Wacker Drive Currency Exchange, presented the form letter signed by Lieutenant Carpenter, and the Exchange cashed accused's check for \$50 (R. 9).

4. The defense introduced Major Harry T. Meyers, Corps of Engineers, and Major Victor E. Lewis, Quartermaster Corps, as character witnesses for accused and they testified that they had known accused for over nine years and that, as an enlisted man, he was dependable, honest, responsible and an "excellent soldier" (R. 28, 112).

After his rights as a witness had been fully explained to him, accused elected to give sworn testimony in his own behalf. His testimony may be summarized as follows:

He stated that he had been in the Army for 19 years and that his record had been spotless up to the present time. He admitted that on or about 29 April 1944 he received the Squadron A funds of \$308.29 from Major Prince and was instructed to deposit them in the fund's bank account. Being Saturday afternoon, he placed the money in one of the envelopes in the safe. A week or ten days later when he went to the safe for the money it was missing (R. 113). He did not inform anyone that the money had disappeared or make any report to his commanding officer or the provost marshal (R. 114, 137-139). He admitted that there was a shortage of \$308.29 in the squadron fund and that it existed on 12 August 1944 when he absented himself without leave (R. 140). He did not submit the fund's records to the Air Inspector for audit because he did not want the discrepancy of \$308.29 discovered (R. 144). He took some records of the fund with him when he absented himself without leave but he did so inadvertently (R. 145). He realized he might be criticized but not punished for losing the money. He could not explain why he failed to report its loss (R. 148, 149).

In so far as Charge II and its Specification are concerned accused admitted he absented himself without leave as alleged and that during his absence he visited the cities of Tacoma, Portland, St. Paul and Chicago (R. 116, 118, 119). He first went to Tacoma for several hours, then moved to Portland where he spent several days and eventually traveled on to St. Paul and Chicago (R. 151, 152). He had packed a suitcase with articles of civilian clothing before leaving for Portland (R. 153).

With respect to the various Specifications of Charge III, involving worthless checks, accused testified that on 12 August 1944, two days before he absented himself without leave, he borrowed \$343 from the Puget Sound National Bank, had it deposited to his account and the next day withdrew \$300 (R. 125, 126). He believed that he had about \$70 in his account before

the deposit of \$343 was made and, after withdrawal of \$300, he estimated he had a balance on deposit of slightly more than \$100 to pay the check for that amount which he cashed at the noncommissioned officers' mess. He expected his wife to make a deposit of about \$200 in August as a result of an arrangement she had with her parents (R. 128, 142). However, he admitted he did not know on what his wife would subsist while he cashed checks against the expected \$200 deposit (R. 143). He did not keep an accurate record of the checks he cashed and was first advised that he was in difficulty because of worthless checks in October 1944 (R. 115). He admitted that he made and uttered all of the worthless checks mentioned in Specifications 1 to 8 inclusive, 13, 14 and 15 of Charge III (R. 120).

With reference to Charge III, Specification 9, accused admitted that he deliberately purchased captains' insignia and wore it on his uniform (R. 150). He was a first lieutenant and had no authority to wear such insignia. He could not explain his conduct in so doing (R. 121).

With reference to Charge III, Specification 10, accused testified that he wore civilian clothes without authority for one day in Chicago while his uniform was being cleaned (R. 116, 122). He had taken some of the civilian clothing from his home when he left on his unauthorized absence and the remainder of it he had purchased thereafter in the city of Portland (R. 149, 153).

With respect to Charge III, Specifications 11 and 12, accused testified that the only reason he presented the orders purporting to grant him leave to the Personal Affairs Office in Chicago was to obtain assistance in cashing the check for \$50 (R. 117). He also admitted he intentionally made the certificate as to the sufficiency of his bank balance and tendered it at that office for the same reason (R. 122). He knew that an officer was to sign the form letter on which appeared the certificate and the various information he had furnished to the clerk (R. 123). He admitted that the orders purporting to grant him leave of absence were false (R. 124).

5. The evidence offered under Charge I and its Specification establishes that on or about 27 April 1944 accused, as custodian, was entrusted with certain squadron funds totaling \$308.29, that he never submitted his records and books of accounts for audit although repeatedly requested so to do by the Air Inspector's Office over a period of three months, and that, when finally ordered to turn over the fund to his commanding officer, he promptly absented himself without leave. Thereafter the fund was found to be short the amount of \$308.29.

When a person fails to account for money that has been entrusted to him, as custodian thereof, the logical inference that he embezzled it is justified in the absence of a credible explanation for the situation (CM 234153, Shirley, 20 B.R. 259, 2 Bull. JAG 341; CM ETO 1302, 3 Bull. JAG 189;

CM ETO 1631, 3 Bull. JAG 421). Accused's failure to turn over his records for audit over a period of three months although repeatedly requested so to do and his flight when finally he was ordered to turn over the funds to his commanding officer are consistent with and evidence of his guilt of the offense charged (Wharton's Crim. Evidence, 7th ed., Vol. 1, par. 301). His explanation that ten days after he received the fund he discovered it to be missing from his organization's safe and that for three and a half months thereafter he refrained from reporting its loss evidences conduct so contrary to human experience as to brand his explanation as complete fiction. The evidence sustains the court's findings of guilty of Charge I and its Specification.

The evidence introduced under Charge II and its Specification fully supports the court's findings of guilty thereof.

The evidence introduced under Charge III, Specifications 1 to 8 inclusive, 13, 14, and 15, fully establishes that accused made and uttered the various checks there alleged without having sufficient funds on deposit to pay them. The only question is whether or not he issued these checks with intent to defraud, not intending to have sufficient funds on deposit to pay them. Accused negotiated a bank loan of \$343 on 12 August 1944 and withdrew \$300 the same day, leaving a balance of \$78.18 in his account. He testified that he believed he had in excess of \$100 in his account on the day he cashed the check for \$100. The other ten checks totaling \$215 were cashed thereafter during accused's absence without leave and while the balance in his account did not exceed \$2.06. In view of accused's own admission that he believed he had but little over \$100 in his account when he cashed the check for that amount dated 12 August 1944, it is quite apparent that he knew his bank balance was negligible when he uttered the ten checks thereafter totaling \$215. Cashing those checks knowing his account was woefully insufficient to pay them establishes the fraudulent intent with respect thereto. Accused's uncorroborated testimony that he expected his wife to deposit \$200 to be obtained from her folks was unworthy of credence. Even if true, knowing the depleted condition of his account, it behooved him to ascertain that the deposit had been made before uttering these checks. His reckless conduct in issuing them without ascertaining if this probability had become an actuality indicates that he was content to issue them whether or not his balance was sufficient to pay them. Such reckless indifference to the condition of his bank account brands accused's conduct in uttering these checks as fraudulent.

This fraudulent course of conduct with respect to the last ten checks might well be sufficient of itself to justify the court in inferring a similar intent when he cashed the first check for \$100 on 12 August 1944. However, there is other evidence from which this intent could reasonably be inferred. On the day accused cashed the \$100 check he had negotiated a loan of \$343 from the bank which had been deposited in his account and from which

promptly thereafter he withdrew \$300. It is unbelievable that he would not have accurate knowledge of the amount of his bank balance on the day he borrowed funds from the bank to augment it. That fact, coupled with accused's prompt absence without leave thereafter, leads to the inescapable conclusion that he was accumulating cash for his flight without respect to the consequences. From all these facts the court was fully justified in concluding that accused uttered all of these eleven checks with intent to defraud. The evidence sustains the findings of guilty of Charge III, Specifications 1 to 8 inclusive, 13, 14 and 15.

The evidence fully establishes that while in Chicago accused, a first lieutenant, appeared in public on one occasion wearing the insignia of a captain on his uniform and on another occasion wearing civilian clothes. His appearance in uniform with improper insignia of grade was violative of Article of War 96 (CM 233900, Sheldon, 20 B.R. 189, 2 Bull. JAG 312). For accused to appear in public in civilian clothes under the circumstances here present violated express provisions of the Army Regulations and also constituted an offense under Article of War 96 (AR 600-40, par. 1a, 31 Mar. 1944; MCM, 1928, par. 134b).

The evidence also establishes that accused made the false certificate alleged in Charge III, Specification 11. As shown by the discussion contained hereinabove relative to the worthless checks, the court was warranted in inferring that accused knew his bank balance was insufficient to pay the check of \$50 issued on 2 September 1944. His written representation in the certificate that his bank balance was sufficient to pay that check was known by him to be just as false as the representation inherent in the issuance of the check itself. The evidence sustains the finding of guilty of Specification 11 of this Charge III.

The evidence fully establishes that accused knowingly made a false statement at the Personal Affairs Office, Sixth Service Command, when he there stated that he was on 13 days authorized leave of absence. Although he made the statement to a female clerk in the office, it was thereafter inserted in a form letter and accused knew that a commissioned officer was to act on that statement in the letter and he intended such officer to rely upon it. This false statement by accused, appearing in the form letter which was signed by Lieutenant Carpenter, was as much a statement made to the lieutenant as if accused had uttered it orally in the officer's presence. The evidence sustains the finding of guilty of Specification 12.

6. Accused is 36 years of age. He enlisted in the Regular Army in September 1925, and served continuously from that date until the present time except for a period of two months. On 11 November 1932 he was appointed a second lieutenant, Infantry Reserve, and upon expiration of this appointment on 11 November 1937 he was appointed a second lieutenant, Army

of the United States. He was honorably discharged as an enlisted man on 31 March 1942 and was ordered to active duty as a second lieutenant effective 1 April 1942. On 22 June 1943 he was promoted to first lieutenant.

7. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 61, Article of War 93 or of Article of War 96.

Thomas M. Taffy, Judge Advocate.

William H. Lambrell, Judge Advocate.

Robert E. Truettman, Judge Advocate.

(192)

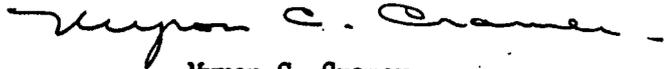
1st Ind.

War Department, J.A.G.O., JAN 15 1945 -To the Secretary of War.

1. Herewith are transmitted for the action of the President the record of trial and the opinion of the Board of Review in the case of First Lieutenant Eugene Sheridan (O-301574), 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 that the forfeitures be remitted and the period of confinement be reduced to 5 years, that the sentence as thus modified be carried into execution and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

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



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

3 Incls.

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

(Sentence confirmed but forfeitures remitted and confinement reduced to five years. G.C.M.O. 102, 24 Mar 1945)

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

(193)

SPJGK
CM 270070

29 DEC 1944

UNITED STATES

v.

First Lieutenant DENNIS
JOSEPH JOHN McGEE (O-1796317),
Corps of Military Police.

FOURTH SERVICE COMMAND
ARMY SERVICE FORCES

Trial by G.C.M., convened at
Fort Bragg, North Carolina,
24 November 1944. Dismissal.

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

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

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

CHARGE I: Violation of the 95th Article of War. (Finding of not guilty of a violation of Article of War 95 but guilty of a violation of Article of War 96.)

Specification 1: (Finding of not guilty).

Specification 2: In that First Lieutenant Dennis J. J. McGee, Corps of Military Police, Prisoner of War Camp, Fort Bragg, North Carolina, was, at Fayetteville, North Carolina, on or about 19 October 1944, in a public place, to wit, the lobby of the Lafayette Hotel, Fayetteville, North Carolina, drunk while in uniform.

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

Specification: In that First Lieutenant Dennis J. J. McGee, * * *, did, at Fort Bragg, North Carolina, on or about 10 October 1944, with intent to deceive Major Morgan F. Simmons, his commanding officer, officially make a written statement under oath, in the course of an investigation, to the said Major Morgan F. Simmons, that he turned over to one Major John H. Suther, a quantity of unsold tickets and a sum of money collected from the sale of certain tickets with the request that said Major John H. Suther was to turn over the unsold tickets and the money to one Paul D. Murray, which statement was known by the said First Lieutenant Dennis J. J. McGee, to be untrue in that he had never given any sum of money to

Major John H. Suther in payment for the tickets.

He pleaded not guilty to the Charges and the Specifications. He was found not guilty of Specification 1 of Charge I, and guilty of Specification 2 of Charge I; of Charge I, not guilty of a violation of the 95th Article of War but guilty of a violation of the 96th Article of War; of Charge II and its Specification, guilty except the words "under oath". 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. Evidence pertinent to the findings of guilty:

a. For the prosecution.

I. As to Specification 2 of Charge I.

Mr. J. A. McGeahy, night clerk at the Lafayette Hotel, Fayetteville, North Carolina, testified that he observed a lieutenant in the lobby of the hotel at about midnight on the night of 19 October 1944 "pretty well intoxicated". The officer "was rather boisterous, using profane language and walking up and down the lobby, and occasionally he would try to sit down and he was so far gone that he on two or three occasions missed the chair he was trying to sit in and fell on the floor. He would get up and go again, but he fell two or three times." (R. 25). The officer staggered when he walked. He looked drunk and acted drunk (R. 28). There were other people in the lobby of the hotel at this time (R. 28,34). The night clerk called the military police, and the call was answered by a major and some other military personnel (R. 25). Although the witness did not identify the accused, he stated that on no other occasion during the month of October did a major enter the Lafayette Hotel and "apprehend a lieutenant" (R. 26). Mr. McGeahy stated that accused left quietly with the military police (R.29). It was raining that evening, but the floor of the hotel lobby was normal in every respect (R. 34). It was not slippery or wet. An individual who had all his faculties could travel the floor without any peril because of the condition of the floor (R. 27).

Major Frank W. Reams, Commanding Officer, Corps of Military Police, Fort Bragg, North Carolina, stated that on 19 October 1944 he was on duty as Officer of the Day in Fayetteville, North Carolina, and that shortly before midnight of that day he received a call to come to the Lafayette Hotel in that city. He responded to the call, and arrived in the lobby of the Lafayette Hotel a few minutes later, accompanied by Staff Sergeant Jimmy Howard and "Corporal Busko". The desk clerk pointed to the accused, who was in the hotel lobby leaning on the counter on both elbows "and more or less wobbly". Accused was in uniform (R. 32). Major Reams took accused by one arm to conduct him from the lobby. Accused held back and informed Major Reams that he had a room upstairs. Major Reams asked the clerk if that statement were correct, and the clerk replied in the negative. Thereupon Major Reams and Sergeant Howard "somewhat forcibly" took accused to the door, "as he didn't

want to leave" (R. 33). The accused had a bottle of whiskey with him (R. 30). The odor of alcohol was on accused's breath (R. 35). He talked in a "very rambling" manner (R. 35). In the opinion of Major Reams, the accused was drunk (R. 33,35). This opinion was also expressed by Staff Sergeant Jimmy Howard, who accompanied Major Reams to the hotel. There were several soldiers sitting in the lobby at the time (R. 34).

II. As to the Specification of Charge II.

Major Morgan F. Simmons, the Commanding Officer of the Prisoner of War Camp at Fort Bragg, North Carolina, stated that accused had been a member of that organization since about 18 September 1944. In October, Major Simmons received a communication relative to certain picnic tickets and called the accused into his office to discuss the matter with him. He stated that he warned the accused that he did not have to make any statement, but that if he did make a statement, it could be used against him (R. 8,9). The accused made an oral statement. After noon that same day, Major Simmons again called the accused to his office, again informed him of his rights, as before, and informed accused that he wanted to reduce his statement to writing, which was agreeable to the accused. At this time accused informed Major Simmons that he had received 50 tickets for sale and distribution to members of his Detachment to attend a picnic given by the Municipal Employees of Nashville, that he had sold all tickets except 22 or 23, and that he attended the picnic with members of the Detachment to whom he had sold the tickets. Accused further informed Major Simmons that he had seen "Mr. Murray", the representative of the Municipal Employees, and had informed him that his men had no money, and requested that he be allowed until payday to turn the money over to him for the tickets. The accused stated that he had certain phone conversations with Mr. Murray after that date, but that he did not get down to Mr. Murray's office to make settlement with him. Accused also stated that he was then ordered to Fort Bragg "rather hurriedly", and that he had turned the tickets and the money over to his Commanding Officer, "Major Suther", with a request that "this matter" be settled with Mr. Murray (R. 9).

The above statements of the accused were reduced to writing by Major Simmons. Later they were "typed up by the stenographer". The following morning, 10 October 1944, Major Simmons called the accused to his office, at which time the accused read the statement and made a correction of a typographical error. Accused and Major Simmons then went into the office of the Executive, a summary court officer, where the statement was signed by the accused in the presence of the summary court officer, Captain T. A. McFarland, who subscribed his name thereto (R. 10,18). The summary court officer did not require the accused to raise his right hand or to take any oath as to the execution of the instrument (R. 16). The statement was admitted in evidence (R. 14, Pros. Ex. 4).

The statement (Pros. Ex. 4) reads as follows:

"On or about 18 July 1944, I received fifty (50) tickets to the Municipal Employees Association, Nashville, Tenn. for the annual picnic, value of which was \$1 each. These tickets were to be sold to the Military Police Detachment of Nashville, Tenn., of which I was the Detachment Commander. I sold approximately twenty-nine, (29) tickets to the men of my Detachment, and together with the twenty-nine (29) men to whom I sold the tickets, attended the picnic. There I saw Mr. Paul D. Murry, Secretary of the Police Department of Nashville, Tenn. at this picnic, and advised him that I would collect for the tickets sold on pay day. I collected the money, but as my Detachment was located some distance from the City Hall, and was not convenient to get in to see Mr. Murry, I neglected to take this money in. Some time early in September Mr. Murry called me about the tickets and asked me the number of tickets I sold and I advised him the number, and at the same time telling him that I would bring the money for the sold tickets the next time I came in. Before I could turn this money in to Mr. Murry, I was ordered to Fort Bragg, N.C. on short notice. I left Nashville, Tenn. on the 17th of September 1944 and before leaving, I turned over to Major John H. Suther, my Commanding Officer, the unsold tickets and the amount of money collected on the tickets sold, requesting Major Suther to turn this over to Mr. Murry. This was in the presence of Lt. Wroten. I never returned any of the unsold tickets personally to Mr. Murry and am at a loss to understand the letter of Mr. Murry to Major Suther, which has been read to me."

Major John H. Suther, Infantry, Provost Marshal, Nashville, Tennessee, Area, testified that about the third week in August of 1944 he had a telephone conversation with the accused relative to the sale by accused of certain picnic tickets which had been entrusted to him (R. 17,19). At that time the accused was stationed in Nashville, Tennessee, and was under Major Suther's general supervision. Witness stated that he informed accused that Mr. Murray, the secretary of the Nashville Police Association, had made a complaint about the tickets and that he directed the accused to bring the money and the tickets "down" and make a settlement with Mr. Murray. The accused promised to attend to it right away, but failed to do so (R. 19). A subsequent call, made a few days later by Major Suther, resulted similarly (R. 20). The last conversation which Major Suther had with the accused concerning this matter was after the accused had received his orders transferring him to Fort Bragg. At this time Major Suther asked the accused "if he had settled his debt with the Police Department about the tickets". The accused replied that he had not, for the reason that he did not have the money. The accused then asked Major Suther if he "would talk to Mr. Murray" "and have him agree not to send a letter in on him, and he would pay Mr. Murray from the first check he received at Fort Bragg; he would send either a check or money order to cover the amount". When the accused left for Fort

Bragg he told Major Suther that the unsold tickets were in the Detachment safe (R. 20). The unsold tickets were procured from the detachment safe by Lieutenant Charles W. Wroten. The only money found in the detachment safe by Lieutenant Wroten was 2 or 3 dollars in an envelope earmarked for the payment of accused's mess bill (R. 7, Ex. 3).

The accused did not turn over to Major Suther at the time he left, or at any time prior thereto, any tickets or any money in payment for picnic tickets for the Police Association. At no time prior to his leaving, did the accused give Major Suther any moneys to be used in payment of picnic tickets to the picnic held by the Police Association. Major Suther did not at any time agree to pay Mr. Murray for the accused, nor was he asked by the accused to do so (R. 19,23,24). On 6 November, Major Suther received a money order from the accused in the amount of \$29, which he delivered to Mr. Paul Murray (R. 21; R. 7, Ex. 1).

b. For the defense.

Second Lieutenant Richard J. Fleming, Air Corps, Laurinburg-Maxton Air Base, testified he was in the lobby of the Lafayette Hotel in Fayetteville, North Carolina, at about 11 o'clock on the night of 19 October 1944. He saw the accused leave the elevator and approach the desk. The accused asked the hotel clerk a question of some sort, and the clerk said he would have to talk louder. The accused turned and walked away from the desk. After the accused walked about five or six steps "he got on a slick part of the floor, slipped and fell" (R. 40). The floor was a composition floor, highly polished, wet, and slippery. Lieutenant Fleming went over and helped the accused up. The accused thanked him. The accused was coherent in his speech, and his actions were "very slow and deliberate, like he was pondering something". In the opinion of Lieutenant Fleming, the accused was not drunk (R. 41). Lieutenant Fleming heard the hotel clerk calling the Military Police a short while thereafter. Witness went out to see if it was still raining, intending to take the accused outside at that time. Just then "the car pulled up, and the Major and two MP's got out" and went into the hotel lobby (R. 42).

On cross-examination, Lieutenant Fleming testified that he did not detect any odor on accused's breath. He did observe a bottle in accused's possession - he believed it was "a fifth of a quart" - it was in accused's pocket with just the neck of the bottle emerging from the pocket. When the Military Police conducted the accused out of the lobby, the accused did not stagger, but his walking "wasn't perfectly straight. It was slow and deliberate, but it wasn't staggering" (R. 42,43). Only about five minutes elapsed between the time the accused got off the elevator and the time the clerk called the Military Police. During that time the only persons in the lobby beside the accused were the clerk and the witness (R. 44).

The accused having been advised as to his right to remain silent,

to make an unsworn statement, or to testify under oath, elected to testify (R. 44-45). He stated that he was inducted into the service on 28 April 1942. He attended Officers' Candidate School from 15 August to 6 November 1942, on which latter date he was commissioned second lieutenant, Corps of Military Police. On 11 May 1943 he was promoted to first lieutenant.

Accused stated that on 19 October 1944 a girl friend arrived to visit him for a week. She engaged Room 404 in the Lafayette Hotel in Fayetteville, North Carolina. She engaged the room at approximately 2:30 o'clock that afternoon; and accused remained either in her room or in the vicinity of the hotel throughout the day. He had had a couple of drinks. When he came down on the elevator at about 11:15 that night for the purpose of returning to Fort Bragg, he noticed that it was raining. While he was walking across the lobby he fell down, and Lieutenant Fleming came over and helped him up. He was leaning on the desk when Major Reams and the two military policemen placed him in arrest and took him to headquarters (R. 49,50).

On cross-examination, the accused testified that he and his friend had had "a couple" of drinks between 2:30 and 5:00 o'clock. They went for a walk around the town for about an hour and a half, after which they returned to the room and had two or three more drinks (R. 52). They went out after that, had something to eat, and returned to the hotel. They had drinks again, but the accused did not recall how many. Accused stated that he "took the balance of the bottle" with him when he left for Fort Bragg that night, that he had it with him when the military police arrived but that Major Reams and the military police took the bottle away from him (R. 53).

With reference to Charge II and its Specification, the accused testified:

He received 50 tickets to be sold for the Employees Mutual Association during July 1944, when he was stationed at Nashville, Tennessee. He handed out approximately 29 tickets to the men of his detachment, and collected approximately \$16.00 or \$17.00 from the sale of these tickets. Others were not collected for. On 17 September 1944, he was to leave Nashville for Fort Bragg, but prior to his departure he called at Major Suther's office. Major Suther asked him if he had "cleared everything". He told Major Suther that he had the picnic tickets in the Detachment safe, but that he did not have the money to pay for them, and that he then asked Major Suther if he would take care of them. Major Suther replied that "he would take care of it", and that he (accused) could send the money for the tickets the first of the month. Accused thereafter proceeded to Fort Bragg. On 10 October, and after he had arrived at Fort Bragg, Major Simmons called accused to his office and read to him a letter from the "Employees Association" concerning the picnic tickets. Accused stated that he believed at that time that "the matter had been taken care of" (R. 45,48). The accused further testified concerning his alleged false statement to Major Simmons as follows:

- "Q. When you signed the statement, were you aware of the fact that the statement contained the amount of money collected on the tickets turned over to Major Suther?
A. Yes, sir. I read the statement.

- Q. Is that statement true?
A. No, sir. It isn't" (R. 48).

On cross-examination:

- "Q. This statement that you signed, Lieutenant McGee--Prosecution Exhibit #4--you read that over before you signed it, didn't you?
A. Yes, sir.

- Q. And that contains this statement: I left Nashville, Tennessee, on the 17th of September 1944, and before leaving, I turned over to Major John H. Suther, my Commanding Officer, the unsold tickets and the amount of money collected on the tickets sold, requesting Major Suther to turn this over to Mr. Murray. Now, that is not a true statement, is it?
A. No, sir.

- Q. You actually did not turn over to Major Suther any money on that occasion?
A. I just turned the keys over to him. That's all.

- Q. To the Detachment safe?
A. Yes, sir.

- Q. That contained only the unsold tickets -- no money?
A. There was some money in there.

- Q. Was it for the purpose of paying for the tickets?
A. No sir.

- Q. When you signed this statement, you knew that that statement was not correct, didn't you, Lieutenant?
A. I thought the matter had been taken care of by Major Suther and that was the impression I intended to create on Major Simmons.

- Q. But you knew you had not actually turned over to Major Suther any money?
A. Yes, sir" (R. 51,52).

The accused testified also that he mailed the money order to Major Suther the day after he was served with charges in this case (R. 55).

4. Discussion.

The accused stands convicted of being drunk in uniform in a public place (Spec. 2 of Charge I) and of making a false official statement with intent to deceive (Charge II and its Spec.) in violation of Article of War 96.

The evidence was clear and convincing that the accused was drunk while in uniform in the lobby of the LaFayette Hotel. Three witnesses for the prosecution testified that in their opinion accused was drunk. The accused admitted that he had been drinking for at least several hours before the alleged occurrence. His only witness would not state that accused was drunk, but his description of accused's conduct was of such character as to corroborate the testimony of the prosecution that accused was under the influence of liquor. The finding of the court was therefore amply supported by the evidence. Being drunk in uniform in a public place constitutes a violation of the 96th Article of War as to one in the military service (CM 261879, Watt; CM 237063, 23 B.R. 251). The lobby of a hotel is a public place.

The making of a false official statement by one in the military service with intent to deceive has long been recognized as an offense which may be charged as a violation of the 95th or 96th Article of War as the facts and circumstances may warrant (CM 265676). In this case the evidence was clear and convincing that the accused (1) made and signed a statement prepared at his dictation, (2) during an investigation carried on by an officer of the Army of the United States in his official capacity, (3) which contained an averment that he had turned over to Major John H. Suther a sum of money collected from the sale of tickets, (4) which statement was shown by Major Suther and admitted by the accused to be false, (5) for the purpose of deceiving Major Simmons. All of the elements of the offense were shown beyond any reasonable doubt.

5. War Department records show the accused to be 30 years of age and single. He graduated from high school and college, and for two years attended Temple University School of Law. He was inducted in the service on 28 April 1942 and on 6 November 1942 was commissioned a second lieutenant, Corps of Military Police. He was promoted to first lieutenant, 11 May 1943.

6. The court was legally constituted and had jurisdiction over the accused and of 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 and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 96.

W. G. Zou, Judge Advocate.
Charles Stephens, Judge Advocate.
Wm. M. Wray, Judge Advocate.

1st Ind.

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

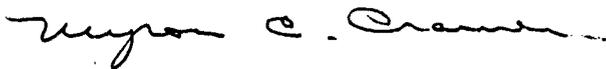
JAN 4 - 1945

- 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 Dennis Joseph John McGee (O-1796317), Corps of Military Police.

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 his review of the record of trial for the convening authority the Staff Judge Advocate states that since accused's arrival at his present station his services have been unsatisfactory. He further states that accused has been reported to his commanding officer as being drunk on two previous occasions. For his conduct on one of these occasions the accused was given punishment under the provisions of Article of War 104 consisting of a reprimand and forfeiture of \$83.00 of his pay. This disciplinary action appears to have been taken 7 October 1944, 12 days prior to the offense of drunkenness for which he was convicted in the instant case. It also appears from the review of the Staff Judge Advocate that the commanding officer of accused has received several communications relative to debt involvements of accused at his former station. It is evident from the facts in the case and from the foregoing statements of the Staff Judge Advocate that the accused has no proper appreciation of the duties and responsibilities of a commissioned officer. I recommend that the sentence be confirmed and carried into execution.

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



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

3 Incls.

Incl.1-Record of trial.

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

Incl.3-Form of Ex. action.

(Sentence confirmed. G.C.M.O. 87, 22 Mar 1945)

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

(203)

SPJGN
CM 270163

23 JAN 1945

UNITED STATES	)	FIELD ARTILLERY REPLACEMENT TRAINING CENTER
	)	FORT SILL, OKLAHOMA
v.	)	Trial by G.C.M., convened
	)	at Fort Sill, Oklahoma,
First Lieutenant JAY S.	)	14 November 1944. Dismissal,
BAKER, JR. (O-1166661),	)	total forfeitures, and
Field Artillery.	)	confinement for thirty (30) years.

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 Charges and Specifications:

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

Specification: In that First Lieutenant Jay S. Baker, Jr., F.A., Air Training, Student Officers' Pool, Field Artillery School, Fort Sill, Oklahoma, did, while enroute to join the 2560th AAF BU, Pittsburg, Kansas, without proper leave absent himself from about 28 July 1944 to about 18 August 1944.

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

Specification 1: In that First Lieutenant Jay S. Baker, Jr., F.A., Air Training, Student Officers' Pool, Field Artillery School, Fort Sill, Oklahoma, did at Pittsburg, Kansas, on or about 3 August 1944 unlawfully and wrongfully make and utter to Hotel Besse a certain check in words and figures as follows, to wit:

THE NATIONAL BANK OF PITTSBURG

83-24

PITTSBURG, KANSAS

August 3

1944

First Citizens Bank and Trust Co.

CF Fayetteville, N. C.

Write Name of Bank on above Line

Town Here

Pay to the order of Hotel Besse

\$10/00

Ten and no/100

-----DOLLARS

(204)

For value received I represent the above amount to be on deposit in said Bank or Trust Company in my name, free from claims and subject to this check.

/sgd/ Jay S. Baker, Jr.
1st Lt., F.A., O-1166661
AAFLTD, Pittsburg, Kansas.

50M-4-43 Baker's

and by means thereof did fraudulently obtain from the Hotel Besse ten dollars (\$10.00), he, the said Lieutenant Baker, then well knowing that he did not have and not intending that he should have any account with the First Citizens Bank and Trust Company, Fayetteville, North Carolina, for the payment of said check.

Specification 2: Same form as Specification 1 but alleging check drawn on same bank, at Pittsburg, Kansas, dated 5 August 1944, payable to the order of Hotel Besse, in the amount of \$20, and fraudulently obtaining thereby \$20.

Specification 3: Same form as Specification 1 but alleging check drawn on same bank, at St. Louis, Missouri, dated 13 August 1944, payable to the order of Chase Hotel, in the amount of \$25, and fraudulently obtaining thereby \$25.

Specification 4: Same form as Specification 1 but alleging check drawn on same bank, at St. Louis, Missouri, dated 14 August 1944, payable to the order of Hotel Chase, in the amount of \$50, and fraudulently obtaining thereby \$50.

Specification 5: Same form as Specification 1 but alleging check drawn on same bank, at St. Louis, Missouri, dated 16 August 1944, payable to the order of Hotel Chase, in the amount of \$25, and fraudulently obtaining thereby \$25.

Specification 6: Same form as Specification 1 but alleging check drawn on same bank, at Denver, Colorado, dated 25 July 1944, payable to the order of The May Company, in the amount of \$25, and fraudulently obtaining thereby \$25.

Specification 7: Same form as Specification 1 but alleging check drawn on same bank, at Denver, Colorado, dated 25 July 1944, payable to the order of Shirley-Savoy Hotel, in the amount of \$50, and fraudulently obtaining thereby \$50.

Specification 8: Same form as Specification 1 but alleging check drawn on same bank, at Denver, Colorado, dated 26 July 1944, payable to the order of Shirley Savoy Hotel, in the amount of \$50, and fraudulently obtaining thereby \$50.

Specification 9: Same form as Specification 1 but alleging check drawn on same bank, at Kansas City, Missouri, dated 27 July 1944, payable to the order of Cash, in the amount of \$50, and fraudulently obtaining thereby \$50.

Specification 10: Same form as Specification 1 but alleging check drawn on same bank, at Kansas City, Missouri, dated 29 July 1944, payable to the order of Cash, in the amount of \$50, and fraudulently obtaining thereby \$50.

Specification 11: Same form as Specification 1 but alleging check drawn on same bank, at Kansas City, Missouri, dated 2 August 1944, payable to the order of Cash, in the amount of \$50, and fraudulently obtaining thereby \$50.

Specification 12: Same form as Specification 1, but alleging check drawn on same bank, at Kansas City, Missouri, dated 3 August 1944, payable to the order of Cash, in the amount of \$50, and fraudulently obtaining thereby \$50.

Specification 13: Same form as Specification 1, but alleging check drawn on same bank, at Kansas City, Missouri, dated 6 August 1944, payable to the order of Cash, in the amount of \$25, and fraudulently obtaining thereby \$25.

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

Specification: In that First Lieutenant Jay S. Baker, Jr., F. A., Air Training, Student Officers' Pool, Field Artillery School, Fort Sill, Oklahoma, having been duly placed in arrest at Building T-417, Fort Sill, Oklahoma, on or about 26 August 1944, did, at Fort Sill on or about 15 September 1944 break his said arrest before he was set at liberty by proper authority.

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

Specifications 1-13: Identical with Specifications 1-13, Charge II.

The accused pleaded guilty to Charge I and the Specification thereunder and not guilty to all other Charges and Specifications. He was found guilty of all Charges and Specifications and, after evidence of one previous conviction by general court-martial for various false representations under Article of War 95 had been introduced, he was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for thirty years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that by paragraph 26 of Special Order 174, Headquarters 8th Armored Division, Camp Polk, Louisiana, the accused on 12 July 1944 was granted a leave of absence for fifteen days, effective 13 July 1944 (R. 48; Pros. Ex. 17). Subsequently, on 19 July 1944, Headquarters Fourth Army, Fort Sam Houston, Texas, issued Special Order 154 providing in pertinent part that he and several other officers,

"are reld from asgmt and dy with orgns and stas as indicated, effective upon departure, and are asgd to the Dept of Air Tng, FA Sch, Fort Sill, Okla, for the purpose of pursuing FA Liaison Pilot-Observers Course. WP Liaison Flying Sch, Pittsburg, Kans, so as to arrive thereat 27 July 1944, reporting to CO, AAF Liaison Pilot Tng Det for temp dy approximately 12 weeks of basic flying tng and upon completion of which they WP proper sta, Fort Sill, Okla" (R. 47, 49; Pros. Ex. 18).

Upon the expiration of his leave the accused neither complied with these directions nor reported back to Camp Polk, his former station (R. 47-48; Pros. Ex. 16a). He remained absent without authority until his return to military control at Chicago, Illinois, on 16 August 1944 (R. 48).

During the period between the latter days of his leave and the last date he executed and passed thirteen worthless checks for each of which he received full face value in cash. The pertinent data relating to each were as follows:

<u>Date</u>	<u>Amount</u>	<u>Payee</u>
25 July 1944	\$25.00	The May Company, Denver, Colorado
25 July 1944	50.00	Shirley Savoy Hotel, Denver, Colorado
26 July 1944	50.00	Shirley Savoy Hotel, Denver, Colorado
27 July 1944	50.00	Cash (Hotel Muehlebach, Kansas City, Missouri)
29 July 1944	50.00	Cash (Hotel Muehlebach, Kansas City, Missouri)
2 August 1944	50.00	Cash (Hotel Muehlebach, Kansas City, Missouri)
3 August 1944	50.00	Cash (Hotel Muehlebach, Kansas City, Missouri)
3 August 1944	10.00	Hotel Besse, Pittsburg, Kansas
10 August 1944	25.00	Hotel Chase, St. Louis, Missouri
5 August 1944	20.00	Hotel Besse, Pittsburg, Kansas
6 August 1944	25.00	Cash (Hotel Muehlebach, Kansas City, Missouri)
13 August 1944	25.00	Hotel Chase, St. Louis, Missouri
14 August 1944	50.00	Hotel Chase, St. Louis, Missouri

All thirteen instruments were drawn on the First Citizens Bank and Trust Company of Fayetteville, North Carolina (R. 36-47; Pros. Exs. 1-14). That the accused had no account in that institution and that at least the first nine checks listed above were dishonored was indicated by the deposition of a Mr. Thurman Williams who was not identified other than by his own statement that his occupation and residence were "Banking Fayetteville, N.C." (Pros. Ex. 15). In view, however, of the accused's admissions in his unsworn statement summarized below there is no doubt that Mr. Williams was qualified to answer the interrogatories submitted to him.

The accused was brought to Fort Sill, Oklahoma, on 25 August 1944, and placed in arrest the following day (R. 29; Pros. Ex. 16-C, 16-D). In his presence orders were given that he was not to leave the building in which he was quartered "except for the purpose of going to and from the mess hall which is situated in this same area". Even the post exchange, which was only one hundred and fifty feet away, could not be visited by him "without specific permission" (R. 29). Despite these explicit instructions he absented himself without authority from his barracks on 15 September 1944. A thorough search revealed that he was not on the post (R. 30, 32, 34; Pros. Ex. 16-E). At about 2:00 a.m. on 16 September 1944 he was found in the Casa Del, an "officers' night club in Lawton" (R. 31, 34-35). He was conveyed back to the post and confined in the post stockade (R. 32; Pros. Ex. 16-E).

4. After being apprised of his rights relative to testifying or remaining silent, the accused elected to make an unsworn statement. Prior to his induction in the Army he had owned a one-half interest in a small bus company. In February of 1944 his partner was about to be inducted into the army and it became necessary to dispose of the business. A prospective purchaser presented himself who was willing to give a \$2800 note for the assets free and clear of all claims. This offer was accepted, but, since the partnership did not have sufficient funds to satisfy its bills, the accused borrowed \$400.00 from the First Citizens Bank and Trust Company of Fayetteville, North Carolina (R. 51-52). This sum plus \$200.00 of his own funds was sufficient to meet all of the outstanding obligations.

During the first part of July 1944, after his transfer to the 8th Armored Division, he received a letter advising him that the sales price was about to be paid in full and inquiring where his share was to be deposited. In his reply he directed that the money be placed to his credit with the First Citizens Bank and Trust Company of Fayetteville, North Carolina. After dispatching these instructions, he "anticipated in full confidence that there was deposited to his account at that time \$1800.00, roughly" (R. 53).

Shortly thereafter he obtained his fifteen day leave and proceeded to spend "freely", for he "was having a good time" (R. 53). While at home he

was notified of his assignment to Pittsburg, Kansas. He set out for his new post by air but was relieved of his seat at Denver, Colorado, by someone with a higher priority. After passing two checks in that city, he proceeded by rail to Kansas City, Missouri, cashed several other checks there, and finally reached Pittsburg, Kansas, "in time to report on the designated day". Upon inquiring at the post office he was handed "a wire from the First Citizens Bank and Trust Company informing him that he had been drawing money on a non-existent account" (R. 54). He immediately sought an explanation and learned that his partner "had used the money for his own purposes for reason of his own" which were justified (R. 54-55).

In his own words,

"I was faced with the problem of either reporting to the school, a course which I had been trying to get into for some six months, and being relieved of my duty within a week when the checks would start to come back, or of absenting myself without leave from my duty until I was able to raise the money necessary to clear myself of my obligations. I then decided to remain absent without leave and try to raise the money. I tried in Pittsburg, Kansas, for a bank loan. I was refused. I tried every bank in Pittsburg, Kansas. I tried in Kansas City, and I was refused." (R. 55).

Before leaving Pittsburg he on 8 August 1944 wrote duplicate letters explaining his position to the commanding officer of the liaison pilot school and to The Adjutant General. Among other things, the accused stated that:

"I intend to remain absent without leave until I will have squared myself of the obligations of which I have spoken above, after I have done so I will return myself to military control." (R. 55).

Although he now definitely knew that he had no funds with the First Citizens Bank and Trust Company, he continued to execute and issue checks against it. Thus, after going to St. Louis, Missouri, to see a young friend who might be of assistance, he "necessarily" paid his expenses by drawing against that institution (R. 56). When he was placed in arrest in Chicago and he realized that he would be unable to raise the money to meet his obligations, he wrote to each of the parties, who had accepted and cashed his checks. The letters were all "practically the same". The one addressed to the manager of Hotel Besse, Pittsburg, Kansas, on 1 September 1944 read in part as follows:

"As you know, a little over a month ago I cashed a check at your hotel drawn on the First Citizens Bank and Trust Company of Fayetteville, North Carolina. Since this check has undoubtedly

been returned to you with a notation of either 'Account closed' or 'No account,' I am writing to explain the reasons which precipitated this circumstance.

* * * *

"It will take some six months before I will be able to save all of the money necessary out of my Army pay. This is, I know, an arrangement that you nor I like but, under the circumstances, it is the very best that I am able to do. If you wish either to retain the check in question or to forward to me a promissory note for the amount of the check made payable with six percent annual interest that I am informed is customary within six months of the present date I will repay you in the manner I have outlined above" (R. 57-58).

At the time of his trial some of the firms to whom this proposition was addressed had entered into the arrangement suggested, and he had paid a part of the obligations incurred by him (R. 58).

With respect to his absence without leave and his breach of arrest he stated that:

"I proceeded from my home down to the place where I was assigned in time to arrive there for my duty. It was a duty that I had been trying to get into for four months. I leave it to the conscience and understanding of the court that no man would proceed from his home town with the intention of going AWOL in a small town such as Pittsburg, Kansas, remaining there for a week, and then proceed to Chicago.

* * * *

"And with the explanation after I had remained in arrest in quarters at this post, it was one month to the day from the time I had first been placed in arrest, no one had informed me of any charges being preferred against me, no one had appeared to investigate the charges, no one had informed me in connection with the circumstances in which I found myself. I was in arrest in one room with the exception for meals or to go to the PX to obtain the necessary tobacco or cigarettes, - one month after that day I broke arrest. I went to the Casa Del and had dinner." (R. 59).

5. The Specification of Charge I alleges that the accused "did, while enroute to join the 2560th AAF BU, Pittsburg, Kansas, without proper leave absent himself from about 28 July 1944 to about 18 August 1944." This offense was represented to be in Article of War 61.

That the accused absented himself without leave from the organization to which he was required to report upon the expiration of his leave was

satisfactorily established by his plea of guilty, but the court's finding was also supported beyond a reasonable doubt by evidence which the prosecution adduced. One of the stipulations entered into by the prosecution and the defense alleged the date of his return to military control to be 16 August 1944 instead of 18 August 1944 as represented in the Specification. Considering the length of the period of unauthorized absence, however, this variance is not material and may be disregarded.

6. Specifications 1 to B of Charge II allege that the accused did on various dates between 25 July and 14 August 1944 "unlawfully and wrongfully make and utter" thirteen checks drawn on the First Citizens Bank and Trust Company of Fayetteville, North Carolina, "and by means thereof did fraudulently" obtain the face values thereof, he "then well knowing that he did not have and not intending that he should have any account with the" said bank "for the payment of said" checks. These acts were set forth as violations of Article of War 95. Specifications 1 to 13 of Charge IV allege exactly the same offenses but are laid under Article of War 96.

Although Mr. Thurman Williams' connection or position with the First Citizens Bank and Trust Company of Fayetteville, North Carolina, is not identified, his assertion in the deposition of 17 October 1944 that the accused did not have and never had had an account with that institution is substantiated and corroborated by the accused's own unsworn statement. The story concerning the expected deposit of a partnership interest is not supported by even a scintilla of evidence and appears to be a mere figment of the imagination. Even if it were true, the accused's culpability is demonstrated by his other statements. His admission that he arrived in Pittsburg, Kansas, "in time to report on the designated day" which was 27 July 1944, and that he then received a telegram from the bank advising him that he had no account fixes the very latest time at which he could have become aware of the actual facts. Despite the knowledge with which he became charged on that date, he subsequently executed and passed nine other checks totaling three hundred and five dollars against the same non-existent account. The contempt and disregard for the rights of others thus demonstrated undermines the credibility of his representations. If he could issue the nine checks referred to knowing that he had no account for their payment, it is hardly reasonable to suppose that he executed the first four instruments in perfect innocence. All of the circumstances of the case indicate the contrary.

The accused has acknowledged that he executed and passed the thirteen checks. Since they were drawn against a non-existent bank account, they may all, in the absence of contravening evidence, be presumed to have been dishonored even though no weight or effect whatsoever is given to Mr. Thurman Williams' deposition. His testimony, if his position with the bank

had been fixed, would have been competent to prove the rejection of at least nine of the instruments.

The making and uttering of checks drawn against a non-existent account unquestionably constitutes conduct unbecoming an officer and a gentleman and is violative of Article of War 95. The same acts are calculated to bring discredit upon the military service and therefore contravene Article of War 96. Identical Specifications alleging this particular offense may be pleaded under both Articles. As was said in XVII BR 331, CM 230222, Daly, this practice "is not illegal as placing accused twice in jeopardy for the same offense ...". All of the Specifications under both Articles of War are sustained beyond a reasonable doubt by the evidence.

7. The Specification of Charge III alleges that the accused, "having been duly placed in arrest . . . on or about 26 August 1944, did, . . . on or about 15 September 1944 break his said arrest before he was set at liberty by proper authority." This act was represented to be a violation of Article of War 69.

Paragraph 139 of the Manual for Courts-Martial, 1928, states that:

"The offense of breach of arrest is committed when the person in arrest infringes the limits set by orders, or by A.W. 69, and the intention or motive that actuated him is immaterial to the issue of guilt, though, of course, proof of inadvertance or bona fide mistake is admissible in extenuation."

When placed in arrest, the accused was asked whether he understood his status. His reply was in the affirmative. Knowing that he was under orders not to leave his quarters except to procure his meals at the mess hall, he nevertheless absented himself from the post to visit a night club. This was a flagrant violation of Article of War 69 within the meaning of the language quoted from the Manual.

8. Before entering his pleas to the general issue the accused made the following pleas in bar:

"1. The accused moves and in bar of trial that these proceedings are illegal and unconstitutional, in that the accused has been in restraint for an unconscionable and unreasonable length of time, in violation of law, in derogation of his constitutional rights to a speedy trial, and in violation of the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

"2. The accused moves in bar of trial that his restraint has been for such an unconscionable length of time as to constitute punishment of the accused" (R. 18).

Taking the stand on these issues only, he testified that he was arrested in Chicago on 16 August 1944, that he asked for an early and speedy trial on 15 September 1944, that he was placed in confinement on 16 September 1944, that the investigation was commenced on 18 September 1944, and that the charges were served upon him on 3 October 1944 (R. 20-22). The trial itself was not held until 14 November 1944 (R.3).

Three of the four Amendments to the Constitution relied upon by the accused have no bearing whatsoever upon his case. The Fourth by its terms applies only to his original arrest, which was clearly valid, and not to his subsequent detention and confinement. The Sixth is pertinent only to criminal prosecutions by the civil, as distinguished from the military, authorities. The Fourteenth inhibits only action by the States.

The Fifth, which provides a more logical basis for the accused's motion, was not violated. A delay of approximately three months between the original arrest and the date of trial is not per se a denial of a speedy trial or of due process nor does it constitute punishment justifying a finding of double jeopardy. Whether a delay of such duration will be considered a deprivation of the right to a speedy trial and of due process depends upon the circumstances and necessities of the individual case. Although the period of pre-trial detention here in issue was unusually prolonged, it was explainable by the necessity for obtaining evidence from distant and widely separated places and by the fact noted by the Trial Judge Advocate on the chronology sheet that the "accused was his own counsel and could not seem to make up his mind . . ." In the absence of proof of inexcusable and deliberate procrastination the accused cannot complain.

9. The accused, who is single, is about 25 years old. After his graduation from high school in Portland, Oregon, in 1937, he attended San Mateo Junior College for one year and Reed College for two years. He was employed from January, 1940, to January, 1941, by Montgomery Ward & Co. as a diverted order clerk and from January, 1941, to January, 1942, by General Motors Parts Division as an automotive technician. Entering the army as an enlisted man on 9 January 1942, he was commissioned a second lieutenant on 21 July 1942 and promoted to first lieutenant on 22 October 1942. On 25 March 1943 a general court-martial sentenced him to be dismissed the service for numerous false representations, oral and written, all in violation of Article of War 95. The sentence was confirmed but commuted to a reprimand by the President on 30 July 1943, and the accused was shortly thereafter restored to duty.

10. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation

thereof. Dismissal is mandatory upon conviction of a violation of Article of War 95 and is authorized upon conviction of a violation of Articles of War 61, 69, or 96.

Abner E. Lipscomb, Judge Advocate.
Robert Connor, Judge Advocate.
Garrett H. Golder, Judge Advocate.

(214)

SPJGN-CM 270163

1st Ind.

JAN 30 1945

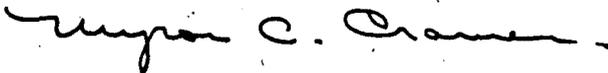
Hq ASF, JAGO, Washington 25, D. C.

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 Jay S. Baker, Jr. (O-1166661), Field Artillery.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but that the forfeitures be remitted, and that the period of confinement be reduced to five years, that the sentence as thus modified be ordered executed, and that the Federal Reformatory, El Reno, Oklahoma, be designated as the place of confinement.

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



3 Incls.

Incl 1 - Record of trial

Incl 2 - Dft. of ltr.

for sig. Sec. of War

Incl 3 - Form of Executive
action

MYRON C. CRAMER

Major General

The Judge Advocate General

(Sentence confirmed but forfeitures remitted and confinement reduced to five years. G.C.M.O. 115, 5 Apr 1945)

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

(215)

SPJGQ
CM 270265

- 5 JAN 1945

UNITED STATES)

v.)

Captain WILLIAM H. BRAN-)
AMAN, JR. (O-1575782),)
Quartermaster Corps.)

ARMY AIR FORCES)
EASTERN FLYING TRAINING COMMAND)

Trial by G.C.M., convened)
at Maxwell Field, Alabama,)
10 and 22 November 1944.)
Dismissal.)

OPINION of the BOARD OF REVIEW
ANDREWS, FREDERICK and BIERER, Judge Advocates

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: In that Captain William H. Branaman, Jr., Quartermaster Corps, attached unassigned Detachment of Patients, Army Air Forces Regional Hospital, Maxwell Field, Alabama, did, at Maxwell Field, Alabama on or about 15 September 1944, with intent to defraud, wrongfully and unlawfully make and utter to The Officers' Club, Maxwell Field, Alabama, a certain check, in words and figures as follows, to wit: "Nashville, Tennessee, 15 September 1944, No. 112, form No. 87-2, Pay to the order of cash, \$25.00, Twenty-five-----and no/100 dollars, for station hospital ward No. 10, to Commerce Union Bank, Main Office, Nashville, Tennessee, Captain William H. Branaman, Jr., O1575782," and by means thereof, did fraudulently obtain from the Officers Club, Maxwell Field, Alabama, currency of the United States in the amount of \$25.00, he the said, Captain William H. Branaman, Jr., then well knowing that he did not have and not intending that he should have sufficient funds in the Commerce Union Bank, Nashville, Tennessee, for payment of said check.

Specification 2: Same form as Specification 1, but alleging check No. 113 dated 16 September 1944, payable to cash, presented and uttered to The Officers' Club, Maxwell Field, Alabama, and fraudulently obtaining thereby \$25 in cash.

Specification 3: Same form as Specification 1, but alleging check No. 114 dated 17 September 1944, payable to cash, presented and uttered to The Officers' Club, Maxwell Field, Alabama, and fraudulently obtaining thereby \$25 in cash.

Specification 4: Same form as Specification 1, but alleging check No. 117, dated 26 September 1944, payable to cash, presented and uttered to The First National Bank of Montgomery, Maxwell Field Facility, Maxwell Field, Alabama, and fraudulently obtaining thereby \$25 in cash.

Specification 5: Same form as Specification 1, but alleging check No. 118, dated 28 September 1944, payable to cash, presented and uttered to The First National Bank of Montgomery, Maxwell Field Facility, Maxwell Field, Alabama, and fraudulently obtaining thereby \$10 in cash.

Specification 6: Same form as Specification 1, but alleging check dated 13 September 1944, payable to The Whitley Hotel, Montgomery, Alabama, made and uttered to The Whitley Hotel, Montgomery, Alabama, and fraudulently obtaining thereby \$10 in cash.

Specification 7: Same form as Specification 1, but alleging check No. 111, dated 10 September 1944, payable to cash, presented and uttered to The Jefferson Davis Hotel, Montgomery, Alabama, and fraudulently obtaining thereby \$10 in cash.

Specification 8: Same form as Specification 1, but alleging check dated 12 September 1944, payable to the Jefferson Davis Hotel, Montgomery, Alabama, made and uttered to the Jefferson Davis Hotel, Montgomery, Alabama, and fraudulently obtaining thereby \$10 in cash.

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

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

During the period from 30 June 1944 to 1 November 1944, the accused maintained a checking account at the Commerce Union Bank, Nashville, Tennessee (Ex. 9). No deposits were made to the account subsequently to 30 June 1944 (Ex. 9), and the balance of the account on that date amounted to \$49 (Ex. 9). By 24 July 1944 the balance had fallen to \$.05 at which figure it remained at least until 1 November 1944 (Ex. 9).

On 10 September 1944, the accused presented to the Jefferson Davis Hotel, Montgomery, Alabama, a check in the amount of \$10 payable to cash and issued by him against this account, as described in Specification 7 (R. 7, Ex. 1). The hotel cashed the check, giving the accused \$10 in cash (R. 7, 9), but upon its presentation to the bank for payment, the check was refused because of insufficient funds (R. 7, Ex. 9). The check has never been paid (R. 7). Two days later, 12 September 1944, a second check against the account in the amount of \$10, bearing the accused's signature, was cashed by the Jefferson Davis Hotel, the check having been presented by "the man who represented himself to be the signer" and who received \$10 in cash therefor (R. 9, 10, Ex. 2). This was the check described in Specification 8, and upon presentation to the bank, it too was returned because the balance in the accused's account was insufficient to pay it (Ex. 9).

Thereafter, on 13 September 1944, a further check in the amount of \$10 bearing the accused's signature, as described in Specification 6, was presented to the Whitley Hotel, Montgomery, Alabama (R. 11, Ex. 3). Like its predecessor, this check was returned by the bank by reason of insufficient funds (R. 11, Ex. 9), and the Hotel has never received payment for it (R. 11). There is no direct testimony either that the Hotel gave cash or credit for this check or that the accused was the individual who presented it, although the credit manager of the hotel testified that "it is on one of our form checks, and it could not have been cashed by anyone else, unless it had our endorsement on it" (R. 11).

On 15, 16 and 17 September 1944, the accused presented the checks described in Specifications 1, 2 and 3 respectively, to The Officers Club, Maxwell Field, Alabama (R. 13, 14; Ex. 4, 5, 6). The accused received \$25 in cash for each of the checks (R. 13, 14) which were thereafter deposited for collection and payment (R. 13, 14, 15). All three, however, were returned for insufficient funds, and have not been paid

(R. 13, 14, 15; Ex. 9). After the checks dated 15 and 16 September 1944 were returned for non-payment, the Officers' Club communicated with the accused, who suggested that the checks be sent through again and that he would take care of them (R. 14). They were sent in for the second time, therefore, but were not paid (R. 14).

Subsequently, on 26 and 28 September 1944, the checks referred to in Specifications 4 and 5 were presented by the accused to the Maxwell Field Facility, First National Bank of Montgomery, and the amounts of \$25 and \$10 respectively were paid to him by the bank (R. 16, 17; Ex. 7, 8). The checks were put through regular banking channels for collection but were refused for insufficient funds (R. 16, 17; Ex. 9). Upon the return of the check dated 26 September 1944, the bank communicated with the accused by telephone and was advised by him that "he would be right over" (R. 16). A day or two later the check of 28 September 1944 was likewise returned and the bank again attempted to get in touch with the accused but was unsuccessful (R. 16).

A statement of the accused's account showing a balance of \$.05 as of 30 September 1944 was mailed to him by his bank, although the exact date on which the mailing occurred does not appear (Ex. 9).

4. The accused, after his rights had been explained to him by the law member in open court, elected to take the stand as a sworn witness. His testimony constitutes the only evidence for the defense.

It is shown that the accused spent 14 months overseas and went through the African and Sicilian campaigns (R. 19). He was injured in Sicily as the result of an accident involving a truck which he was driving, and after three months of hospitalization, he was returned to this country for further treatment (R. 19). Since his return, he appears to have spent approximately ten months in various hospitals and convalescent centers (R. 19). Apparently during this period, he and his wife separated and a divorce is pending (R. 19).

The accused admitted presenting eight checks during September 1944 to the persons named in the Specifications, stating, however, that the first check issued to the Jefferson Davis Hotel and the check issued to the Whitley Hotel were in payment of hotel bills rather than for cash, as alleged in Specifications 6 and 7 (R. 20). He believed at the time these checks were issued that he had money in the bank, never having received a statement of his account until 1 October 1944 (R. 20, 21, 22, 23, 24).

The overdrawing of his account was attributed by accused to his carelessness in failing to keep an accurate record of his financial transactions and a consequent lack of realization that his balance

was as low as it was (R. 20, 21, 24). He did not intend to defraud anyone and did not learn that the checks in question had been returned until after 1 October 1944 (R. 20). He was unable to make them good at this time because of heavy expenses at the hospital and at home in connection with the support of his wife and child (R. 21). He is now in a position, however, to pay the checks (R. 22). The accused admitted that a check which he had issued to the Nichols General Hospital had been returned in June 1944, but stated that he had immediately made deposits to his account aggregating \$350 (R. 21, 22).

On cross-examination, the accused admitted that he had made no deposits to his account since June 1944 (R. 23), but had continued to draw checks on the account under the impression that his June deposits were sufficient to cover them (R. 23, 24). On 22 September 1944, he received a notice from the Commanding Officer of the Convalescent Center, Nashville, Tennessee, advising him that a check he had previously issued for subsistence had been returned for insufficient funds (R. 23). The accused admitted that the Officers' Club, Maxwell Field, had called him on the telephone relative to a returned check and that he advised that the check be put back through channels (R. 25). He took no steps at this time to determine whether his account was sufficient, however, thinking that there was money in the bank (R. 25, 28). He did not recall whether the checks cashed by him on 26 and 28 September (Specifications 4 and 5) were issued after this conversation with the Officers' Club (R. 26). The accused stated that the eight checks described in the Specifications were the only ones drawn by him in September 1944 (R. 25), but admitted that on 7 October 1944, he issued a further check which has not been paid (R. 28).

5. With respect to Specification 8, the prosecution failed affirmatively to show that the accused was the person who presented the check to the Jefferson Davis Hotel on the date alleged. The check in question was offered and admitted in evidence as Exhibit 2, however, the accused raising no objection to it on the ground of authenticity. Moreover, the accused admitted having issued two checks to the hotel sometime in September and also stated that the eight checks referred to in the Specifications were the only ones drawn by him during that month. Seven of the eight checks were otherwise accounted for, six by the direct testimony of the individuals to whom they were presented and one by reason of the fact that it was payable to the Whitley Hotel rather than the Jefferson Davis. It is, therefore, reasonable and proper to infer that the accused was the individual who presented and cashed the check payable to the Jefferson Davis Hotel as described in Specification 8.

Similarly, there was a failure to establish directly that the accused was the person who presented and cashed the check at the Whitley Hotel on 13 September 1944 as described in Specification 6. This check was admitted in evidence as Exhibit 3 and the accused raised no question

as to its authenticity. The accused admitted having issued a check to the Whitley Hotel sometime in September and all of the seven other checks drawn by him in that month were otherwise accounted for, six by the testimony of those who cashed them and one by reason of being payable to the Jefferson Davis rather than the Whitley Hotel. Hence, the court in this instance was likewise justified in inferring that the accused presented and cashed the check in question.

In two instances (Specifications 6 and 7), the testimony of the accused indicates that the checks were given in payment of hotel bills at the Whitley and Jefferson Davis Hotels, respectively, whereas it is alleged in the Specifications that they were issued for cash. As for the Jefferson Davis check, the evidence for the prosecution flatly contradicts the testimony of the accused on this point and the court is therefore supported in its finding that the check was cashed and not used in payment of a hotel bill. In the case of the Whitley check, although the evidence for the prosecution is less clear, there is nevertheless enough to justify the court's finding that the check was issued for cash. The credit manager of the hotel was asked whether it was the accused who presented the check "for payment", to which he replied that it was one of their form checks and could not have been "cashed" by anyone else unless it bore the hotel's indorsement. Furthermore, the check was in the even amount of \$10, thus indicating an unlikelihood that it was given in payment of an overnight hotel bill as stated by the accused.

The only remaining question is whether the record of trial is legally sufficient to support the court's finding that the checks were issued by the accused with the intent to defraud. Examination of the evidence from this point of view, leaves no genuine doubt that the accused must have been aware that his account could not possibly have been sufficient to meet the checks complained of. Even accepting at its face value his testimony that he deposited \$350 in the account in June 1944, the fact remains that no further deposits were made and that by 30 June 1944 his balance had declined to \$49. A few days later, on 7 July 1944, it had been reduced to \$9 and by 24 July 1944, it stood at \$.05, where it remained for the balance of the period involved in this case. So sharp a reduction could only have resulted from the issuance of checks either in large number or large amounts, and on either hypothesis, the accused must have been aware that his balance had dwindled to practically nothing. Nevertheless in September he issued in rapid succession eight checks aggregating \$140. Two of these checks, those issued on 26 and 28 September 1944, were written after the accused had received notice that an earlier check had been returned for insufficient funds. Moreover, on 7 October 1944, after the accused had received his bank statement showing a balance of \$.05 and after he had been advised of the return of at least two of the September checks issued by him, he wrote

an additional check which has not been paid. Evidence of this additional check was clearly admissible on the issue of the intent to defraud and was properly considered by the court (Par. 112b, MCM 1928; CM 239984, Hoyt, 25 BR 301). Considered together, these circumstances leave no reasonable doubt that the accused was guilty of more than the mere carelessness he admitted in the management of his financial affairs. They establish clearly and beyond doubt that at the time he issued the eight checks described in the Specifications he knew or was chargeable with knowing from his own transactions that his account was in such a state that the checks in all likelihood could not and would not be paid. The cashing of checks under such conditions represents a fraud on the persons to whom they are presented (CM 250772, Greenmyer, 33 BR 37, CM 250787, Eyen, 33 BR 47).

6. Records of the War Department disclose that the accused was born at Berea, Kentucky and is now 26 years and 11 months of age. He graduated from high school in 1935 and attended Sue Bennett Junior College, London, Kentucky, for 1½ years. He is married and has one child. In civilian life, he was employed as a salesman and as a ticket, freight and express agent for a railroad. He entered the army on 16 September 1940 and served as an enlisted man until 15 July 1942 when, upon graduation from the Quartermaster Officer Candidate School, he was appointed second lieutenant, Army of the United States and was ordered to active duty. He was promoted to the grade of first lieutenant, AUS-AC, on 23 January 1943 and to the grade of captain, AUS-AC, on 1 May 1943, and on 5 May 1943 he was promoted to the grade of first lieutenant AUS. The accused was found incapacitated for active duty by reason of injuries incident to his service by an Army Retiring Board convened at the Army Air Forces Regional Hospital, Maxwell Field, Alabama, on 4 October 1944. This finding was not concurred in by The Surgeon General who recommended that, in view of his "(psychiatric) emotional disability", the accused be placed on six months' temporary limited duty in a fixed installation within the continental United States. Accordingly, the Army Retiring Board has been directed to reconvene for reconsideration of its findings in the case.

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

Fletcher R. Andrews, Judge Advocate.

(On Leave) _____, Judge Advocate.

W. W. Kiser, Judge Advocate.

(222)

SPJGQ - CM 270265

1st Ind

JAN 18 1945

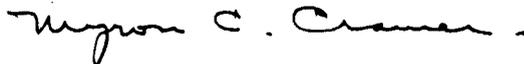
Hq ASF, JAGO, Washington 25, D. C.,

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 Captain William H. Branaman, Jr. (O-1575782), Quartermaster Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence. The conduct of the accused in willfully issuing checks with knowledge that his bank account was insufficient to meet them, demonstrates a degree of irresponsibility and a lack of appreciation of the standards of conduct required of a commissioned officer which fully merit the dismissal to which he was sentenced. It is noted that as of the date of trial, restitution had not been made. The accused attributed his failure to make restitution to his heavy expenses, stating at the trial, however, that he was then in a position to pay the checks. Consideration has been given to the prolonged period of hospitalization undergone by the accused as the result of an overseas accident. However, as disclosed in War Department Records, the Surgeon General has disapproved the Retiring Board's finding that he is incapacitated for active duty, and I do not consider these circumstances sufficiently mitigating in character to justify a modification of the sentence. Accordingly, 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 the above recommendation into effect, should such action meet with approval.



3 Incls

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

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence approved. G.C.M.O. 147, 16 Apr 1945)

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

(223)

SPJGH
CM 270281

17 JAN 1945

UNITED STATES)

v.)

Second Lieutenant WALLACE
H. HOFFER (O-686318), Air
Corps.)

ARMY AIR FORCES
CENTRAL FLYING TRAINING COMMAND

) Trial by G.C.M., convened
) at Foster Field, Texas,
) 10-11 November 1944. Dis-
) missal, total forfeitures
) and confinement for two (2)
) years.

OPINION of the BOARD OF REVIEW .
TAPPY, GAMBRELL 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 Second Lieutenant Wallace H. Hoffer, Air Corps, did, at Victoria Country Club, Victoria, Texas, on or about 19 October 1944, with intent to do him bodily harm, commit an assault upon Arthur V. Yariger, by striking him on the side of the head and face with a dangerous thing, to-wit, a bottle.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of any previous conviction was introduced. He was sentenced to dismissal, total forfeitures and confinement for two years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. On the evening of 19 October 1944 the accused, in the company of several other officers, went to the Victoria Country Club, Victoria, Texas, and there engaged a table. They arrived at the club about 9:30 and were later joined by another group of officers, making about eight

or ten at the table, all of whom spent the evening drinking whiskey (R. 56, 83). During the evening there were about five bottles (fifths) of whiskey on the table, part of the whiskey being Schenley's and the other Park and Tilford's (R. 56).

On the same evening, Mr. and Mrs. Irwin Ray Coons, accompanied by Arthur V. Yariger, were present at the Victoria Country Club, and were sitting at a large table in a small room in the rear. They had a quart bottle about one third full of whiskey which Mr. Coons and Yariger drank. Coons and Yariger also each drank one bottle of beer as did Mrs. Coons. None of them was drunk. Yariger is a 17 year old boy, six feet and two inches tall.

At closing time Mr. Coons and Yariger went to the rest room, and Mrs. Coons sat down on the lounge near the door outside the rest room to wait for them (R. 33, 75, 105). Mrs. Coons saw a lieutenant, later identified as Lieutenant Wyzykowski, having an argument with a girl and heard a negro waiter tell him to leave. He then walked over to the lounge where Mrs. Coons was sitting, sat down and put his arms around her. She told him to go on, and he was just starting to rise when Mr. Coons and Yariger came out of the rest room (R. 105). Coons noticed a distressed look on her face and assumed that Lieutenant Wyzykowski had been annoying her, so told him she was his wife. The three civilians then left the club and the lieutenant followed them and again put his arms around Mrs. Coons after they got outside. At this juncture Coons told him, "Mister, I have already told you that this is my wife", to which the lieutenant replied, "What's the difference, she is a woman, isn't she?" Coons then struck the officer and knocked him down (R. 34, 75, 105), saying after he had done so, "I will teach you to do that to my wife" (R. 57). About this time Oscar Small, a negro waiter at the club, came outside and turned the porch light on, the lights on the inside of the club already being on. Small said something to Mr. Coons to the effect that he wanted no trouble and Wyzykowski was led away by another officer. Meanwhile Coons turned and walked toward some other officers nearby and made a remark that he had just been discharged from the Merchant Marines, had been taking "you fellows" overseas, and that he resented such treatment. One of the officers, Lieutenant Edwards, replied, "You didn't take me overseas", which angered Coons and an argument ensued, in which Coons grabbed Edwards, but no blows were struck, Mrs. Coons having told Edwards not to fight with her husband because he was a boxer (R. 57, 59, 112).

About closing time the accused left his table, carrying a quart bottle containing Park and Tilford whiskey belonging to Second Lieutenant Joseph L. Agoes, and started toward the door with it (R. 160). He was later seen to leave through the door of the club, at which time he had a quart size bottle in his hand (R. 68). At the time the accused left the club an argument had just occurred in front of the club, and a group of people, variously estimated to number from 10 to 30, including both officers and civilians, were in the immediate vicinity (R. 69-70).

After Mr. Coons had hit Lieutenant Wyzykowski, Mrs. Coons had said to Yariger "Bubba do something", but Yariger took no part in the trouble, never engaged in any argument with anyone, and remained standing next to Mrs. Coons after Mr. Coons had walked over toward the group of officers of which Lieutenant Edwards was one. Yariger made only one remark, and that was to Mrs. Coons, in which he said, "Doris, you had better come on and go to the car" (R. 34, 66, 81). When she refused to do so, Yariger just stood there by her with the first two fingers of each hand in his pockets and was joined by Oscar Small, the negro waiter (R. 34, 52, 75, 84, 105). About this time the accused approached from behind Yariger cursing and saying, "Let me at the son-of-a-bitch" and as Yariger turned the accused hit him with a brown quart whiskey bottle that still had whiskey in it, the blow landing on the left side of Yariger's head just about the ear (R. 35, 62, 75-76, 105-106). When the bottle broke, Yariger was cut across the left side of the face, the cut extending from about the center of the ear diagonally down to the jaw below his mouth (R. 69).

When hit Yariger staggered as if to fall, was bleeding badly, was dazed by the blow, and stumbled toward the accused as if to strike him (R. 60, 63, 69, 84-85, 106, 162). At this juncture the accused put up his arms as if to spar with Yariger and, according to Oscar Small, still had the neck of the bottle in his hand and attempted to cut Yariger again with it but Small pushed him back (R. 85). Yariger never saw the person who hit him, and was not sure that it was the accused who had used the profanity above set out. After the blow, he put his hand up to his head, felt a quantity of fine glass in his hair, and felt the whiskey from the bottle burn the wound in his face. However, he soon lost consciousness (R. 76). After he was hit, Yariger walked part of the way, and was carried the rest of the way into the club (R. 106), it being necessary for one of the officers to force a door in order to get back in (R. 43, 106). There an effort was made to get an ambulance, and later Yariger was put in his car and started to the hospital, but the car stalled in a gravel bank. A cab containing other officers came along then and the accused helped transfer Yariger to the cab, in which Yariger and Mrs. Coons were taken to the hospital. The accused later rode to the hospital in the car which was driven by Mr. Coons (R. 106, 149).

Mr. Coons saw the blow which Yariger received, but did not see the face of the man who struck him or any insignia of rank on his uniform, his identification of the accused being based on the size and height of the accused, whom he described as being between five feet four inches and five feet six inches tall (R. 35-36). While not seeing the actual blow, Second Lieutenant John A. MacCallum heard the crash of the breaking bottle, looked in that direction and saw the accused stepping back from Yariger, as if preparing to fight, both of his hands being empty at that time (R. 57). Second Lieutenant William L. Crider saw the blow, but was unable to state positively that it was the accused who delivered

it, although the accused was of about the same stature and height. Crider stated that when hit Yariger staggered as if to fall and then straightened up to fight the man who hit him (R. 62-64). Second Lieutenant James W. Couperthwaite did not see the blow. However, he heard the crash of the broken bottle and had shortly before that seen the accused with a brown quart whiskey bottle in his hand (R. 68, 73). Oscar Small, the negro waiter, positively identified the accused as the man who delivered the blow, and was one of the persons closest to Yariger when he was hit (R. 84). After Yariger was on his way to the clubhouse, Second Lieutenant Roger Rice saw the accused at the scene of the fight and asked him what had happened, to which the accused replied that he had seen a fight, stuck his nose in it, and somebody had "clipped him", following which the accused stated he had hit or swung at him (R. 96-97). Mrs. Coons definitely identified the accused as the man who said, "I will get you, you son-of-a-bitch", and then hit Yariger on the head with a brown quart whiskey bottle (R. 105-106, 113).

The cut sustained by Yariger was about an inch wide, laid open because the muscles in the face were severed, and bled profusely (R. 69). When he reached the hospital, he was in no condition to talk, was still bleeding profusely, had already lost a lot of blood, and was suffering from shock. Dr. W. T. DeTar clamped the bleeding blood vessels and had to call in another doctor to administer plasma and glucose to the patient while he closed the wound. The cut was four and one half to five inches long and Yariger had been cut through the parotid, or saliva gland, which lay from one fourth to one half inch under the skin. Also the facial nerves had been severed. This cut resulted in a paralysis of the upper lip, which will permanently prevent Yariger from opening his mouth normally wide. In addition the scar will be permanent. The severed saliva gland drained until 5 November 1944, a period of about two and one half weeks, and the wound has not yet completely healed. At the time of his hospitalization, which lasted for one week, Yariger had a bump on the left side of his head at about the center of the skull and had some superficial scratches. There was also a quantity of fine brown glass in his hair. In Dr. DeTar's opinion the wound was caused by a sharp instrument and could have been made by broken glass. It was necessary for the cut to be sewed both inside and outside. It was further Dr. DeTar's opinion that the injury could have resulted fatally due to the extreme loss of blood (R. 115-118).

Sometime after the date on which the incidents above described occurred, the accused, after proper warning, made a voluntary oral statement to First Lieutenant William C. Church, Jr., to the effect that on 19 October 1944 he and some other lieutenants had gone to Victoria, Texas, and later to the Victoria Country Club; that when the lights in the club flashed as a signal for closing time, they started to leave;

that as he went out the door he noticed there was a fight outside; that somebody hit him and he went down; that he got up and swung; that he was hit again and again went down; that he did not know whom he hit or who had hit him; that he did not have a whiskey bottle in his hand at the time he hit the person; and that he knew no one who was there except Lieutenants Baltensberger and Agoes (R. 120-122).

4. For the defense:

Technical Sergeant LeRoy Stein, a clerk in the provost marshal's office, testified that he took down in question and answer form certain statements made by Oscar Small and Mr. and Mrs. Coons the day after the fight, which statements he later reduced to writing in narrative form, using his own words. He identified as Defense Exhibits 2, 3 and 4 such narrative statements of Mr. Coons, Mrs. Coons and Oscar Small, respectively.

For impeachment purposes the defense introduced certain parts of each narrative statement. The statements by Coons, "I have been gone from Victoria for 7 years and the Yariger boy was the first one I saw and I knew him well and we went out to the Club together", and "The Yariger boy was a little behind us and he and my wife walked off to go to the car and when he did this, this Officer walked to him and hit him with a bottle and it broke and the part he had in his hand apparently was pulled across the boy's face. I could not get up because everybody grabbed me and when I finally got up I saw that he was loosing (sic) a lot of blood and we took him inside * * * were slightly inconsistent with statements made by Coons at the trial, but were satisfactorily explained by Coons.

The statement by Mrs. Coons, "I know he was a Second Lieutenant but I really don't think I could identify him. I saw the Officer again after we got to the hospital but I did not get a good look at him because it was dark. I did see him hit him with the bottle", was at variance with her testimony as a witness when she positively identified accused.

The statement made by Oscar Small, "The Yariger boy then started walking toward the car and this Lt. Hoffer with two other officers and hit the Yariger boy with a full bottle of whiskey on the side of the head. The bottle was a quart bottle. The bottle cut the boy on the side of the head and face. I then stepped in between them and the Lieutenant made another attempt to hit the boy over my shoulder", varied from his testimony at the trial in that he stated on the witness stand that Yariger was standing still when hit, and that instead of stepping between Yariger and accused he merely put out his arm and pushed the accused away to prevent his striking Yariger again with the broken bottle (R. 125-128).

On 27 October 1944 Second Lieutenant Jack Herndon was at the club for dinner and there asked Oscar Small, "Oscar, did you see it?", to which Small replied, "No, I did not see it happen but I saw Lieutenant Hoffer immediately afterwards with a broken bottle in his hand" or words to that effect (R. 131-134).

Second Lieutenant Edwin G. Baltensberger saw Yariger immediately after the cutting making his way unassisted to the door of the club. The door was locked, however, and Lieutenant Baltensberger forced another door in order to get into the club, and later helped to carry Yariger out of the club. During this entire interval Baltensberger did not see Oscar Small (R. 136-138).

Baltensberger, on cross-examination, stated that he previously told the provost marshal that "the accused had gone to the rescue of another boy and apparently had a bottle in his hand, and just hit him with it", but on the stand stated that he did not know these facts of his own knowledge. He also admitted previously saying that he saw the accused following Yariger into the club and yelling, "Get him to a hospital", but testified that when this statement was made his mind was not clear (R. 138-143).

Flight Officer Benjamin J. Hoffacker, Jr., saw the accused and talked to him ten or fifteen minutes after the fight. At that time he noticed nothing in the hands of the accused, but stated that he paid no particular attention (R. 145).

The accused, after proper warning, took the stand as a witness in his own behalf. In substance he testified that on 19 October 1944 he and Lieutenants Agoes, Baltensberger and Rice went to Victoria, Texas, with Lieutenant Couperthwaite; that they first stopped at a liquor store, but he didn't go in; that they then went to a hotel to arrange for a room for Mrs. Rice for the week end, where Lieutenant Rice made ten or twelve phone calls in an unsuccessful effort to secure such room; that they went to the Victoria Country Club, where they put three quart bottles of liquor on the table, ordered set ups and there remained until they were told that it was closing time; that he left the table to call a cab, later returned to the table, and still later stood around the piano a short time; that as he was getting ready to go outside Mr. Hoffacker asked if he wanted to go with him, to which he replied in the negative; that he went outside and saw an argument; that he then stepped off the porch a short distance and was hit from behind, so hit the person next to him, and was then hit again; that he is hazy as to what happened after that until he went down the road and saw a car in the ditch; that he and Lieutenants Rice, Edwards, Helm and MacCallum tried to get the car out of the ditch but could not do so; that he then flagged an oncoming cab and helped transfer Yariger to it; that they then helped the driver of the stalled car to get out of the ditch and rode to the hospital in that car; that he saw Dr. DeTar put the clamps on the injured boy and then left the hospital; that a car pulled around the corner

and someone said, "Are you Lieutenant Hoffer?" and asked him to come back to the hospital with him; that he did so and there gave the military policeman his AGO card; that for the first time he saw Oscar Small, who pointed to him and said, "That's the man that did it"; that he did not know Yariger and did not see him at the club that night; that he had no grievance against Yariger, did not strike him and did not say, "Let me have the son-of-a-bitch"; that a few days prior to the trial he saw Oscar Small, Mr. Coons, and a girl, whom he cannot definitely say was Mrs. Coons; that he and Captain Lingle came out into the hall of one of the buildings on the post and Lingle said, "Hello, Oscar"; that Oscar did not speak to Lingle, but pointed toward the accused and said, "Hello, Lieutenant Hoffer", at which time the girl took a good look at him (R. 148-151).

On cross-examination the accused stated that all together there were twelve officers at his table at the club during the evening; that the original six had three quarts of liquor, but he does not recall what brand it was; that he drank some of each brand; that he was sober; that when he went outside neither Lieutenant Agoes nor Lieutenant Baltensberger was there when he was; that he had no argument with anyone; that he does not know who hit him or what hit him, but he fell on his back, got up and hit someone who knocked him down again; that he and his opponent then got split up by the crowd; that he did not hear a bottle break and did not carry a bottle of Park and Tilford whiskey out of the club; that to his best knowledge there were only two fights at the club that night, including the one in which he was engaged; and that he had previously made a statement to the provost marshal that "I don't know what I hit him with. * * *. I don't know what the civilian boy was hit with. * * * I didn't have a bottle in my hand and there was no whiskey on the table" (R. 151-155).

5. The evidence, although conflicting and in some instances slightly at variance with pretrial statements, is amply sufficient to establish the identity of the accused as the person committing the assault and every element of the offense alleged. In resolving the conflicting testimony, it was the function and duty of the court to consider all of the competent evidence introduced at the trial and to accord to it that weight and credence which in the judgment of the court it was entitled to receive, rejecting such portions as it believed to be unworthy of credence or otherwise untrustworthy (MCM, 1928, par. 124; CM 128252, Heppberger). The record of trial, taken as a whole, compelled findings of guilty of the Charge and the Specification.

6. Accused is 28 years of age and single. He is a high school graduate and before entering military service was employed by Robertshaw Thermostat Co., Youngwood, Pennsylvania, as a Microne machine helper. He served one year as a private in the Pennsylvania National

(230)

Guard from 16 January 1940 to 16 January 1941, on which latter date he enlisted in the Army. He was enrolled as an aviation cadet 25 September 1942 and upon graduation from the AAF Advanced Flying School, Brooks Field, Texas, 29 July 1943, he was appointed a second lieutenant, AUS 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 and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 93rd Article of War.

Thomas N. Jappy Judge Advocate.

William H. Lambrell Judge Advocate.

(On Leave) Judge Advocate.

SPJGH-CM 270281

1st Ind

Hq ASF, JAGO, Washington 25, D. C. JAN 28 1945

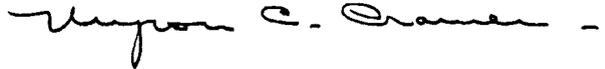
TO: The Secretary of War

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 Wallace H. Hoffer (O-686318), 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 and 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 the inclosed letter from the Honorable Augustine B. Kelley, Member of Congress, dated 9 December 1944.

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



MYRON C. CRAMER
Major General
The Judge Advocate General

4 Incls

1. Record of trial
2. Ltr fr AB Kelley, MC
3. Dft ltr for sig S/W
4. Form of action

(Sentence confirmed. G.C.M.O. 106, 26 Mar 1945)

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

(233)

SPJGH
CM 270352

16 FEB 1945

UNITED STATES)

65TH INFANTRY DIVISION

v.)

Private YOSHITAKA UYECHI)
(39019794), Headquarters)
& Headquarters & Service)
Company, 171st Infantry)
Battalion (Separate).)

Trial by G.C.M., convened at
Camp Shelby, Mississippi,
21 November 1944. Dishonorable
discharge (suspended) and con-
finement for five (5) years.
Rehabilitation Center.

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

1. The record of trial in the case of the above-named soldier having been examined in the Office of The Judge Advocate General and there found legally sufficient to support only so much of the findings of guilty of the Charge and Specification as involves the lesser included offense of absence without leave, has been examined by the Board of Review and held to be legally sufficient to support the findings of guilty and the sentence.

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Yoshitaka Uyechi, Headquarters & Headquarters & Service Company, 171st Infantry Battalion, Separate, did at Camp Shelby, Mississippi, on or about 15 October 1944, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: Movement overseas, and did remain absent in desertion until he was apprehended at Fort Riley, Kansas, on or about 29 October 1944.

The accused pleaded not guilty to the Charge and Specification, but guilty of absence without leave for the period alleged in violation of Article of War 61. He was found guilty of the Charge and Specification. Evidence of two previous convictions by summary court-martial for absence without leave for periods of nine and three days respectively, in violation of Article of War 61, was introduced at the trial. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for five years. The reviewing authority approved the sentence, suspended the dishonorable discharge, designated the Fourth Service Command Rehabilitation Center, Fort Jackson, South Carolina, as the place of confinement, and ordered the sentence executed. The proceedings were published in General Court-Martial Orders No. 84, Headquarters 65th Infantry Division, 7 December 1944.

3. The prosecution introduced competent evidence to show that on 28 September 1944 accused's company was assembled and a roll call taken. As the roll was called, accused or someone answered to his name, following which the company commander read the 28th Article of War to the men; told them the company was alerted, and advised them to prepare for a POR shipment. A notice of this assembly had previously been posted on the company bulletin board (R. 15-19). In accused's organization there was published a daily bulletin. This bulletin was posted on the company bulletin board daily and copies filed in the company orderly room. The purpose of the bulletin was to apprise the various members of the company of their daily duties and to notify them of company formations. The daily bulletin posted 12 October 1944 contained the following announcement: "All Pvts and Pfc's on POR will report to the Supply Room for their clothing before 1900 TONIGHT" (R. 16, 20; Ex. D). The daily bulletin posted (Friday) 13 October 1944 directed all men on POR to turn in certain equipment and clothing on Saturday (14 October) at 1200 hours, and contained the announcement that a clothing inspection of all POR men would take place on Sunday (15 October) at 1300 hours (R. 16, 17, 20; Ex. E). When assembled for this final check on Sunday morning (15 October) those present were told that they were ready to go, and their equipment and clothing would be placed at certain points to be picked up. Only those persons scheduled for POR shipment had their equipment and clothing checked. Accused's equipment and clothing were checked and he was issued additional clothing prior to going on pass 14 October 1944 (R. 22-23; Ex. C). The daily bulletin posted 14 October 1944 carried the following notice:

"3. ATTENTION P O R MEN!! THE FOLLOWING INFORMATION IS FOR THE GUIDANCE OF ALL CONCERNED.

a. Barracks Bags will be brought to the Battalion assembly Area by 0800, 16 Oct 44. There will be a marker there for Hq. Co. area.

b. Men will be ready to fall out in class 'A' O.D. uniform W/blouse. The time will be given later.

c. Toilet articles only will be taken with the men when they fall out. You will not be able to get at your barracks bag after 0800 Mon. Carrying bags will not be allowed to accompany the men.

d. There will be paper plates on the train-- it will not be necessary to carry your eating equipment with you." (R. 17, 20, 21; Ex. F).

Accused was issued a pass the afternoon of 14 October 1944 which required his return at 2300 hours that night. He did not return as required. He did not sign the company sign-in book nor report to the Charge of Quarters and turn in his pass. Accused remained absent without leave until he was apprehended by military police at Fort Riley, Kansas, 29 October 1944 (R. 7-10; Exs. A, G, H).

The officer who investigated the charge against accused testified that after warning accused of his rights under the 24th Article of War the accused told him freely and voluntarily that he had received a pass at about 1400 hours on 14 October 1944 authorizing him to be absent until 2300 hours that night; that he did not return as required; that he was aware that he was on "the transfer list to be transferred to Fort Meade"; that he knew the shipment to Fort Meade was due to leave within a very short time, that he did not like the infantry and did not wish to go overseas as an infantryman, and that he had previously tried to transfer to either the Air Corps or Army Ordnance (R. 26-29).

4. After being fully informed of his rights, accused elected to make an unsworn statement as follows:

"Well, sir, the reason I went AWOL this time is I dislike the infantry. I tried to transfer to some other service, but they won't let me. If they can get me some other branch of service I'm willing to go overseas, but not as an infantryman. I want to go overseas, but not as an infantryman. I tried to enlist in the Navy; that was pre-war time. When I got in the Army I tried to get in the air force, armored division, and tank corps, but I couldn't." (R. 35).

Technical Sergeant Peter Segawa, a witness for accused, testified that he was sent as a guard to Fort Riley, Kansas, to return accused to his station at Camp Shelby, Mississippi; that after he had returned accused to Camp Shelby he overheard a conversation between accused and a Captain Thornburg; that Thornburg asked accused, "Did you plan to return?" * * * "when were you going to come back?" and accused replied, "As soon as my money ran out." The witness further testified that accused gave him a sealed envelope containing a note for delivery to Private Okamoto, a member of accused's battalion, and that he delivered the note to Private Okamoto the same day, being the day he and accused arrived back at Camp Shelby (R. 34-35).

Technical Sergeant Etsuo Anzi, a witness for accused, testified that he was also sent as a guard to Fort Riley to return accused to his

station and that while there he heard accused tell the sergeant of the guard that he (accused) intended to return to his station after his money ran out. He further testified that sometime, while accused was in his custody, he observed some transportation tickets in his wallet, but did not know what destination the tickets called for (R. 30).

Private Mitsuo Okamoto, a defense witness, testified that Sergeant Segawa upon his return to Camp Shelby, Mississippi, gave the witness three transportation tickets, one to St. Louis was a train ticket, one from St. Louis to Hattiesburg, Mississippi, was a bus ticket, and the third was a bus ticket from St. Louis to Birmingham, Alabama. At the time Sergeant Segawa gave him the tickets he also gave him a note from accused stating that he had no use for the tickets and authorizing the witness to make use of them. The witness had turned them in for the purpose of getting a refund. He was not in possession of the note accused had sent him.

5. Accused was arraigned and tried upon a charge of desertion alleging specific intent to avoid hazardous duty, to wit: movement overseas.

"In past cases under Article of War 28, overseas shipment has ordinarily been described in the specifications as 'important service', the term more clearly appropriate where the departure for overseas duty is the act in question. However, under wartime conditions it would seem permissible to describe it as either, and as long as the Specification leaves no doubt that it is overseas movement which the accused is charged with intent to avoid, it may without prejudice be described as 'hazardous duty' or 'important service' (See CM ETO 2432, 3 Bull. JAG 335, August 1944, where it was held that the two may be pleaded in the conjunctive, the prosecution being free to prove either or both at the trial.)" (CM 272610, Armas).

Certain evidence introduced by the prosecution demonstrates that accused absented himself without leave immediately prior to his scheduled transfer to the replacement depot at Fort Meade, Maryland. Were this all the evidence in the record the case would fall squarely within the doctrine of a long line of recent opinions wherein it has been held that, under Article of War 28, "important service" encompasses all actual service designed to protect or promote national or public interest or welfare in a manner direct and immediate, such as embarkation for foreign duty in time of war, but does not include what may be termed "preparatory service", such as transfer to a replacement depot (CM 264237, Patillo; CM 272610, Armas; CM 266441, Mugan; CM 265447, Hodge, CM 268240 Closson; CM 268622, Sfer). In all of the cited cases there was no direct

evidence of the intent of the accused. He did not himself express his intent. His intent could only be inferred by the court from (a) what he knew or had reason to believe and (b) his conduct thereafter. The rule fixing the amount of proof which will justify the court's inference of intent to avoid important service in these embarkation cases is succinctly stated in CM 272610, Armas, as follows, viz:

"Where, as in the great majority of cases, there is no direct evidence of the requisite intent, a proper inference thereof may be raised by evidence establishing that the accused knew, or had reason to know and accordingly believed, that his embarkation for overseas duty was 'imminent' and that his absence would result in avoiding such embarkation" (See also CM 268622, Sfer, CM 265447, Hodge and cases there cited).

In these embarkation cases where the intent of accused must be inferred because of the absence of direct evidence of his intent, it has been consistently held that to justify the inference of intent to avoid hazardous duty or shirk important service the proof must show that "accused expected his early embarkation for overseas service" (CM 253070, Moran, 34 B.R. 265); that he "was about to depart for overseas duty" (CM 231163, Sinclair, 18 B.R. 153); or that he believed his embarkation to be "imminent" (Armas case, supra).

From all of the foregoing cases it is apparent that where there is no direct evidence of the intent of accused but such intent must be inferred by the court, a requisite element is proof of accused's belief that his embarkation for overseas duty was imminent. The reason for that rule is obvious. Where an accused is at a replacement depot or staging area and faced with reasonable prospects of going overseas sometime in the not too distant future he may absent himself for any number of reasons other than to avoid embarkation; it is only when he has reason to believe that his embarkation is imminent that it can be reasonably inferred that his absence was with specific intent to avoid it.

In the present case, however, we are not faced with the problem of inferring intent inasmuch as there is direct evidence in the record as to accused's intent. Accused stated that he absented himself because he did not like the infantry; that he was willing to go overseas in some other branch of service but not as an infantryman. It is evident from this that accused did not intend to go overseas as an infantryman and that he absented himself to avoid overseas shipment as an infantryman. Thus, there is direct proof that when he absented himself without leave he did so with the intent to avoid overseas shipment as an infantryman, and it becomes unnecessary in this case to draw any inferences as to accused's intent; he has admitted what his intent was.

In some of the "inference" cases there is certain language which indicates that to constitute this specific type of desertion under Article of War 28, there must be proof that accused was in fact, as distinguished from his belief, faced with the prospect of prompt embarkation for overseas duty. However, the Article of War does not state that such fact is an essential element of the offense. The Article is worded in its pertinent particulars as follows, viz:

"Any person subject to military law who quits his organization or place of duty with the intent to avoid hazardous duty or to shirk important service shall be deemed a deserter."

Furthermore, in setting forth the essential elements of proof of this offense the Manual does not include as one of them proof that accused in fact was scheduled for hazardous duty or important service; it requires proof only that he intended to avoid hazardous duty or shirk important service (MCM, 1928, par. 130). In none of the cases in which this additional element was suggested was it the turning point of the opinion or essential to the decision. A careful reading of the embarkation cases indicates rather that it was a somewhat ambiguous way of stating that in inferring the intent of the accused, where there is no direct evidence thereof, proof that in fact he was scheduled for prompt overseas shipment and knew it established that he believed or had reason to believe that his embarkation for overseas duty was imminent and justified the court in inferring that his absence was with the intent to avoid it. Our conclusion that imminent embarkation as a fact, as distinguished from accused's belief, is not an essential element of the offense here alleged is supported by the opinion of the Board of Review in CM 223300, Manashian, 13 B.R. 363). There the proof established only that accused apprehended prompt embarkation for overseas duty but there was no proof that such imminent embarkation existed in fact.

In the instant case, the information, instructions and notices which were brought to the attention of the accused between 28 September and 14 October, coupled with accused's own statement as to why he absented himself without leave on 14 October, leave no room for doubt that at the time accused left his organization on 14 October he believed that the organization would embark for overseas service within the reasonably near future and that he absented himself with the specific intent of avoiding embarking with his organization. It is the opinion of the Board of Review that this constituted an intent to avoid hazardous duty within the meaning of Article of War 28, and that, accordingly, the evidence sustains the findings of guilty of the offense alleged.

6. Accused is 25 years of age. He was inducted into the military service 18 February 1942 at Fort MacArthur, California.

7. For the reasons stated, the Board of Review holds that the record of trial is legally sufficient to support the findings of guilty and the sentence.

Thomas M. Jaffy, Judge Advocate.

William H. Lambell, Judge Advocate.

Robert C. Treverhan, Judge Advocate.

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

(241)

SPJGN
CM 270372

26 JAN 1945

UNITED STATES)

NINTH SERVICE COMMAND
ARMY SERVICE FORCES

v.)

Second Lieutenant WILBUR
C. THOMPSON (O-1590853),
Quartermaster Corps.)

Trial by G.C.M., convened at
Dibble General Hospital, Menlo
Park, California, 28 November
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 Charges and Specifications:

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

Specification 1: In that Second Lieutenant Wilbur C. Thompson, Quartermaster Corps, Attached Unassigned to Detachment of Patients, Service Command Unit 1985, Dibble General Hospital, did at Menlo Park, California, on or about 14 August 1944, wrongfully and unlawfully, with intent to defraud, falsely make in its entirety a certain writing in the following words and figures, to wit:

14 August 1944

To Whom It May Concern:

This is to certify that Lt. Wilbur C. Thompson, a patient this hospital, is on a special diet which cannot be furnished at the expected price of one dollar per day. Therefore, we had to rebill him from May 2nd to June 30th a total of \$60.00. All bills for him will be billed at two dollars per day from this past July 1st.

For the Commanding Officer:

Karl H. Hires, Jr. /s/
Earl H. Hires, Jr.
Captain MAC
Mess Officer

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

Specification 2: In that Second Lieutenant Wilbur C. Thompson, Quartermaster Corps, Attached Unassigned to Detachment of Patients, Service Command Unit 1985, Dibble General Hospital, did at Menlo Park, California, on or about 18 July 1944, wrongfully and unlawfully, with intent to defraud, falsely make in its entirety a certain writing in the following words and figures, to wit:

Dibble General Hospital
Menlo Park, California
July 18, 1944

Fred W. West
114 Sansome St.
San Francisco, Cal.

Dear Mr. West:

In checking our account with Lt. Wilbur C. Thompson I find that he has paid \$60.00 up to July 1, 1944.

Thanking you very kindly, I remain

Yours truly,

Robert L. Coe
1st Lt.
Mess Officer

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

Specification 3: In that Second Lieutenant Wilbur C. Thompson, Quartermaster Corps, Attached Unassigned Detachment of Patients, Service Command Unit 1985, Dibble General Hospital, did, at Menlo Park, California, on or about 15 August 1944, wrongfully and unlawfully, with intent to defraud, falsely alter a certain receipt in words and figures as follows, to wit:

MENLO PARK, CALIFORNIA

No. 2286

10 August 1944

Received from Captain Wm B. Compton

Thirteen and 00/100 Dollars

account of hospital charges 13 days to July

	Subsistence	\$....X.....
The Hospital Fund	Other Chgs.....	\$.....
By.....K..Kilcare.....	Total.....	\$..13.00...

DUPLICATE

1142-Presidio of SF (LG)4-6-44-40 Books
50 Dup Each

Form No. 6-DGH

by erasures and substitutions thereon, to read as follows, to wit:

DIBBLE GENERAL HOSPITAL
MENLO PARK, CALIFORNIA

No. 2286

10 August 1944

Received from Lt. Wilbur C. Thompson

Sixty two and no/100 Dollars

account of hospital charges 31 days to July 1

	Subsistence.....	\$...X.....
The Hospital Fund	Other Chgs.....	\$.....
By.....K..Kiliare.....	Total.....	\$..62.00...

ORIGINAL

1142-Presidio of SF (LGH)4-6-44-40 Books
50 Dup Each

Form No. 6-DGH

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

Specifications: In that Second Lieutenant Wilbur C. Thompson, Quartermaster Corps, Attached Unassigned Detachment of Patients,

Service Command Unit 1985, Dibble General Hospital, with intent to defraud United Services Automobile Association, of San Antonio, Texas, did, at Menlo Park, California, from about 1 May 1944 to about 18 July 1944, unlawfully pretend to said United Services Automobile Association that Mills Memorial Hospital, San Mateo, California, had charged him, and that he had paid to said Mills Memorial Hospital, the sum of \$110.23 for medical and hospital services, compensable to said Second Lieutenant Wilbur C. Thompson by said United Services Automobile Association under the Medical Payments Clause of United Services Automobile Association Policy No. 56334-U-1 held and carried by said Second Lieutenant Wilbur C. Thompson, the said Second Lieutenant Wilbur C. Thompson well knowing that said pretenses were false in that he had been charged by said Mills Memorial Hospital for such services the sum of \$10.23 only and which said sum of \$10.23 had not been paid, and by means thereof did fraudulently obtain from said United Services Automobile Association the sum of \$100.00.

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

3. The evidence for the prosecution shows that under the terms of a policy bearing number 56334 U 1 issued by the United Services Automobile Association of San Antonio, Texas, the accused was insured for the period between 22 January 1944 and 22 January 1945 against various contingent liabilities arising from the operation of his 1939 tudor Ford sedan. Among other things, the insurer agreed to pay for all damage to the vehicle caused by collision and for all medical expenses, not in excess of \$500.00, incurred by any one person as the result of accidental injury sustained "while in or upon, entering or alighting from the automobile" (R. 10-14; Pros. Ex. A). In February of 1944 the accused was involved in an accident which entitled him to recovery on both grounds. The insurer company immediately paid him "the sound market value of the car" which was a total wreck. Having suffered injuries to one of his legs, he also presented several hospital bills "for diets" "some stating \$31.00 a month ..., others \$62.00". Subsequently he discussed the figures with Mr. Fred W. West, the claims representative of the company, who summarized the conversation as follows:

The accused "told me that he would be in the hospital for one year and such being the case, if we had to pay him at the rate of \$60.00 a month, it wouldn't take a full year to eat up the \$500.00 [the maximum recovery permitted under the policy by

any one person for medical expenses⁷. [He] also told me that being off pay, he had sent his wife and baby to his mother and that he had no money" (R. 11).

Moved by the accused's predicament and desiring to aid him, Mr. West gave him a draft for the full \$500.00 (R. 12, 28). Upon learning of the transaction, the claims attorney for the insurer became convinced that the settlement was for "loss of pay" against which the policy offered no protection and accordingly suggested that steps be taken to prevent collection. Mr. West followed this advice and caused the draft to be dishonored (R. 12, 39). Since the accused had already written a number of checks against his deposit of \$500.00, his bank demanded reimbursement for the resulting deficiency. He complied as soon as he was able to raise the money (R. 40). While barring immediate complete recovery as premature, the insurer apparently did not by its action intend to deny liability for bona fide medical expenses which might thereafter accrue. At any rate, the accused presented several hospital bills and was in each instance reimbursed for the amounts represented as expended.

The first, a statement as of 28 February 1944 from the Mills Memorial Hospital of San Mateo, California, marked "Paid March 10-44," was addressed to the accused and contained the following entries:

"Miscellaneous	Last Amount Is Balance Due
Emer Rm \$92.50	
Ambul 7.73	
	110.23" (R.20; Pros. Ex.F).

Since the total represented an error in addition of \$10.00, Mr. West returned the document on 17 July 1944 to the accused and requested him to forward "a corrected bill" (R. 22-23; Pros. Ex. H). The accused replied in a letter dated 19 July 1944 and inclosed two letters (Pros. Ex. I). One, purporting to have been written the day before at Mills Memorial Hospital by "Fred A. Hoag M.D.," read as follows:

"In checking our account with [the accused] the discrepancy does not lie in the total amount shown own [sic] our previous bill. The discrepancy came in on the ambulance fee which should have been \$17.73.

"The amounts below are what he paid us:

Emer-Room	\$92.50	
Ambulance	17.73	
	<hr style="width: 50%; margin-left: 0;"/>	
	110.23" (R. 21-22; Pros. Ex. G).	

(246)

The other, also dated 18 July 1944, was addressed from "Dibble General Hospital, Menlo Park, California," bore the signature of "Robert L. Coe 1st Lt. Mess Officer," and stated that:

"In checking our account with [the accused] I find that he has paid \$60.00 up to July 1, 1944" (R. 16-17; Pros. Ex. C).

In August of 1944 the accused presented two other instruments to Mr. West. One was a printed form receipt from the Dibble General Hospital dated 10 August 1944 containing pencil entries which acknowledged the payment of \$62.00 by the accused and signed "THE HOSPITAL FUND BY K. Kiliare" (R. 17-20; Pros. Ex. E). The other, which was captioned "Dibble General Hospital" and dated 14 August 1944, consisted of two certifications, the last of which purported to be signed "For The Commanding Officer" by "Earl H. Hires Jr. Captain MAC Mess Officer" and represented that:

"This is to certify that [the accused], a patient this hospital, is on a special diet which cannot be furnished at the expected price of one dollar per day. Therefore, we had to rebill him from May 2nd to June 30th a total of \$60.00. All bills for him will be billed at two dollars per day from this past July 1st" (R. 14-16; Pros. Ex. B).

If genuine, this last instrument, the statement of 28 February 1944 from the Mills Memorial Hospital, the letters from "Fred A. Hoag M.D." and "Robert L. Coe", and the receipt from "THE HOSPITAL FUND BY K. KILIARE" would have all created or tended to create a legal liability on the part of the United Services Automobile Association (R. 15, 17-18, 21-22). Each was accepted at face value by Mr. West (R. 15, 17-18, 21). The claims which they represented arising prior to 22 July 1944 were apparently embodied in, and satisfied by, a remittance in the sum of \$254.23 which he forwarded to the accused on that day (R. 15-16, 21, 26-29, 31-32; Def. Ex. 1). The obligations based on the instruments dated 10 August and 14 August 1944 purporting to be signed by "Earl H. Hires, Jr." and "K. Kiliare" were apparently also paid but at a later date (R. 15, 19-20, 27-29).

These two signatures and those of "Fred A. Hoag" and "Robert L. Coe" had all been forged by the accused (R. 17, 37-39, 42-45; Pros. Ex. D). The receipt allegedly subscribed by a "K. Kiliare" had originally been issued to Captain William B. Compton for the sum of \$13.00 and had been signed by a Miss K. Kilcare, a bookkeeper at Dibble General Hospital (R. 41-43, 45-46; Pros. Ex. K). All of the erasures had been made by the accused and all of the alterations as well as the signature of "K. Kiliare" were in his hand (R. 37).

The statement of 28 February 1944 had also been altered by him. In its original form it had set forth charges of only \$2.50 and \$7.73 or a total of \$10.23 (R. 34; Pros. Ex. J). By placing a 9 before the figure of "2.50" and a 1 before the total of "10.23" and by the subsequent letter of explanation from "Fred A. Hoag M.D." the accused succeeded in increasing the amount of his claim by \$100.00 (R. 23, 26, 33; Pros. Exs. F, G, J). None of the alterations made in the statement had been authorized by the Mills Memorial Hospital or any of its personnel, and neither the forged receipt or forged letters had been written with the consent of the individuals whose names had been appropriated (R. 46-47).

The \$60.00 obtained by the use of Coe's name was rightfully due and owing to the accused anyway (R. 27). Although the other sums collected by him were prematurely paid, the insurer at the time of the trial was still indebted to him in an amount exceeding their total (R. 30, 32-34). Mr. West has accordingly signed the following affidavit:

"[The accused] is not indebted to the insurance company financially and was not indebted to them financially at any time.

"This insurance company does not have any claim against the accused and does not desire to have the man penalized in any way.

"I recommend that the accused be granted clemency by the Court under the present circumstances" (R. 30; Def. Ex. 2).

4. After being apprised of his rights relative to testifying or remaining silent, the accused took the stand on his own behalf. At 12:13 a.m. on 28 February 1944 he had been injured in an automobile accident. The adjutant at the post misread the report of the investigating officer and recorded the incident as due to misconduct. As a result of this erroneous entry the Finance Department not only stopped the accused's pay but required him to return \$488.25 which he had previously received (R. 48, 51-52, 58). Since he was without funds at the time, he was required to assign his quarters allowance and subsistence to cover his alleged indebtedness (R. 48, 59). This arbitrary action deprived him of the only source of income which he had available for the support of his wife and child (R. 50).

Pressed by urgent need, he acquainted Mr. West with the demand for reimbursement in the sum of \$488.25 and persuaded him to make immediate payment of the maximum recoverable under the policy for medical expenses (R. 48). Against the draft for \$500.00 which was received by him, the accused drew \$400.00 which he turned over to his wife who had finally

decided to leave him. He had long been involved in domestic difficulties with her, and his financial predicament had "put the finishing touches" to their relationship. After accepting the \$400.00 from him, she departed and was never heard from again by him (R. 49-50, 53, 57).

His sole purpose in thereafter forging the various instruments described was not to enrich himself at the expense of the insurer but "to hurry along" the payments which Mr. West assured him would ultimately aggregate "the whole \$500.00" (R. 55-56). As evidence of his good faith he in July of 1944 returned a remittance from the insurance company for \$62.00 because he did not believe that he was entitled to it (R. 49, 56; Def. Ex. 3). The \$100.00 balance remaining to him from the settlement of \$500.00 and the \$254.23 subsequently paid to him by Mr. West were applied to the reduction of the obligation to the bank created by the dishonor of the draft. The accused's net assets then aggregated fifteen cents (R. 57). Upon being restored to a pay status, he promptly satisfied the balance which he owed to the bank (R. 51). Making due allowance for all the sums obtained by his forgeries and alterations, the insurer still owed him approximately \$120.00 (R. 56).

In his first indorsement recommending trial by general court-martial for the accused Colonel William H. Allen, the Commanding Officer at Dibble General Hospital has stated that:

"I have personal knowledge that the following extenuating circumstances exist. This officer was originally admitted to Letterman General Hospital for injuries incurred while absent without leave. The Investigating Officer found that such injuries were not in the line of duty, but were not the result of the officer's own misconduct. The Report of Investigation erroneously showed that the injury was the result of his own misconduct. This was corrected by the Investigating Officer by writing the word 'not' and initialing the same. The officer was transferred to this hospital on 2 May 1944. The Registrar, in reporting his admission to his commanding officer, (C.O., War Dog Reception and Training Center, San Carlos, California) erroneously stated that the officer had been admitted to the hospital for injuries incurred not in line of duty and as a result of his own misconduct. In spite of the fact that the case was reported as one of injury and therefore obviously did not come within the purview of AR 35-1440, a stoppage order was entered against his pay and he was subsequently called upon to refund \$488.25, which it was alleged had been paid to him in error. As soon as the matter came to my attention, efforts were made to correct the error and have the officer restored to a pay status. Information leading to the

present charges was received at a later date, but in my opinion the officer's alleged effort to obtain payments through fraud were due to the serious financial predicament in which he had been placed through this series of errors. It is understood that the officer has a wife and minor children who were in dire need of support." (R. 60).

5. Specifications 1 and 2 of Charge I allege that the accused, on or about 14 August and 18 July 1944, respectively, did "wrongfully and unlawfully, with intent to defraud, falsely make in their entirety" certain writings which were "of a private nature which might operate to the prejudice of another". Specification 3 of Charge I alleges that the accused did, "on or about 15 August 1944, wrongfully and unlawfully, with intent to defraud, falsely alter a certain receipt ... by erasures and substitutions ...". These violations were laid under Article of War 93. The Specification of Charge II alleges that the accused "with intent to defraud United Services Automobile Association ... did ... from about 1 May 1944 to about 18 July 1944, unlawfully pretend to said Association that Mills Memorial Hospital ... had charged him, and that he had paid to said ... Hospital, the sum of \$110.23 for medical and hospital services ..., the said accused well knowing that said pretenses were false ... and by means thereof did fraudulently obtain from said ... Association the sum of \$100.00." This act was represented to be in violation of Article of War 96.

By his pleas of guilty and his testimony as a witness on his own behalf the accused has admitted that he committed all of the offenses described. His alteration of the statement from the Mills Memorial Hospital coupled with his forgery of the supporting letter of explanation from "Fred A. Hoag" were deliberately calculated to deceive and to defraud the United Services Automobile Association. In presenting these instruments he falsely and unlawfully pretended that he had incurred expenses at the Mills Memorial Hospital aggregating \$100.00 in excess of those actually billed to and paid by him. Since his fraudulent representations induced the United Services Automobile Association to disburse \$100.00 before any obligation in that amount had matured under the policy, he undoubtedly contravened Article of War 96 as stated in the Specification of Charge II.

Although sustained beyond a reasonable doubt by the record, the forgeries alleged under Charge I are unusual in that they neither prejudiced the parties whose names were used nor caused any ultimate loss to the insurer. The problem is particularly acute in the case of the letter purporting to be signed by "Coe" which was presented to induce payment of

an obligation already fully matured and owing to the accused. Neither of the grounds mentioned warrants the disapproval of the findings of guilty. State v. Johnson and Johnson, 26 Ia. 407 (1868), effectively disposes of any argument which might be founded on the first point. The court there said that:

"It must be borne in mind that it is not necessary that the instrument shall have actual legal efficacy, but it is sufficient, that, if genuine, it might apparently have such efficacy, or serve as the foundation of a legal liability, and if it might be taken as legal proof, it would have such apparent efficacy . . . Here . . . is an instrument, which, if genuine, by the legitimate action of the proper authorities, would be received, and according to the averments of the indictment, was to be received as legal proof of a liability. It was, therefore, clearly, legally capable of effecting a fraud." (Underscoring supplied)

This holding has been cited and quoted in part in several federal decisions of which Read v. United States, 299 Fed. 918 (Ct. of App. D. C. 1924) and Milton v. United States, 110 F (2d) 556 (Ct. of App. D.C. 1940) are typical. This last case observed, among other things, that, "It is enough if the forged instrument be apparently sufficient to support a legal claim and thus to effect a fraud." The rule has been even more explicitly enunciated in the following excerpt from III Bull, JAG July 1944, p. 287, sec. 451 (25):

"It is not necessary that the person defrauded be the person whose name was signed on the receipt. Falsely personating another and signing his name is forgery, if the signers' intent is to have it received as the instrument of such other person, and if the instrument so signed is such as to be of legal efficacy. CM CBI 85 (1944)".

Since obviously the letters and the receipt purporting to be signed by Hires, Coe, and "Kiliare", respectively, were presented as legal proof of his claims under the policy, and, since they not only were capable of effecting but did in fact effect a fraud, they were instruments which were susceptible of forgery and which will support a conviction for that offense.

That the insurer ultimately sustained no loss by their execution is not an exculpatory factor. Thus in Easterday v. United States, 292 Fed. 664 (Ct. of App. D.C. 1923), it was pointed out that,

"the intent to defraud could exist without any actual fraud resulting. The fact, then, that the indorsees

suffered nothing by reason of the forged checks was immaterial
 ...".

Citing this decision with approval, the court in Milton v. United States,
 110 F (2d) 556 (Ct. of App. D.C. 1940) remarked that:

"It is sufficient if there is an intent to defraud some-
 one by making or altering a writing, which act might pre-
 judice another."

Two of the instruments forged by the accused were not only capable of
 working to the financial detriment of the insurer but they did in fact
 have that immediate result. The accused was entitled to reimbursement only
 after his medical expenses had been incurred and paid. In obtaining pay-
 ment of part of his claim prematurely he exacted an undue personal ad-
 vantage and prejudiced the insurer by causing it to perform sooner than
 it had contracted to do. Specifications 1, 2, and 3 of Charge I are
 accordingly sustained by the evidence beyond a reasonable doubt.

6. The accused, who is married and the father of one child, is
 about 32 years old. After completing three years of high school, he was
 successively employed as an assistant manager of a wholesale gasoline and
 oil company, as a stock clerk of a wholesale grocery company, and as a
 service station operator. He had enlisted service from 24 May 1940 to
 16 April 1943 when he was commissioned a second lieutenant for "limited
 service" only. He has been on active duty as an officer since the last
 date.

7. The court was legally constituted. No errors injuriously af-
 fecting the substantial rights of the accused were committed during the
 trial. In the opinion of the Board of Review the record of trial is le-
 gally sufficient to support the findings and the sentence and to warrant
 confirmation thereof. Dismissal is authorized upon conviction of a viola-
 tion of Article of War 93 or 96.

Abner E. Lipscomb, Judge Advocate.

Robert J. Cannon, Judge Advocate.

George K. Golden, Judge Advocate.

(252)

SPJGN-CM 270372

1st Ind.

Hq ASF, JAGO, Washington 25, D. C.

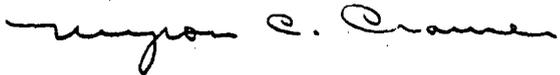
FEB 7 - 1945

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 Wilbur C. Thompson (O-1590853), Quartermaster Corps.

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



3 Incls

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

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed but execution suspended. G.C.M.O. 103,
24 Mar 1945)

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

(253)

SPJGQ
CM 270398

3 JAN 1945

UNITED STATES	)	INFANTRY REPIACEMENT TRAINING CENTER
	)	Camp Roberts, California
v.)	
Private LINDRETH C. DuPUIS	)	Trial by G.C.M., convened at
(39594185), Company B, 82d	)	Camp Roberts, California, 24
Infantry Training Battalion,	)	November 1944. Dishonorable
Camp Roberts, California.	)	discharge and confinement
	)	for ten (10) years. Disci-
	)	plinary Barracks.

HOLDING by the BOARD OF REVIEW
ANDREWS, FREDERICK and BIERER, Judge Advocates.

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

2. The accused was tried upon several Charges and Specifications of which only Specifications 1 and 2 of Charge II need be made the subject of comment in this holding. The remaining Charges and Specifications involve allegations of desertion (Charge I and Specification), and of the making and uttering of worthless checks with the intent to defraud (Charge II and Specifications 3 and 4; Additional Charge and Specifications 1, 2 and 3). The Charge and Specifications with which this holding is concerned are as follows:

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

Specification 1: In that Private Lindreth C. DuPuis, Company B, 82nd Infantry Training Battalion, Camp Roberts, California, did, at Camp Roberts, California, on or about 17 August 1944, with intent to defraud, wrongfully and unlawfully make and utter to 1st Lieutenant C. R. Storer, Chaplain, a certain check in words and figures as follows, to wit:

90-770 ~~Topeska, Kan. (Ink)~~
~~CAMP ROBERTS BRANCH~~ 90-770 (Ink)
12th and Mission Streets
Merchants National Bank (Ink) No. _____
~~BANK OF AMERICA (Ink)~~
National Trust and Savings Association

~~Topeska, Kan. (Ink)~~
~~CAMP ROBERTS, CALIF., (Ink)~~ 17 Aug. (Ink) 19 44 (Ink)

Pay To The Order Of Cash (Ink) \$ 3.00 (Ink)

(254)

Three Dollars -----(Ink)-----Dollars

39594185 (Ink) Mrs Julia Hutchinson (Ink)
Co. B. 82nd Inf. Tng. Btn by /s/ Lindreth C. DuPuis (Ink)

and by means thereof did fraudulently obtain from the said 1st Lieutenant C. R. Storer, Chaplain, the sum of \$3.00 lawful money of the United States, he, the said Private Lindreth C. DuPuis, then well knowing that the said Mrs. Julia Hutchinson did not have any account with the Merchants National Bank, Topeka, Kansas, for the payment of said check.

Specification 2: Same as Specification 1, but alleging check made and uttered to Glen E. Mallory, R. N., at Paso Robles, California, in the amount of \$20.00.

3. The above Specifications allege the making and uttering of worthless checks by the accused against the account of Mrs. Hutchinson (his mother) in the Merchants National Bank, Topeka, Kansas, setting forth that the accused, at the time the checks were issued, knew that Mrs. Hutchinson did not have an account with the bank described. The evidence for the prosecution establishes that the accused issued the checks in question, receiving cash in return for them (R. 10, 11), and that they were returned to the persons who cashed them together with a memorandum of the bank in each case to the effect that the drawer had no account (R. 10, 11; Exs. 2, 3). The accused signed the checks with his mother's name "by Lindreth C. DuPuis" (Exs. 2, 3). There was no evidence either that the accused lacked authority to draw upon his mother's account or that, at the time the checks were drawn, the mother had no account at the bank. A motion for findings of not guilty as to these two Specifications was made at the close of the prosecution's case and was denied (R. 14).

4. The only evidence for the defense consisted of the testimony of the accused, given after he had been advised of his rights as a witness. His testimony with respect to Specifications 1 and 2 was principally to the effect that his mother had authorized him to draw on her account (R. 15, 18, 19, 20), and he did not at any point admit that his mother did not have an account at the bank at the time of issuance of the checks.

5. It is apparent that the evidence as outlined above is legally insufficient to support the findings of guilty of Specifications 1 and 2 of Charge II. The Specifications allege that the accused made and uttered the checks in question with intent to defraud, knowing,

at the time, that the account against which they were drawn was non-existent. Since it is not charged that the accused signed the checks without authority, it must be assumed that he had such authority, as, indeed, the evidence indicates, and the charge of fraud therefore must rest upon a showing that he knowingly issued checks against a nonexistent account. Not only is the record lacking in evidence of such knowledge, but there is a complete absence of proof that the accused's mother did not in fact have an account at the time the checks were drawn. The memoranda of the bank which were attached to the returned checks did not even constitute competent evidence of the nonexistence of the account at the time the checks were presented for payment to the bank (Dig. Op. JAG, 1912-40, sec. 395 (16)). Certainly, therefore, neither they nor the fact that the checks were not paid may be accepted as evidence that the account did not exist at the time the checks were drawn (CM 242967, Helton, 27 BR 239). The evidence therefore is not sufficient to sustain the findings of guilty of the offenses set forth in these Specifications.

6. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Specifications 1 and 2 of Charge II. With these exceptions, the record of trial is legally sufficient to support the findings and is likewise legally sufficient to support the sentence as modified by the reviewing authority.

Fletcher R. Andrews, Judge Advocate.

(On Leave), Judge Advocate.

A. J. Biner, Judge Advocate.

(256)

1st Ind.

War Department, J.A.G.O., **JAN 6 1945** - To the Commanding General,
Infantry Replacement Training Center, Camp Roberts, California.

1. In the case of Private Lindreth C. DuPuis (39594185), Company B, 82d Infantry Training Battalion, Camp Roberts, California, I concur in the foregoing holding by the Board of Review and for the reasons therein stated recommend that the findings of guilty of Specifications 1 and 2 of Charge II be disapproved. Upon compliance with this recommendation, and under the provisions of Article of War 50 $\frac{1}{2}$, you will have authority to order the execution of the sentence.

2. The maximum confinement authorized for the offenses involved in Specifications 1 and 2 of Charge II aggregates one year. Since, as noted, the record of trial is legally insufficient to support the findings of guilty of those Specifications, it is recommended that the period of confinement be reduced to nine years.

3. When copies of the published orders 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 orders to the record in this case, please place the file number of the record in brackets at the end of the published orders, as follows:

(CM 270398).



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.

(257)

SPJGQ
CM 270400

10 JAN 1945

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

INFANTRY REPLACEMENT TRAINING CENTER

v.)

) Trial by G.C.M., convened
) at Camp Blanding, Florida,
) 30 November 1944. Dis-
) missal.

) First Lieutenant JOEL P.
) LAWSON (O-1822591),
) Infantry.)

OPINION of the BOARD OF REVIEW
ANDREWS, FREDERICK and BIERER, 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, as amended in some minor details by proper authority and without objection at the trial, before arraignment:

CHARGE: Violation of the 95th Article of War.

Specification 1: In that 1st Lt. Joel P. Lawson, now of Company F, formerly of Company B, 215th Infantry Training Battalion, 66th Infantry Training Regiment, Camp Blanding, Florida, did at Sylvania, Georgia, on or about 26 June 1944 with intent to defraud, wrongfully and unlawfully make and utter to Screven Drug Co., a certain check, in words and figures as follows, to wit:

26 June 1944

Bank Guranty Bank & Trust Co.

City and State Gatesville, Texas

Pay to

Order of Screven Drug Co. \$10.00

(258)

Ten -----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. _____ /s/ Joel P. Lawson
O-1822591

and by means thereof, did fraudulently obtain from Screven Drug Co. the sum of \$10.00, he the said 1st Lt. Joel P. Lawson, then well knowing that he did not have and not intending that he should have any account with the Guranty Bank & Trust Co., Gatesville, Texas, for the payment of said check.

Specification 2: In that 1st Lt. Joel P. Lawson, now of Company F, formerly of Company B, 215th Infantry Training Battalion, 66th Infantry Training Regiment, Camp Blanding, Florida, did at Fort Benning, Georgia, on or about 26 July 1944 with intent to defraud, wrongfully and unlawfully make and utter to Fort Benning Exchange, a certain check, in words and figures as follows, to wit:

26 July 1944

FIRST NATIONAL BANK
STANTON, TEXAS

Pay to the order of Post Exchange \$15.00

Fifteen and no/100-----DOLLARS

/s/ J. P. Lawson
1st Lt., Inf. O-1822591

and by means thereof, did fraudulently obtain from Fort Benning Exchange the sum of \$15.00, he the said 1st Lt. Joel P. Lawson, then well knowing that he did not have and not intending that he should have sufficient funds with the First National Bank, Stanton, Texas, for the payment of said check.

Specification 3: In that 1st Lt. Joel P. Lawson, now of Company F, formerly of Company B, 215th Infantry Training Battalion, 66th Infantry Training Regiment,

Camp Blanding, Florida, did at Fort Benning, Georgia, on or about 28 July 1944 with intent to defraud, wrongfully and unlawfully make and utter to Fort Benning Exchange, a certain check, in words and figures as follows, to wit:

28 July 1944

First National Bank
Stanton, Texas

Pay to the order of Post Exchange \$12.00

Twelve and no/100-----DOLLARS

/s/ J. P. Lawson
1st Lt., Inf. O-1822591

and by means thereof, did fraudulently obtain from Fort Benning Exchange the sum of \$12.00, he the said 1st Lt. Joel P. Lawson, then well knowing that he did not have and not intending that he should have sufficient funds with the First National Bank, Stanton, Texas, for the payment of said check.

Specification 4: (Withdrawn by direction of appointing authority).

Specification 5: In that 1st Lt. Joel P. Lawson, now of Company F, formerly of Company B, 215th Infantry Training Battalion, 66th Infantry Training Regiment, Camp Blanding, Florida, did at Swainsboro, Georgia, on or about 20 June 1944 with intent to defraud, wrongfully and unlawfully make and utter to The Citizens Bank of Swainsboro, Swainsboro, Georgia, a certain check, in words and figures as follows or to the following effect, to wit:

20 June 1944

First National Bank
Stanton, Texas

Pay to the order of The Citizens Bank of Swainsboro
\$18.00

Eighteen and no/100-----DOLLARS

/s/ J. P. Lawson
1st Lt., Inf.
O-1822591

and by means thereof, did fraudulently obtain from The Citizens Bank of Swainsboro the sum of \$18.00, he the said 1st Lt. Joel P. Lawson, then well knowing that he did not have and not intending that he should have sufficient funds with the First National Bank, Stanton, Texas, for the payment of said check.

Specification 6: In that 1st Lt. Joel P. Lawson, now of Company F, formerly of Company B, 215th Infantry Training Battalion, 66th Infantry Training Regiment, Camp Blanding, Florida, being indebted to General Finance & Investment Corp., Augusta, Georgia, in the sum of \$45.45, which amount became due and payable on or about 3 June 1944, did at Fort Benning, Georgia, and Camp Blanding, Florida, from 3 June 1944 to 18 September 1944, dishonorably fail and neglect to pay said debt.

Specification 7: In that 1st Lt. Joel P. Lawson, now of Company F, formerly of Company B, 215th Infantry Training Battalion, 66th Infantry Training Regiment, Camp Blanding, Florida, being indebted to General Finance & Investment Corp., Augusta, Georgia, in the sum of \$45.45, which amount became due and payable on or about 3 July 1944, did at Fort Benning, Georgia, and Camp Blanding, Florida, from 3 July 1944 to 18 September 1944, dishonorably fail and neglect to pay said debt.

Specification 8: In that 1st Lt. Joel P. Lawson, now of Company F, formerly of Company B, 215th Infantry Training Battalion, 66th Infantry Training Regiment, Camp Blanding, Florida, being indebted to General Finance & Investment Corp., Augusta, Georgia, in the sum of \$45.45, which amount became due and payable on or about 3 August 1944, did at Fort Benning, Georgia, and Camp Blanding, Florida, from 3 August 1944 to 18 September 1944, dishonorably fail and neglect to pay said debt.

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

Specification: In that 1st Lt. Joel P. Lawson, now of Company F, formerly of Company "B", 215th Infantry Training Battalion, 66th Infantry Training Regiment, Camp Blanding, Florida, with intent to defraud, did at Augusta, Georgia, on or about 18 May 1944 unlaw-

fully pretend to General Finance & Investment Corporation that he was the owner of a certain 1941 Dodge coupe automobile Motor No. D19-96122, and had the right to convey the title thereof, well knowing that said pretenses were false, and by means thereof did fraudulently obtain from the said General Finance & Investment Corporation the sum of \$450.00.

ADDITIONAL CHARGE II: (Finding of not guilty).

Specification: (Finding of not guilty).

He pleaded not guilty to all Charges and Specifications and was found guilty of the Charge and of Additional Charge I and all Specifications thereunder, and not guilty of Additional Charge II and its Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved only so much of the sentence as provides that accused be dismissed the service, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution established the following facts.

The accused is in the military service, in the grade and organization specified (R. 8). The signatures on the checks and conditional sale contract involved are those of the accused (Stipulation, R. 9; Ex. A).

Specification 1 of the Charge.

On or about 26 June 1944, the accused identified himself to Sydney J. Waters, pharmacist, doing business as Screven Drug Company, at Sylvania, Georgia, and presented his check for \$10, in words and figures as specified. Mr. Waters received the check and gave the accused \$10 therefor, less 10¢ for exchange. The check was forwarded through banking channels for payment, but dishonored for want of sufficient funds. (Deposition, R. 9; Ex. B). The accused had an account with the drawee bank, Guaranty Bank and Trust Company of Gatesville, Texas, from June 1943 to 21 February 1944. The account was closed on the latter date, and thereafter the accused had no account there (Deposition, R. 10; Ex. C).

Specifications 2 and 3 of the Charge.

The Fort Benning Exchange gave the accused \$15, on or about 26 July 1944 and on or about 28 July 1944, gave him \$12, each in exchange for his checks in words and figures as specified. On being forwarded through

banking channels for payment, the checks were dishonored for want of sufficient funds (Deposition, R. 10; Ex. D; R. 11; Ex. E). The accused, jointly with his wife, had an account in the drawee bank, First National Bank of Stanton, Texas, wherein he had deposited \$35 on 4 November 1943 and \$147.50 on 4 January 1944. Withdrawals by checks had reduced the balance to \$5.37 on 31 January 1944, \$4.37 on 1 March 1944, at which amount the balance stood thereafter. There were no other deposits, and the accused had no other account in that bank (Deposition, R. 11; Ex. G).

Specification 5 of the Charge.

The Citizens Bank of Swainsboro, Georgia, on or about 20 June 1944, gave the accused \$18 in exchange for his check in words and figures as specified. On being forwarded through banking channels, the check was dishonored for want of sufficient funds (Deposition, R. 11; Ex. F). The drawee bank was the First National Bank of Stanton, Texas, as in Specifications 2 and 3, and the only account there maintained by the accused had stood at a balance of \$4.37 since 1 March 1944 (Deposition, R. 11; Ex. G).

Specifications 6, 7 and 8 of the Charge; Additional Charge 1 and the Specification.

On or about 18 May 1944, the accused borrowed \$450 from General Finance and Investment Corporation, of Atlanta, Georgia. To secure the repayment of this loan with accruals and certain expenses, he executed to that Corporation a defeasible bill of sale of a 1941 Dodge coupe automobile, motor number D 19-96122, and his promissory note for \$545.40, payable in twelve equal monthly installments of \$45.45 each, commencing on 3 June 1944, due successively on the third day of each month thereafter. Of the \$450 principal sum of the loan, \$248.54 was paid to a garage for installing a new motor in the car, \$81.46 was paid to the accused, and \$120 was sent by the lender's check to McEwen Motor Company to pay the "balance" on a previous loan on the car. The \$120 check was subsequently returned, with the information that the true balance on the earlier loan was not \$120, but \$660. Accused was credited on the new loan with this \$120. Ultimately the lender assigned its note and bill of sale to a motor company, at a discount. Meanwhile the accused defaulted on the three monthly payments which fell due on 3 June, 3 July and 3 August, and made no response to repeated requests for payment. The bill of sale contained provisions warranting title in the accused, free of encumbrances, with full right to sell (Deposition, R. 11; Ex. H). At the time of the foregoing Georgia transaction, the accused's interest in the car was that of the purchaser under a conditional sale contract from McEwen Motor Company of Big Spring, Texas, dated 8 July 1943, signed by the

accused, whereby title was retained in the seller until payment should be made in full. Mrs. L. E. Jobe, of Big Spring, Texas, who had known the accused about three years, had paid the automobile dealer \$500, the down payment on the car, leaving the balance, \$720, payable in twelve monthly installments of \$60 each, beginning 10 August 1943. On 13 November 1944, when Mrs. Jobe testified by deposition, \$660 remained due on this contract, and she had paid the dealer and taken assignment of the contract. Inferentially, the accused or someone on his behalf had paid one payment of \$60 at some time in the intervening fifteen months (Deposition, R. 12; Ex. J). General Finance and Investment Company, of Augusta, Georgia, assigned its note and contract at a discount to Harrell Motor Company, of Phoenix City, Alabama (R. 11; Ex. H).

4. The accused, duly advised of his rights, elected to remain silent, and introduced no evidence (R. 12).

5. As to Specifications 1, 2, 3 and 5 of the Charge, the evidence, with its attendant inferences, is clear and complete. The accused officer presented to business institutions four personal checks for cash for his accomodation, three of which were drawn by him on an account which for months had been depleted to a nominal balance substantially less than the amount of any one of the three checks. The other check was drawn by him on a bank account which had been closed and discontinued over four months previously, wherein he had no credit. In each case, he received the money called for by the check presented. Unexplained, these transactions give rise only to one reasonable inference: that he intended the frauds which he perpetrated, and did not believe or intend that he would have funds or credit with the drawee banks so that the checks or any of them would be honored on presentation for payment.

As to Specifications 6, 7 and 8 of the Charge, involving the failure and neglect of the accused to pay three successive monthly installments of his automobile loan in Georgia, they being the first installments to fall due, the evidence must be considered together with that concerning the automobile transaction generally, otherwise applicable to Additional Charge I and its Specification. The gravamen of the offense of dishonorable failure of an officer to pay his debts lies in the dishonorable character of such failure, arising from circumstances which so characterize it, not from the default alone. (CM 246776, Dittmer, 30 BR 157, 170), quoting from Winthrop, Military Law and Precedents, 2d ed., rep. 1920, page 715:

"In these cases, in general, the debt was contracted under false representations, or the failure to pay characterized by deceit, evasion, false promises, denial of indebtedness, etc., and the neglect to discharge the obligation, at least in part, was continued for an unconscionable period. Some such culpable and dishonorable

circumstances should characterize the transaction to make it a proper basis for a military charge."

Here, the accused had newly obtained a loan from a business concern on an automobile on which he already owed \$660 of the purchase price to the dealer, and on which he had paid not more than one \$60 installment out of ten such installments which had then fallen due. From ordinary business experience, as the loan was made in Georgia on a car bought in Texas, we may infer that he was enjoying the possession and use of the car. The down payment, \$500, had been made for him by a woman evidently interested in his comfort and welfare, who subsequently took up the badly defaulted balance of the purchase contract. His contract with his Georgia lender recites that he has title to the automobile free of liens or encumbrances, with full right to "convey" it. In view of the preexisting contract with the car dealer, this was a bald falsehood. It is clear from the evidence that the representation so involved was modified by some further information given to the Georgia lender, as that lender appropriated \$120 of the proceeds of the loan to pay the "balance" due the car dealer. Resort to inference should be unnecessary to find what the actual representation was, since an official of the Georgia lender testified by deposition, but since the loan was made and the specific sum of \$120 was applied for the payment of the sum remaining due the dealer, we may infer that the representation was that the payment of that sum would validate the recitals of the loan contract, and leave title to the car in the accused, free of prior encumbrances and with the right to sell the car. With or without such representation, those recitals were false, as there was a prior encumbrance of \$660 well known to the accused, long past due, which the payment of \$120 would not remove.

Under those circumstances, calling for especial diligence by the accused to pay off such a loan and improve his badly damaged credit, his total failure to pay any of the monthly installments as they became due on the new loan, unexplained and unextenuated, was not only careless and irresponsible, but dishonorable, and reveals a disposition to enjoy luxuries and advantages at the expense of others not obligated to him, and a disdain for his own obligations, thoroughly unbecoming an officer and a gentleman. Accordingly, Specifications 6, 7 and 8 are fully sustained.

The facts established with reference to the same loan transaction sustain Additional Charge I and its Specification. On the false pretenses above discussed, concerning his right to sell or encumber the automobile, the accused fraudulently obtained from the lender the sum of \$450. Of this sum, he received \$81.46 in money, \$248.54 was expended on his behalf for improving the car, and the remaining \$120 was appropriated and made available for payment on his behalf to his creditor, all presumably with his acquiescence and at his direction, as no objection or complaint appears on his behalf regarding this distribution of the

loan, and it is a distribution appropriate to the circumstances under which it appears that the loan was made.

6. War Department records indicate that the accused officer is 30 years of age, formerly married but divorced in March 1942 and single thereafter. However, it otherwise appears that he is remarried and has a child. In civilian life he was a farmer in Texas, later employed in road construction and by the Civilian Conservation Corps. He had three years high school education and six months secretarial training. After enlisted service from 20 November 1940, he was commissioned second lieutenant, Army of the United States, 4 December 1942, through Officer Candidate School at Camp Hood, Texas, and promoted to the grade of first lieutenant 2 April 1943.

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

Fletcher R. Andrews Judge Advocate.

Herbert B. Frederick Judge Advocate.

W. B. King Judge Advocate.

(266)

SPJGQ-CM 270400

1st Ind

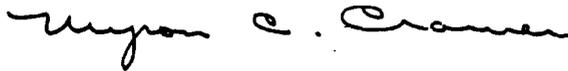
Hq ASF, JAGO, Washington 25, D. C., FEB 1 - 1945

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 Joel P. Lawson (O-1822591), 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 of the sentence. I recommend that the sentence as approved by the reviewing authority be confirmed and carried into execution.

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



3 Incls

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

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence as approved by reviewing authority confirmed.
G.C.M.O. 121, 5 Apr 1945)

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

(267)

SPJGQ
CM 270425

5 FEB 1945

UNITED STATES	)	CAMP BEALE, CALIFORNIA
)	
v.	)	Trial by G.C.M., convened at
	)	Camp Beale, California, 10,
Private CLINTON STEVENSON	)	11 and 13 November 1944.
(38L47920), Company B,	)	Death by hanging.
Fifth Replacement Battalion,)	
Army Service Forces Personnel)	
Replacement Depot, Camp Beale,)	
California.)	

OPINION of the BOARD OF REVIEW
ANDREWS, FREDERICK and BIERER, Judge Advocates

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Clinton Stevenson, Company B, Fifth Replacement Battalion, Army Service Forces Personnel Replacement Depot, Camp Beale, California, did, at Isleton, California, on or about October 17, 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private King D. Blanshaw, Jr., a human being, by cutting him with a knife.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous conviction was introduced at the trial. He was sentenced to be hanged by the neck until dead. All of the members of the court present at the time the vote was taken on the finding and the sentence, respectively, concurred therein. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

(268)

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

The accused and the deceased were both members of a group of 51 soldiers of Company B, 5th Replacement Battalion, Army Service Forces Personnel Replacement Depot, regularly stationed at Camp Beale, California, but who, on Sunday, 15 October 1944, were at Isleton, California, on a three day pass so that they might engage in employment at the National Cannery Company located there (R. 7, 8, 71, 171).

While in Isleton the men were quartered in the schoolhouse which contained a couple of small rooms at one end of a long hall-way and a much larger room at the other end (R. 8, 173). The small rooms were occupied by the non-commissioned officers (R. 7, 75) and about 25 or 30 of the enlisted men, on an average, slept in the large room (R. 8). This room was 32 feet long and 25 feet, 10 inches wide and was furnished with folding cots (R. 53, 78; Pros. Exs. H to M, inclusive). Both the accused and the deceased were quartered in the large room (R. 8, 9).

According to Private Paul Jackson, who was one of the soldiers quartered in the schoolhouse, he was in the large room on the night of 16 October 1944, writing a letter, when a crap game was started sometime between 10 and 10:30 o'clock (R. 122, 147). There were about 8 or 9 men playing, (R. 100, 122, 142) among whom were Privates Clarence E. Adams, (R. 81), Albert Worthen (R. 99), Lawrence Jones (R. 107), David K. Carter (R. 122), Robert L. Delaney (R. 135), the accused (R. 81; 99, 107) and the deceased (R. 81, 101, 108, 123, 136). Others, among whom were Privates Bernard Jackson, Ernest Williams and Paul Jackson, were present in the room lolling on cots, reading or writing letters (R. 94, 115, 147) and they later were spectators of the events which transpired.

As usual, under such circumstances, there were various arguments between the players from time to time (R. 105, 106, 109, 111, 116), one of them sufficiently boisterous to arouse one of the men who was sleeping; but he went back to sleep and nothing untoward occurred then (R. 135).

Meanwhile Adams, who had gone out and returned at about midnight, got into the game and when he did he noticed that the accused had an opened knife in his hand (R. 81). No one else in the game displayed a knife (R. 90) so Adams told the accused "Stevenson, you don't need the knife ... Put it in your pocket" (R. 81). Delaney said that he saw a knife lying on the floor and heard Adams tell the accused to pick it up and put it in his pocket. Accused picked it up in his hand but still kept it "about a third open" while he continued to argue with someone in the game. Adams again told him to close the knife and put it in his pocket and then snatched it out of the accused's hand, closed it, and, handed it back to accused, who put it in his pocket (R. 136).

Jackson heard someone tell the accused to close the knife and put it in his pocket (R. 147) and when he looked around he saw the accused holding the knife, half opened, with his hand between the blade and the handle. According to Jackson the accused later closed the knife and put it in his pocket (R. 148). Worthen saw the knife lying "right in front" of the accused but later saw Adams close it and give it to the accused (R. 100, 104). Adams said he took the knife out of the accused's hand, gave it back to him, and he then put it in his pocket (R. 81, 90).

At some time during the playing, the accused asked for and obtained the loan of \$2.00 from Bernard Jackson (R. 116, 151).

Thus the game progressed until in due course, it was again Blanshaw's turn to play. What transpired thereafter is best detailed by the evidence of those who were eye-witnesses of the episode.

According to Carter, Blanshaw threw down a dollar and said "I'll shoot all of that" and the accused, picking up the money, said: "Shoot, I got you faded" (R. 123). Blanshaw said "I don't want you to hold my money; put my money in the middle of the board so I can see it". Accused replied: "I've been holding everybody else's money; how come I can't hold yours?" Blanshaw again said: "Man, I just don't want you to hold my money. Put my money where I can see it". They argued back and forth, Blanshaw saying: "Do you think you're bad" or words of some similar import (R. 128) to which the accused replied: "Man, do you know who you are talking to? Do you know I am Stevenson?" Blanshaw said he didn't care who he was, and as they continued to bandy words the accused ran his hand in his pocket, "looking Blanshaw in the eye". Carter then told the accused not to break up the game over such a small matter but no attention was paid to the remark. Someone then advised Blanshaw that the accused did not want him to use his (the accused's) dice and to go to bed. Thereupon Blanshaw picked up his money and reached for a corner of the blanket on which they were playing, saying, "If I can't shoot your dice, then you'll have to get another blanket to gamble on" (R. 124). At this the accused said: "I wouldn't take that blanket if I was you" but Blanshaw nevertheless picked up the blanket and started walking away. The accused had been looking Blanshaw in the eye and was withdrawing a knife from his pocket, opening it up with one hand as it came out (R. 125). (To show that this could be done, Carter demonstrated it to the court by withdrawing the knife from his pocket, opening it with the one hand as he did so (R. 126)). The accused then held the knife in his hand down near his pocket and as Blanshaw turned away, he jumped up from the floor and started cutting him. Someone yelled: "Don't cut that man" but it was too late; Blanshaw had already been stabbed as his back was turned toward the accused. Blanshaw then turned around, backed away from the accused, trying to get away and fell over a cot. He crawled under the cot crying out: "Man, don't cut me no more. Somebody stop him. If its my money you want, go ahead on and take it but don't cut me no more." Accused then took him by the legs and started

(270)

stabbing them. Blanshaw struggled but gradually weakened (R. 126). Accused then pulled him out from under the bed and cut his stomach so that "his intestines rolled out". Bernard Jackson grabbed the accused by the arm and told him not to bother Blanshaw any more whereupon the accused kicked Blanshaw in the face (R. 127).

Delaney testified that when the time came for Blanshaw to play he threw two, silver, half-dollars on the floor and said he would "shoot" them. Accused picked up the money and told him to "shoot" but Blanshaw protested and said: "Take my money and lay it on the floor. I don't need you to hold my money". Thus they argued back and forth, Blanshaw insisting that the accused put Blanshaw's money on the floor (R. 136). At one time Blanshaw said of the accused: "He wasn't no big hen's ass if he did shit Boston eggs" (R. 140). Accused finally said: "If you want the dice go ahead on and shoot them. I got you faded. If you don't want to shoot, turn them loose". There were two pair of dice in the game, one pair belonging to the accused. Blanshaw, accordingly threw accused's dice on the blanket and picked up the other pair but the accused still held Blanshaw's money. Thereupon Blanshaw threw the dice down saying: "I'll get my blanket and go to bed" (R. 136). During this argument Delaney saw the accused abstract a knife from his pocket while he watched Blanshaw. As Blanshaw "just kept on arguing and cussing at Stevenson" although Delaney kept "pushing" him, Delaney "slid back" from the game because he "saw it coming" (R. 137). Accused then threw Blanshaw's money on the blanket and Blanshaw stooped and picked up the money and a corner of the blanket, throwing it over his shoulder and dragging it (R. 136). The accused then got up and stepped on the corner of the blanket, and this action caused Blanshaw to be pulled around (R. 136, 139, 140). As he turned, the accused stabbed him in the neck with the knife and Blanshaw fell to the floor kicking (R. 136, 137). As he did so he threw the two half-dollars on the floor saying: "Take the money" and cried out: "Somebody stop him from killing me". Accused was down on him, stabbing him with the knife. Someone jumped up and grabbing the accused's arm, pulled him away saying: "Stop cutting him; don't stab that boy no more". The accused walked away but returned and "stomped" Blanshaw in the face (R. 137) then he picked up Blanshaw's money and put it in his pocket (R. 143).

Adams heard Blanshaw say "Put my money down; you don't have to hold my money" and accused's reply: "Go ahead on and shoot". Blanshaw, however, repeated his request. Accused then said "You don't have to shoot my crap" and after a while Blanshaw answered: "No, I don't, but I know what I can do; I can take my blanket and go to bed". At this the men in the game started to get up from the floor (R. 81). The next thing Adams knew, Blanshaw was falling up against the bed where he (Adams) was sitting and accused was "coming down with the knife, stabbing him". Blanshaw was pleading "Please don't let him kill me". Some money (a half-dollar and a silver dollar) fell to the floor

and the accused picked it up. One of the men ran over and grabbed the accused who shook him off. By this time Blanshaw was on the floor beside the bed and the intervenor again grabbed the accused "and pulled him off" of Blanshaw. The accused then walked away but "he came back and stamped him (Blanshaw) in the mouth with his feet" as "he was laying down on the floor dying" (R. 82).

Paul Jackson also heard Blanshaw ask the accused to put his money down. The accused then "pitched him the money" and told him he couldn't shoot his dice any more". Blanshaw then reached down to get his blanket and while he was doing so the accused was getting his knife out of his pocket (R. 148, 149). By the time Blanshaw had straightened up, the accused had the knife out and open and struck Blanshaw in the neck with it (R. 148, 154). Blanshaw fell kicking, but the accused grabbed his leg and continued to stab him (R. 148). Blanshaw was "hollering 'don't let him kill me; please don't let him kill me'". Bernard Jackson then caught the accused by the arm and tried to pull him away but accused threw him down on a bed. Bernard Jackson again grabbed him by the arm and pulled him away but the accused went back and "stomped" Blanshaw (R. 150).

According to Bernard Jackson's version Blanshaw got up and grabbed his blanket followed by the accused, who jumped up and stabbed him in the neck (R. 116). Blanshaw fell down but the accused kept on stabbing him "around the hips or butt and in the stomach" after he was on the floor, although Blanshaw did not fight back and was saying: "Please don't let him kill me" (R. 116, 117). Jackson then went over to the accused and grabbed his arm but accused threw him over a bed. He got up and again grabbed the accused's arm but although he did not stab Blanshaw anymore thereafter, he kicked him in the face several times (R. 117, 118).

Jones saw Blanshaw put a dollar on the blanket, which the accused took and held against Blanshaw's remonstrance "You don't need to hold my money". Accused said "I have been holding all the rest of the boys' money, so why can't I hold yours?" Blanshaw insisted that he put down the money and after some argument he stooped down and picked up his blanket. Jones then heard someone say "Look out, he'll cut you", whereupon Jones turned and ran out of the room (R. 108).

Worthen heard someone say "You can't shoot this man's dice" and Blanshaw's answer: "Well, if I can't shoot the dice, you can't shoot on my blanket". As he reached down to get his blanket, Worthen heard a "click" which he took to be a knife and he also ran out of the door (R. 101) followed by others (R. 103, 106).

Williams had gone to bed but was aroused by the noise made by the others. He saw Blanshaw lying on the floor, with the accused standing over him (R. 94).

(272)

Except for the conversations to which the witnesses thus testified, it is not shown that Blanshaw engaged in any other controversy with or used any vile or opprobrious epithets toward the accused or any other provocative remarks (R. 87, 97, 103, 119, 128, 140, 152).

After the accused had been separated from Blanshaw he walked over to his bed but shortly thereafter went out to a latrine (R. 94) where he told Bernard Jackson, who had accompanied him, that "he was sorry he did it" (R. 118).

Meanwhile Corporal James E. Short, who was sleeping in the small room, was aroused by the disturbance in the building and received a report that someone had been stabbed. Upon investigation he found a group of men milling around in the hallway and, in the large room, where there were about 7 soldiers then present, he found Blanshaw lying on the floor. Blanshaw was not dead but "was taking his last breath" as Short entered the room (R. 75, 79).

When the accused returned to the room within a few minutes, he placed something under the cover of another man's bed (R. 94), then went over once more to the body of the deceased. Adams said he opened deceased's shirt and he thought the accused was looking to see where deceased was cut. Then he looked to see what deceased had in his pockets (R. 82). Bernard Jackson, who returned with the accused, saw him get down on the floor close to the deceased and heard accused say, "Somebody go get a doctor" (R. 118). When Jackson looked at the deceased later, he saw that his clothes were open (R. 119). Carter said he heard someone say "Somebody go get a doctor" and that then the accused got down "over the boy's body and looked at him as if he was examining him" (R. 127). Accused then said: "You all can get anybody you want; he won't do this man any good. This man is dead" (R. 83, 95, 127, 150). Paul Jackson saw the accused get down on the floor and "feel" the deceased and at this moment two 50¢ pieces fell to the floor out of the deceased's hand and the accused put them in his pocket (R. 150).

According to Delaney the accused then said: "There ain't no use of you all hiding and getting excited. That's nothing; that's the fourth man I killed" (R. 137). Adams heard him say: "I'm sorry it happened but it had to happen; I lost my temper" and then he added: "What are you all looking at; you are looking like you never saw a dead man before. That's my fourth". Adams placed the time of this remark at about 3½ or 4 minutes after the stabbing (R. 83). Carter testified that the accused said: "Man, I didn't mean to kill you, but you just made me mad. That's my fourth one" (R. 127) and Delaney also heard the accused tell someone: "Man, I didn't mean to kill you, but you made me mad" (R. 141).

Accused then walked over to his cot where he was later observed by both Adams and Delaney examining a wallet (R. 84, 85, 139), after which he went to sleep (R. 94).

Meanwhile Carter had telephoned for police assistance and a doctor and by the time he returned to the schoolhouse the Chief of the Isleton police, who had received a call at 12:15 a.m. (R. 66), arrived (R. 127). Sergeant George W. Garrett, the non-commissioned officer in charge of the enlisted men on pass, had been awakened just as the Chief of Police came in the door. It was then about 12:35 a.m. (R. 9). Sergeant Garrett went with the policeman to the large room where they found the deceased lying on the floor (R. 10, 66). Sergeant Garrett asked "What's the trouble?" and accused answered: "You needn't worry now, Sergeant, because it's all over now. He is dead; there can't be nothing done about it" (R. 10). The Chief of Police testified that when he asked "who had done this" the accused answered that he did it (R. 66). Carter said that the accused replied: "Ya, I done it; I done it" (R. 127).

Sergeant Garrett then examined the body of the deceased to see if he was really dead and when he got up asked: "Who did this?" to which the accused replied: "I did it" and added: "That's not the first guy I've killed; that's the third guy I put to sleep" (R. 10). The police chief then asked the accused why he had done it and the accused explained that there had been a dice game during which the deceased had called him some vile names. When told that was no reason for doing such a thing the accused said: "Well, I fight for my honor" (R. 66).

Within 10 minutes after the arrival of the chief of police, Dr. Godfrey Steinert, a physician and surgeon of Isleton who had been summoned by the chief arrived on the scene (R. 66). He examined the body of the deceased and found one bloody spot on the upper portion of the right thigh; another wound on the lower portion of the left chest; and on the abdomen a visible portion of the intestinal contents had come up through a stab wound. There was a wound about an inch long over the left collar-bone from which considerable blood came up through the shirt on the left side of the neck. This he considered the fatal wound because it appeared that several of the main blood-vessels lying under that region had been cut (R. 43, 44, 48). The clothing of deceased was torn and cut (R. 43). After the examination he pronounced Blanshaw dead (R. 127).

The Chief of police removed the accused to the city jail at about 1 a.m. (R. 67).

Thereafter, Adams, whose cot had broken down and who then lay down on the accused's cot, found, under the comforter, the wallet which accused had been seen examining some time previous (R. 76, 77, 79, 85, 150, 153).

(274)

Corporal Short looked at the contents, which he had seen before, and recognized it as the deceased's wallet. It contained \$45.00 in bills, some pictures and a check stub (R. 77, 86, 153, 156). Short kept it until the military police came and then surrendered it to them (R. 156).

At 1:55 a.m. Sergeant Garrett called the officer of the day at Camp Beale to make a report of the incident and requested that military police and an ambulance be sent to the schoolhouse but sometime between 2 and 3 a.m. Sergeant Jack R. Vensel, Corporal Dale Cooley and enlisted personnel of the military police detachment at Sacramento, California, arrived in response to a call from police authorities in Isleton (R. 19, 20). They found between 12 and 15 soldiers in the large room of the schoolhouse and saw the deceased lying on the floor (R. 21, 26, 70). No one present gave any information, so they were all placed in arrest and confined to the building and military police were placed on guard (R. 27, 30). Sergeant Garrett furnished the police with a roster of the men quartered in the building (R. 22, 24) and assisted them in listing the names of those who were witnesses (R. 12, 25, 27, 29, 173), and the names of those who said they were in the dice game or were watching it were taken down (R. 28, 33). All of the men but one were accounted for and he had been absent and came in at 6 a.m. (R. 24, 174).

During these proceedings Williams pointed out to the military police the cot in which he had seen the accused place something on his return from the latrine (R. 21, 95) and upon arousing Private Davis, who had arrived after the police chief and was asleep on the cot (R. 114), Corporal Cooley found a knife with blood upon it (R. 35) between the folds of a bed-comfort (R. 20, 27, 34, 76). The knife was turned over to Sergeant Vensal (R. 21, 34) but no identification mark was placed upon it nor were any finger-prints taken (R. 31). It was later delivered by the sergeant to the desk sergeant at headquarters in Sacramento (R. 34). At some time not shown, Corporal Short was present at the city jail in Isleton when the chief of police searched the accused and found, among other things, two silver dollars and several "half-dollar pieces" (R. 77).

At about 4 a.m. the military police called for an ambulance from Sacramento and when it arrived at about 5:15 a.m. the deceased's body was removed and taken to a funeral home in Sacramento (R. 12, 27, 68). No one had searched the body or clothes of the deceased at any time during the night (R. 13, 31).

At 6:30 a.m. the accused was surrendered by the chief of police to the military police and was taken to Sacramento (R. 27, 68).

On 17 October 1944 photographs were taken of the body of the deceased at the funeral home (R. 40, 41) after Sergeant John H. Baldwin had identified the body as that of "King D. Blanshaw, Jr." (R. 17, 40). These were

admitted in evidence over objection by the defense (Pros. Exs. D, E, F). Dr. Steinert testified that they were correct representations of the body as he had seen it in the schoolhouse at Isleton shortly after the killing (R. 44) except that Exhibit D does not plainly show the fatal wound (R. 45) and that there may have been a possible intestinal "recession" during the interval (R. 47). He also described the wounds he had seen on Blanshaw's body (R. 83, 84). Adams testified that the pictures were representations of the wounds he had seen (R. 84). A photograph of the knife found in the schoolhouse was also taken at military police headquarters on the same day and was introduced in evidence (R. 40; Pros. Ex. C).

Dr. C. H. McDonnell, physician and surgeon of Sacramento, California, performed an autopsy upon the body of the deceased at the funeral home on 17 October 1944. He observed 5 wounds which, in the order of their severity, beginning with the least, were:

1. On the upper part of the left arm.
2. On the anterior surface of the left thigh.
3. On the right lower quadrant of the abdomen.
4. On the lower border of the ribs penetrating the rectus muscle.
5. Above and behind the inner third of the left clavicle.

The last, because it severed the subclavian (artery) and vein, caused immediate death (R. 49). He also noted a slight abrasion on the side of the face (R. 51). His report to the coroner was received in evidence (R. 49; Pros. Ex. G).

On 17 October 1944, Captain H. R. Pierson, Provost Marshal of Camp Beale, with First Sergeant Howard J. Kauffman, went to Sacramento to return the accused to camp. They were present at military police headquarters in Sacramento when Captain McCallum, commanding officer of the military police section, showed a knife to the accused and asked him: "This is your knife, isn't it? The one you had last night?" and heard the accused acknowledge that it was his (R. 36, 37, 65). The knife was turned over to Captain Pierson and was introduced in evidence (R. 38; Pros. Ex. A). Both Captain Pierson and Sergeant Kauffman identified this knife at the trial (R. 36, 37, 64). Sergeant Vensal identified it as the knife found in the schoolhouse (R. 34, 35). Williams and Adams both testified that it "looked like" or was "the same type" of knife which they saw in the accused's hands before the stabbing (R. 90, 98).

First Lieutenant Herman Kline, Corps of Military Police, the investigating officer, had photographs of the large room in the schoolhouse at Isleton, California, taken under his direction on 26 October 1944. These were received in evidence (R. 53; Pros. Ex. H through N). All

(276)

but one show various views of the room in which the deceased was killed. The quilt appearing therein was placed by Dr. Steinert to indicate the spot where he found and examined the body of the deceased on 17 October 1944 (R. 53, 55).

On 25 October 1944 Lieutenant Kline had an interview with the accused at the county jail in Marysville, California and, after having been duly warned of his rights, accused then made a statement which was reduced to writing and signed by accused in the presence of witnesses (R. 157-170). Objection was made to its introduction in evidence for the reason that it had been "induced by promises and possible punishment to be inflicted" (R. 168) and that it was, therefore, not "voluntarily" made (R. 171). The objection was sustained (R. 171).

During cross examination of several witnesses, defense counsel made inquiries regarding a supposed purchase of a knife by Blanshaw on the night he was killed. Adams denied that he saw Blanshaw and the accused at a Mexican pool hall on that day or that he saw Blanshaw buy a knife from a Mexican for \$2.00 (R. 88). Williams likewise denied seeing Blanshaw and accused at any time when Blanshaw bought a knife (R. 96). Neither he nor Adams had ever seen Blanshaw with a knife (R. 88, 96, 97). Carter, however, was with Blanshaw and another soldier at a pool room in Isleton sometime after 10 p.m. on 16 October 1944. There were Mexicans in the rear playing poker, and Carter left the others and played for a while with the Mexicans. After a while Blanshaw came back and asked him to quit and go along back to the barracks where a game might be in progress (R. 129).

Worthen was in a pool room in Isleton after 6 p.m. on 16 October 1944 but saw neither Blanshaw nor accused while there (R. 105).

According to both Williams and Carter the accused appeared to be sober at the time of the stabbing (R. 95, 127).

4. Evidence for the defense, briefly summarized, is as follows:

First Lieutenant Wykowski, Commanding Officer of Company B, 5th Replacement Battalion, when shown the blanket pass for the men of his company who were on the canning detail (Def. Ex. 1) and the list of witnesses for the prosecution who were to be present at the trial of the accused (Def. Ex. 2), and asked whether he could tell which of the men listed on the former were still at Camp Beale (R. 73), replied that those listed on the latter were still present but that the ones listed on the former and not on the latter had been transferred on or about 30 October 1944 and were no longer at Camp Beale (R. 172).

The investigating officer, called as a witness for the defense, stated that he made his first trip to Isleton for the purpose of

investigating the homicide on 23 October 1944. He received the charges at 1:30 p.m. on that date and interviewed witnesses from then until midnight (R. 178). He made other trips to Isleton on 24 and 26 October 1944 and delivered his report to the office of the commanding general on 27 October 1944 (R. 178). Charges were served on the accused on 29 October 1944 (R. 179).

An offer to introduce in evidence a report as to the alcohol content of deceased's blood, allegedly made at Letterman General Hospital, was denied (R. 177).

It was shown that at the request of the judge advocate and other officers, certain men had been withheld from shipment at a port of embarkation for appearance at the trial of accused (R. 183) and that only one was temporarily withheld at the request of defense counsel and later released because his evidence was of little value (R. 184, 186). Defense counsel, however, did interview about 20 other men at Camp Stoneman and also went to the port of embarkation to interview the witness who had been held and was later released (R. 186) and to try to find any other possible witnesses (R. 187).

The accused, having been advised of his rights, elected to make an unsworn statement which is substantially as follows:

He is 30 years of age and married but childless, one child having died (R. 188). He first became acquainted with Blanshaw on Sunday (15 October 1944). On 16 October 1944 the accused, Blanshaw, and a "boy" who worked with the accused (but whose name he does not know) went to the bank, where the accused cashed a check for \$21.00. They then had dinner and later went to the "Mexican pool hall" where Blanshaw "was asking about a knife" and he asked a Mexican "did he have one". The Mexican showed him a knife which Blanshaw considered too small, whereupon the Mexican agreed to sell him his "regular" knife for \$2.00 and Blanshaw agreed to come back after work in the evening to get it. The knife was "a big, long, white-handled knife...about 8 or 9 inches long". Apparently, the accused and his friend drank a pint of whiskey while they were here (R. 192), and he had seen Blanshaw drinking in the Mexican "cafe" (R. 193). At 6 p.m. the accused and the "boy" who had been his companion at noon, ate their evening meal together and had "a couple shots of port wine and some beer" (R. 190). They returned to work at 7 p.m. and at 9 p.m. returned to the pool room. While they were there Blanshaw entered, accompanied by Private Carter, and got the knife, paying the Mexican \$2.00 for it (R. 190, 191). From there the accused and his friend tried to get into several places but were denied admission. They then decided to go to a movie but the accused changed his mind and went to the "Chinaman's Cafe" with a soldier by the name of Kenneth Thompson. Here they met a civilian and his daughter, Laura. Another civilian entered and purchased drinks of port wine for the crowd.

Accused had about 10 drinks. At about 11:45 p.m. he accompanied Laura to the door of a "hotel", after which he met a soldier whom he knew as "California" (R. 192). Accused then returned to the schoolhouse, where he got into a crap game (R. 193). Blanshaw was sitting on a cot and the accused on the floor with his back to the wall. "California" sat beside him. There were several arguments as the game progressed. At one time the accused loaned one of the players "four bits" to pay Blanshaw, who claimed he had made his point although the dice had "cocked up" on one of the pieces of silver money. Accused then told the players to keep the silver money out of the middle of the board to prevent the dice from cocking and that he would keep "the fade" where he was sitting. Thereafter, as they played, the accused took the money being wagered and kept it between his legs and although the dice had gone around the circle two or three times, Blanshaw made no protest because he was winning. Presently his luck changed, however, and when he next played and the accused drew his money in as before, Blanshaw said: "Leave my money out in the middle of the board where I can see it". Accused told him it was "no cut-throat game" and urged him to play. He did so but on his next turn he again complained. Accused then said: "Well soldier, you about half drunk. We better break up this game". He threw the money to Blanshaw and picked up the dice saying: "Whose blanket is this?" to which Blanshaw replied: "It's mine." Accused said: "Get your blanket; you done broke up the game" and Blanshaw countered by saying: "You think you half damn bad". Accused replied: "No, I don't think that ... as long as you keep your damn hands off me, me and you get along lovely ... I don't think I'm bad". Blanshaw then said: "Kiss my mother's ass" and called the accused a "black mother-fucker". As he did so he got up with his blanket thrown across his shoulder and "he run his right hand in his pocket" (R. 194). Accused made no reply but continued to sit on the floor with his back to the wall (R. 194, 195). Blanshaw stood facing the accused about 5 feet away and continued to talk, saying something about the accused not being "a big hen's ass", and still "working in his pocket". Accused then put his hand in his pocket and Blanshaw made a step toward him. As he did so the accused sprang up from the floor, opened his knife with both hands and struck at Blanshaw. Accused "figured that he (Blanshaw) was trying to get that old knife. I seen him with it and he got to fumbling around in his pocket, and I figured that was what he was trying to do - get it." He did not know whether, after it was over, he kicked Blanshaw in the face. He "wouldn't say (he) did" and "he wouldn't say (he) didn't"; he would not dispute it. He had "no mind at all" and when Jackson told him "You done cut that boy", he answered "I did?" and then went to Blanshaw, unbuttoned his shirt intending to take it off but, as he pulled the shirt out of his trousers, "his intestines came up". He "just turned him loose then" and said "I am sorry" and after going to the latrine asked "Kenneth" to get the Sergeant and tell him to call a doctor quick. Everyone had "cleared out" of the room but the accused and Jackson. After further examination of Blanshaw the accused announced to the others who started

coming back "Well, it won't be no use to get a doctor now... The boy's about gone". He denied that he had made any statement to the effect that he had killed other men before and that he had taken either a wallet or money from the body of the deceased (R. 195, 196).

5. In rebuttal, the prosecution recalled Carter, who testified that he did not see the accused at any time during the evening of 16 October 1944 prior to the time when he, Carter, went to the school-house, and that he had not seen Blanshaw with a knife at any time during that day (R. 199).

Delaney testified that he never knew a soldier by the name of "California" and no one of such name was in the crap game at the school-house on 16 October 1944 (R. 200). He saw Blanshaw pick up his blanket and his money with his right hand and saw nothing in the left hand nor did he see Blanshaw put his hand in his pocket (R. 200, 201).

The investigating officer was recalled and testified that, although he had tried to locate a soldier by the name of "California" he had been unable to do so (R. 202).

The prosecution then again offered in evidence the statement of the accused made to the investigating officer for the purpose of impeaching the accused by showing prior statements inconsistent with his unsworn statement at the trial. Objection thereto was sustained (R. 207).

6. The accused was charged and convicted of the murder of King D. Blanshaw, Jr., a fellow soldier.

Murder is the unlawful killing of a human being with malice aforethought. It is, therefore, necessary, in the light of the cross examination of witnesses for the prosecution, the unsworn statement of the accused, and the burden of argument offered by defense counsel, first to inquire whether the admitted attack by the accused upon the deceased resulted in an unlawful killing.

"Unlawful" in the definition of murder means without legal justification or excuse. Since 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, none committed under any of these circumstances is deemed to be unlawful (par. 148a, MCM 1928).

We are not concerned with the matter of legal justification nor with legal excuse for causing death by accident in doing a lawful act; but the issue of self-defense was raised and, however feebly it was supported by evidence, it must be decided.

It was clearly shown that the accused and the deceased, together with about six other soldiers, were engaged in an innocuous dice game in their quarters at Isleton, California, on the night of 16 October 1944. There were intermittent, perhaps persistent, arguments between the players, as is customary and usual under such circumstances. However, nothing unusual occurred until the accused opened and laid by his side a pocket knife of the "switch-blade" variety with a blade $3\frac{1}{2}$ inches long and an overall length of 8 inches. No one else had displayed a knife on the occasion and when the accused failed to put it away when warned by one of the players to do so, it was forcibly taken from him and closed, after which he placed it in his pocket.

There had been a dispute between the accused and the deceased occasioned by the accused's taking the money as wagered and keeping it between his legs while the dice were rolled. This, the accused said he did because during a play of the deceased he had claimed his point although the dice had "cocked" upon a piece of silver money on the blanket upon which they were playing and the accused wished to avoid a repetition of such an event. The deceased resented the accused's holding his money although it does not appear that any of the others objected while they and others were playing. The dispute, however, reached an impasse at which point the accused refused to allow the deceased to use his dice and the deceased thereupon refused to permit the dice to be rolled on his blanket.

Thus far, nothing except simple retaliatory phrases had passed back and forth between the accused and the deceased but suddenly the deceased reached for his blanket and his money. At this point, according to the accused, the deceased called him vile and opprobrious names, took a step forward and reached into his pocket for a knife which the accused believed he was concealing there since he had bought it from a Mexican in a pool room a few hours previously in the accused's presence. Upon this slight provocation the accused admitted that he jumped up from the floor, withdrew his knife and, crossing the five feet that intervened, struck the accused with the knife.

This naive defense would have some grain of plausibility if there had not been overwhelming evidence which outweighed it. Only one of the witnesses who were asked about it stated that he heard any of the vile and opprobrious epithets attributed to the deceased by the accused and he merely heard the reference to being "a big hen's ass". Another heard the deceased ask the accused: "Do you think you're bad?" Except for these and the ordinary statements made in the dispute about holding the money, no other proof of inflammatory or provocative remarks appears in the record. They are disclosed only by the accused's unsworn statement. So also with regard to the knife which the deceased purchased on the night of the fatal encounter. The episode of the purchase and sale in the Mexican pool room existed only in the accused's imagination.

Carter who, according to the accused, was with the deceased when he bought the knife denied that deceased had bought a knife and he and Williams had never seen the deceased with a knife in his possession. No one testified that the deceased had a knife in his hands or in his clothes at the time he was killed.

"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 necessary to save his life...or to prevent great bodily harm to himself... The danger must be believed on reasonable grounds to be imminent, and no necessity will exist until the person, if not in his own house, has retreated as far as he safely can... To avail himself of the right of self-defense the person doing the killing must not have been the aggressor and intentionally provoked the difficulty..." (par. 148a, MCM 1928).

Even when given the most charitable construction, nothing can be found in the evidence which will support the view that the accused, under the circumstances shown, could have had any belief founded upon reasonable grounds that he was in imminent danger and was obliged to kill the deceased in order to save his own life or prevent great bodily harm to himself. Mere words, however threatening, insulting or opprobrious, do not constitute an assault; but whether or not the accused was the aggressor and himself provoked the difficulty, it is shown that he advanced upon the deceased who was apparently ignorant of the imminent attack and, who, after the first stroke, fell to the floor and made no active resistance. Certainly, though he sat with his back to the wall, the accused could have found an avenue of further retreat from the deceased, who was five feet away and, according to the weight of the testimony of disinterested witnesses, walking away, unarmed, from the scene with his back either entirely or partially turned to the accused, had the accused honestly feared him as a dangerous antagonist. The burden of proving self defense rested upon the accused. This he failed to meet. He availed himself of the privilege of making an unsworn statement. "This statement is not evidence, and the accused cannot be cross-examined upon it, but the prosecution may rebut statements of fact therein by evidence. Such consideration will be given the statement as the court deems warranted" (par. 76, MCM 1928). It is evident that the court gave little consideration to the matter and in this they were entirely justified.

Having thus concluded that the killing was unlawful, the next inquiry is whether it was perpetrated with malice aforethought.

"Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent

to take his life, or even to take anyone's life. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed (Clark)* (par. 148a, MCM 1928).

Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not (except when death is inflicted in the heat of a sudden passion, caused by adequate provocation); knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused... (Idem).

In the definition of murder, "malice" is used in a technical sense, including not only envy, hatred and revenge, but every other unlawful and unjustifiable motive. It is not confined to ill-will towards one or more individual persons but is intended to denote an action flowing from any wicked and corrupt motive - a thing done mallo animo - where the fact has been attended by such circumstances as carry in them the plain indication of a heart regardless of social duty and fatally bent on mischief (Commonwealth v. Webster, 5 Cush. 296, 52 Am. Dec. 711).

Moreover, when in a prosecution for homicide, it is shown that the accused used a deadly weapon in the killing, the law infers or presumes from the use of such weapon, in the absence of circumstances of explanation or mitigation, the existence of the mental element - intent, malice, design, premeditation, or whatever may be used to express it - which is essential to culpable homicide (26 Am. Jr. p. 360, par. 305).

The principle is settled that where a killing with a deadly weapon is admitted or proved, in the sense that it is established as a fact in the case, malice may be implied, inferred, or as said in some cases, presumed. It hardly can be doubted that the selection of a deadly weapon, its use to effect a wound in a vital part of the anatomy, and especially the delivery of several blows, thrusts, or shots, all are circumstances pointing to the mental element described as "malice aforethought" (Idem p. 362, par. 308).

Tested by these rules it is plain that the essential element of malice aforethought was conclusively shown. The accused not only inflicted a fatal blow with the first stroke of his knife but viciously persisted in a brutal succession of stabs after his defenseless victim was lying on the floor pleading for his life, and when the struggle had ceased he kicked the dying man in the face. Such circumstances demonstrate conclusively that he intended to kill the man he assaulted and proceeded to do so with determined malice.

Every element of the crime charged was proved beyond every reasonable doubt.

7. At the conclusion of the prosecution's case the defense moved for a finding of not guilty for the reason that "malice aforethought" had not been established. For the reasons hereinbefore stated the denial of the motion was proper (par. 71d, MCM 1928).

Strenuous objection was made by the defense to the introduction of the photographs of the body of the deceased on the ground that they did not correctly and adequately show the condition of the body at the time of the killing and because they were offered merely for the inflammatory purpose of arousing the sympathies and prejudices of the court.

An inspection of the exhibits does disclose that the main feature in each photograph is a gruesome view of intestines protruding from the deceased's abdomen. However, an expert witness and others, testified that the photographs did truly depict the body as they saw it shortly after the fatal encounter and, except for one, each picture showed the fatal wound in the neck. While there is respectable authority to support the contention of the defense, the cases all arose in civil courts with petit juries. It is unnecessary to discuss the differences between a military court composed of officers of the army and a petit jury consisting of civilians. It is sufficient to say that it is not likely that the court was inflamed to either sympathy or prejudice by the exhibits and that, since the direct evidence of witnesses at the trial fully described the protruding intestines, the accused suffered no injury by the admission of the photographs thereof.

Although a careful examination of the evidence regarding the manner in which the accused's extra-judicial statement was received leads to the conclusion that it might properly have been received in evidence as a confession, it was highly improper for the prosecution to attempt to use it for impeachment purposes after the court had refused to admit it in evidence as a confession and thus accomplish indirectly what the court had, by its previous rulings forbidden.

"... An involuntary confession cannot be used as a basis for, or admitted as a part of, the cross examination of the defendant, and he may not be cross-examined thereon, even for the purpose of impeachment"

(3 Wharton's Criminal Evidence, 11th Ed., sec. 1328, pp. 2206, 2207). The same rule is otherwise stated:

"... Where a person accused of crime testifies in his own behalf he cannot be impeached by showing that he has made statements admitting his guilt, where such statements were not made under such circumstances as to be admissible as a confession" (70 C.J. sec. 1256, p. 1068). (See also: Cross v. State, 221 S.W. 489, 9 A.L.R. 1354; and Harrold v. Territory of Oklahoma, 169 Fed. 47).

We take it that the court excluded the extra-judicial statement of the accused because it found that it was not voluntarily made. That being so, the prosecution had no right to attempt to bring it into evidence under the guise of attacking the accused's credibility. However, since the statement was never admitted in evidence, no substantial right of the accused was affected by the proceedings.

At the outset of the trial and during the examination of the first witness for the prosecution, evidence was adduced to the effect that the accused had, in apparent boastfulness, stated, in effect, that this was his third killing. Defense counsel immediately objected to the matter on the grounds that it was an attempt (1) to prove the commission of the crime charged by evidence of other similar occurrences and (2) to introduce evidence of the character of the accused before it was in issue. At the same time counsel "moved for a mistrial on the ground that it is no longer possible for the defendant to be tried fairly; that such prejudice cannot be cured by striking it from the record". The request was also made "that this court be dissolved and a new court constituted to retry the accused." The law member overruled "the objection provisionally" provided it could be shown that the remark was made a short time "after the time of the event." It was then shown that the remark was made within $3\frac{1}{2}$ or 4 minutes after and at the scene of the killing but no further ruling was then made. Subsequently three other witnesses gave similar testimony and motions to strike and to dissolve the court were interposed by defense counsel in each instance. The law member denied the motions on the ground that the statement was a part of the res gestae but admonished the court that it should not consider the same as character testimony nor evidence of any other crime.

It is apparent that civilian defense counsel sought to avail himself of the privilege accorded to the defense in civil trials under certain circumstances of withdrawing a juror and requesting that the proceedings be declared a mistrial. No such procedure is known to military law. The dissolution of a court is solely within the province of the appointing authority and the court was without power to entertain a motion touching the matter.

It does not appear that the evidence in question was adduced deliberately and for the purpose of showing evidence of similar offenses or to attack the character of the accused. The testimony flowed spontaneously from the lips of the witnesses in their description of what had occurred on the scene when the deceased was killed. The accused made the accusation against himself and although it was done merely in a spirit of braggadocio, it was competent and relevant to explain his state of mind at the time of the killing. Testimony as to conduct and appearance, manner toward the deceased, motive for taking life, indifference to suffering, or other facts of the homicide are relevant as constituting both incriminatory and exculpatory circumstances (Wharton's Criminal Evidence 11th Ed., Vol 1, par. 299).

"In criminal trials the conduct of the accused at or about the time an offense is alleged to have been committed or about the time of the arrest may go to the jury as a means of establishing the fact and extent of the defendant's guilt. In other words, what one does or says immediately after he is charged with having committed a criminal offense is admissible for the purpose of showing innocence or guilt. There are no limitations as to the matters which may be described respecting the conduct of the accused. In general, any matters which serve to explain or describe his conduct or appearance may form the subject of the witnesses' testimony" (20 Am. Jur. par. 284).

Moreover, the court was entirely justified in considering the evidence admissible as part of the res gestae (Wharton's Criminal Evidence, 11th Ed., par. 492, 494, 495).

In the direct and cross examination of a number of witnesses it was sought, by innuendo, to convey the notion that, after the homicide, many of the 51 men, most of whom were quartered in the room where the deceased was killed on the night of the homicide, had been transferred to a staging area or a port of embarkation whereby possible witnesses for the defense were thus made unavailable. The record discloses that the retention of only one witness was requested by the defense and without a more definite showing of the specific manner in which the accused was prevented from summoning any witness necessary for his defense or of the denial of a request for the retention or return of any such material witness at a port of embarkation, it cannot be said that any substantial right of the accused was in any way affected by necessary troop movements which involved hypothetical witnesses.

8. The charge sheet shows accused is 30 years of age and that he was inducted on 1 March 1944.

(286)

9. The court was legally constituted and had jurisdiction of the accused 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. A sentence of death or imprisonment for life is mandatory upon conviction of a violation of Article of War 92.

Fletcher R. Andrews, Judge Advocate.

Herbert R. Frederica, Judge Advocate.

A. G. Bures, Judge Advocate.

SPJGQ-CM 270425

1st Ind.
FEB 20 1945

Hq ASF, JAGO, Washington 25, D. C.

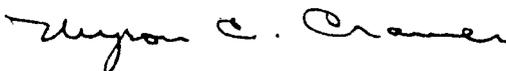
TO: The Secretary of War

1. Herewith transmitted are the record of trial and the opinion of the Board of Review in the case of Private Clinton Stevenson (38147920), Company B, Fifth Replacement Battalion, Army Service Forces Personnel Replacement Depot, Camp Beale, California.

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. Consideration has been given to two letters from the accused and two letters from Nanie Bailey, of Paris, Tennessee, addressed to the President of the United States requesting clemency and referred in due course to this office.

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 the above recommendation into effect, should such action meet with approval.



MYRON C. CRAMER
Major General
The Judge Advocate General

7 Incls

1. Rec of Trial
2. Drft of ltr for sig S/W
3. Form of Action
4. Ltr fr. Pvt Stevenson
26 Nov 44
5. Ltr fr. Pvt Stevenson
27 Nov 44
6. Ltr fr Nanie Bailey
25 Nov 44
7. Ltr fr Nanie Bailey
8 Dec 44

(Sentence confirmed. G.C.M.O. 336, 20 Jul 1945)

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

3. Evidence for the prosecution:

On Easter Sunday, 9 April 1944, two civilians, David Boddy and Peter Zelinski, acting under instructions of the General Superintendent of the P.R.A. Camp at Fort St. John, British Columbia, Canada, and using a Government-owned truck, moved a number of household articles for the accused from the quarters he was then vacating at Dawson Creek, British Columbia, to the quarters he was taking at Fort St. John. These articles included, among other things, a refrigerator. The accused and his wife were present when the articles were loaded at Dawson Creek, and they were present when the articles were unloaded at Fort St. John (R. 6, 7, 9, 14, 15).

The next time that Boddy saw the refrigerator was late in June or early in July 1944, when the accused was departing from Fort St. John (R. 11). Accused stored a number of household articles in Boddy's quarters but placed the refrigerator in the vestibule between the apartment occupied by Boddy and the apartment occupied by one Ingram. At the same time accused instructed Mrs. Ingram in the use of the refrigerator (R. 19). The refrigerator was thereafter used by Mrs. Ingram, and it remained in the same place until it was removed by Lieutenant Bolton near the end of September (R. 12, 13).

Government ownership at one time of a "Kerosene Refrigerator, Cabinet No. 202684, Unit No. 202680" was established by the introduction into evidence of a tally-in sheet, dated 3 May 1943, identified as forming part of the records of property received by the accountable property officer of the District Engineer at Dawson Creek (R. 33; Pros. Ex. 5). Such tally-in sheet was made in the ordinary course of business (R. 34).

On or about 20 August 1944 the accused inquired of Vern McLeod, Manager of the Canadian Bank of Commerce at Fort St. John, whether the latter knew any person who might be interested in buying a refrigerator. Following that conversation, McLeod had a conversation with a local merchant in Fort St. John by the name of Warren Titus. Still later, on 28 August 1944, the accused again spoke to McLeod at the bank and at that time McLeod took the accused to Titus and introduced him to Titus. McLeod did not see accused again until the next day, 29 August 1944, when accused came to the bank and cashed Titus' check for \$425. The canceled check was introduced as Prosecution's Exhibit 6 (R. 42, 43). The accused placed the cash in his purse and told McLeod that he was leaving the next morning for Edmonton, Alberta, Canada (R. 43).

Titus testified that on 28 August 1944 the accused inquired of him in his store whether he (Titus) wanted to buy a refrigerator. He signified that he did, and thereupon the accused took him to a barracks at the P.R.A. Camp and showed him a refrigerator. The barracks was occupied by "some people by the name of Ingram". Titus examined the refrigerator and at that time made a notation of the numbers on it. Refreshing his recollection from the notes he had preserved, he testified that the numbers were 803-202684 and N803-202680 (R. 37, 38, 39). Accused advised Titus that the refrigerator was his (the accused's) property (R. 40). After examining the refrigerator, Titus told accused that he would pay the purchase price asked by the accused, \$425 (Canadian funds), provided accused would deliver the refrigerator to him at his store. Accused promised that he would have it delivered the next morning, 29 August, and Titus thereupon gave the accused his check for \$425 (R. 39). The refrigerator was not in fact delivered and Titus was not repaid the \$425 (R. 40).

4. The accused, after having his rights as a witness explained to him by the court, elected to remain silent.

Only one witness was called by the defense, namely, Master Sergeant Alfred A. Rosenberg, clerk in the office of the Service Command Judge Advocate, Northwest Service Command. He testified that he came to Fort St. John with the Trial Judge Advocate in this case and that he was assisting the latter in the matter of pointing out legal authorities to him and looking up law for him (R. 46). Defense counsel at this point made an argument to the court that the collaboration of Sergeant Rosenberg with the Trial Judge Advocate in the preparation and trial of the case was prejudicial to the rights of the accused (R. 47-49).

5. Captain Elmer C. Winters, Headquarters Northwest Service Command, called as a witness by the court, testified that since March 1944 he has been the officer in charge of sales of surplus property for the Northwest Service Command (R. 58, 59). He examined the tally-in sheet, dated 3 May 1944, introduced as Prosecution's Exhibit 5, and testified that it was made in the usual course of business (R. 61). He further testified that no Government-owned merchandise has been offered for sale to the public by his office (R. 62).

6. The uncontroverted evidence shows that a kerosene refrigerator bearing the same cabinet number and the same unit number as the one exhibited by accused to Titus on 28 August 1944 in Fort St. John, British Columbia, was received as a Government-owned item at the office of the District Engineer at Dawson Creek, British Columbia, on 3 May 1943. There is also uncontroverted evidence that the refrigerator which accused exhibited to Titus was transported for accused from Dawson Creek to Fort St. John on 9 April 1944 by Government truck. There can be no reasonable doubt that this is the same refrigerator which was listed on the tally-in sheet at Dawson Creek on 3 May 1943. This evidence was sufficient to establish a prima facie case of Government ownership of the property at the time of the transaction

(292)

between the accused and Titus. Once ownership in one party has been established, the continuity of such ownership is presumed until facts are proven which tend to show a change of such ownership. The defense introduced no evidence tending to show that, between the time the refrigerator was listed on the tally-in sheet as Government property and the date of the transaction between the accused and Titus, events occurred which altered the Government's title, or that accused had acquired title thereto. There was no evidence that the Government has ever made any sales of refrigerators to the public in the Northwest Service Command, and the officer in charge of sales of surplus property for that Command since March 1944 testified that none have been made by his office.

On the matter of proof of Government ownership it is pertinent also to note the following provision of the Manual for Courts-Martial, 1928 (150*i*):

"Although there may be no direct evidence that the property was at the time of the alleged offense property of the United States furnished or intended for the military service thereof, still circumstantial evidence such as evidence that the property was of a type and kind furnished or intended for, or issued for use in, the military service might together with other proved circumstances warrant the court in inferring that it was the property of the United States, so furnished or intended."

The offense of which the accused was convicted (Specification 1 of Charge II) is that of obtaining money under false pretenses, and it is charged under Article of War 95. The offense is sufficiently alleged if the Specification alleges (a) a specific intent of the accused to defraud, (b) the specific fraud involved, (c) the person or organization accused intended to defraud and (d) that accused succeeded in defrauding such person or organization (CM 199641, Davis, 4 B.R. 145; Dig. Op. JAG, 1912-40, sec. 454 (5)). Each of those elements was properly alleged in the instant case and each is fully established by the record of trial. The evidence is clear that accused, with intent to defraud Titus, falsely represented to him that a Government-owned refrigerator was his own (the accused's) property and by resort to such false representation obtained from Titus the sum of \$425 (Canadian funds). The offense, involving as it does gross moral turpitude, was properly charged under Article of War 95 (CM 209677, Conner, 9 B.R. 125; CM 218325, Harris, 12 B.R. 29).

7. The attack made by defense counsel upon the propriety of the Trial Judge Advocate using, as his assistant, a clerk from the office of the Staff Judge Advocate of the Service Command was, without merit. As shown by the Staff Judge Advocate's Review, the Trial Judge Advocate was not a lawyer and the clerk who assisted him took no part in the review.

8. In accordance with accused's request, he was represented at the trial by Major Irvin Waldman, A.C., with the regularly appointed defense counsel and assistant defense counsel acting as associate counsel.

9. The records of the War Department show that accused is 26 years of age and married. He had two years of college training at Oklahoma University, where he specialized in civil engineering. From June 1940 until April 1942 he was employed as a supervisor by a construction company engaged in constructing air fields. He enlisted in the Army in April 1942, was commissioned a second lieutenant, Ordnance, Army of the United States, upon graduation from Officer Candidate School 23 January 1943 and was promoted to first lieutenant on 30 June 1944.

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

Thomas N. Jaffy, Judge Advocate.

William H. Lambrell, Judge Advocate.

(On Leave), Judge Advocate.

(294)

SPJGH-CM 270454

1st Ind

Hq ASF, JAGO, Washington 25, D. C. JAN 26 1945

TO: The Secretary of War

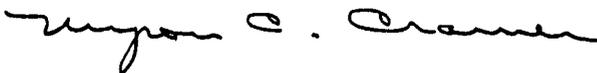
1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant Alvin H. Kreie (O-1553120), Ordnance Department.

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. There appear to be no mitigating or extenuating circumstances. I recommend that the sentence be confirmed and carried into execution.

3. Attention is invited to a statement in the Staff Judge Advocate's Review, attached to the record of trial, that subsequently to the trial of this case the accused has repaid to the injured party the \$4.25 (Canadian funds) which he was convicted of obtaining by false pretenses (par. 6e). Attention is also invited to the following extract from the Staff Judge Advocate's Review (par. 6e):

"Inspector General's report further reveals that Government property such as: 1 stove, 2 pistols, 1 Army rifle, 1 field telephone, 2 micrometers, 1 pair binoculars, 1 repair kit, and 1 master mechanic Blackhawk tool kit complete with tools, in possession of accused for which no satisfactory receipts or explanation could be produced. (Items have since been picked up on account of Property Officer in Dawson Creek, B.C.)"

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 recommendation meet with approval.



3 Incls

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

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed. G.C.M.O. 138, 11 Apr 1945)

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

(295)

SPJGK
CM 270462

10 JAN 1945

UNITED STATES)

v.)

Second Lieutenant MURRY A.
RICKER (O-1035581), Chemical
Warfare Service.)

FOURTH SERVICE COMMAND
ARMY SERVICE FORCES

Trial by G.C.M., convened at
Camp Sibert, Alabama, 27, 29
November 1944. Dismissal,
total forfeitures, 15 years
confinement.

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

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

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

Specification: In that Second Lieutenant Murry A. Ricker, Surplus Detachment, Section I, Service Command Unit 1479, Camp Sibert, Alabama, did, at Camp Sibert, Alabama, on or about 11 September 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Ralph's Place, on Highway 11-E, approximately ten miles from Knoxville, Tennessee, on or about 10 November 1944.

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

Specification: In that Second Lieutenant Murry A. Ricker, * * *, did, at Camp Sibert, Alabama, on or about 31 May 1944, wrongfully present for payment a claim against the United States by wrongfully presenting to Finance Officer at Camp Sibert, Alabama, an officer of the United States duly authorized to pay such claims, in the amount of \$153.40 for services rendered to the United States by said Second Lieutenant Murry A. Ricker and for rental and subsistence allowance for the alleged dependent wife of said Second Lieutenant Murry A. Ricker, which claim was false and fraudulent in that said Second Lieutenant Murry A. Ricker had

previously received the sum of \$120.00 as a partial payment on account of said services and in that the said Second Lieutenant Murry A. Ricker did not then have a lawful dependent wife for whom he was entitled to claim an allowance for rental and subsistence, and said claim was known by the said Second Lieutenant Murry A. Ricker to be false and fraudulent.

He pleaded not guilty to and was found guilty of the Charges and the Specifications. Evidence was introduced of a previous conviction by a general court-martial on 16 February 1944 of a violation of the 61st Article of War, for being absent without leave from 8 August 1943 to 22 October 1943, for which he was sentenced to be restricted to the limits of his post for three months and to forfeit \$100 per month for a like period. 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 the term of his natural life. The reviewing authority approved the sentence but reduced the period of confinement to 15 years and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that at the times set forth in the specifications and at the time of trial the accused was in the military service of the United States in the grade of a second lieutenant stationed at Camp Sibert, Alabama, and assigned to Surplus Detachment, Section I, Service Command Unit 1479, but attached to Company K of the 1st Regiment for special duty (R. 18-19, 35).

With reference to Charge I, on 9 September 1944 accused was informed by his company commander that orders had been received relieving the accused from his present assignment and duty and assigning him to a permanent station outside the continental limits of the United States effective upon his departure (R. 35, Pros. Ex. 3). Upon learning of the orders the accused appeared interested and anxious to obtain the orders. He claimed that he desired to leave Camp Sibert and to "prove himself overseas" (R. 30). At that time an investigation was being conducted concerning the accused's absence from 7 to 9 September 1944. The accused was worried. He appeared to be recovering from an illness (R. 30). The orders were never delivered to the accused (R. 36). On 11 September 1944 the accused disappeared from Camp Sibert and could not be found therein. Nor could he be found at his home in nearby Gadsden (R. 25-27). He was entered in the morning report of his organization as absent without leave as of 0700 11 September 1944 (R. 34, Pros. Ex. 2). On 10 November 1944 accused was apprehended by the Military Police in a tourist cabin at "Ralph's Place" located about 10 miles northeast of Knoxville, Tennessee (200 miles from Camp Sibert), dressed in a mixed uniform (R. 38-39). Accused voluntarily signed a statement, admitted in evidence without objection (R. 29, Pros. Ex. 1), in which he admitted that he absented himself without

proper leave from Camp Sibert, Alabama, on the morning of 11 September 1944, and remained absent without leave until the 11th day of November. He denied that he intended to desert. He stated that he had heard about the "alert" order but had never seen it. He feared that because he had been ill at his home in Gadsden the alert order would be cancelled. He was anxious to go overseas. On the 11th of September he suddenly decided to run away for a short time to get away from the trouble he was in. So he went to Gadsden, picked up his winter uniform and his wife, and drove to Knoxville. There he stayed a short time at the Park Hotel and then went to "Ralph's Place".

It was shown that on 13 September 1944 a "Lt. and Mrs. Minski" registered at the Park Hotel in Knoxville, Tennessee, and remained there for five days (R. 54). About 20 September 1944 the accused, accompanied by a woman whom he represented as his wife, rented a cabin at "Ralph's Place", giving as his name "Lieutenant Minsky". He lived there until 10 November 1944. During his early occupancy the accused told the proprietor of the establishment that he was in the Army but was getting a medical discharge. Subsequently, after a three-day absence, he told the proprietor that he had been to Fort Oglethorpe for his medical discharge and to address him as "Mr. Minsky" (R. 40-41). For two weeks the accused was employed to work around the cabins by the proprietor who paid him \$25 per week (R. 41-46). The accused also sought employment at a cafe near Knoxville, Tennessee (R. 47) under the name of Minsky (R. 49). He also requested a civilian to sign his bond so as to enable him to operate a cafe near Knoxville (R. 51).

With reference to Charge II, it was shown that the accused on 31 May 1944 was paid \$153.40 by the Disbursing Officer at Camp Sibert, Alabama (R. 62), upon a voucher signed by the accused and previously submitted to the Disbursing Officer at a time that does not appear in the record. The voucher was on War Department Form No. 336 for "Pay and Allowance Account" and set forth among other things the following pertinent information:

Dependents:

Lawful wife: Mary E. Ricker, 928 N. Calvert Street,
Baltimore, Maryland.

Credits:

For base and longevity pay from May 1, 1944 to May 31, 1944 -	\$150.00
For subsistence allowance " " " " " " " " "	43.40
For rental allowance " " " " " " " " "	60.00
	<u>\$253.40</u>

Debits:

Due United States for fine per General C.M. Orders No. 251, ASF Hq. 4th Service Command dated 3 March 1944 -	100.00
Net balance ---	<u>\$153.40</u>
(R. 64, Pros. Ex. 5).	

On 15 May 1944 the accused was temporarily stationed at Fort Benning, Georgia, and on that date he received \$120.00 upon his voucher which he presented there for a partial payment of his pay from "1 May 1944 to 15 May 1944" (R. 65, Pros. Ex. 7).

By stipulation a true and correct copy of a divorce decree of the Circuit Court of Baltimore, Maryland, was admitted in evidence (R. 66, Pros. Ex. 8) which showed that on 22 January 1944 Mary E. Ricker was divorced "a vinculo matrimonii" from the accused and granted guardianship and custody of Robert M. Ricker, their minor child. The decree charged the accused with the maintenance and support of the child. Notwithstanding the fact that on 15 May 1944 he had received \$120 at Fort Benning on account of his pay and allowances and was paid in full at Camp Sibert on 31 May 1944, the accused during June, July and August did not deduct the \$120 from his pay vouchers (R. 66).

Captain Robert H. Weeks, the Disbursing Officer, admitted that the accused was entitled to receive the amount set forth in his May voucher (except for the \$120 paid on account), even if he were divorced from his wife, by reason of the dependency of the minor child (R. 67-68). No evidence was introduced to show if accused knew of the divorce decree at the time the voucher was submitted or paid (R. 69).

By further stipulation it was shown that accused remarried on 10 August 1944 (R. 70, Pros. Ex. 9).

It was the custom at Camp Sibert for the "officer personnel section" to prepare pay vouchers for the officers stationed there (R. 70).

By deposition (Pros. Ex. 10) Mrs. Mary E. Ricker's attorney testified that no notice of the granting of the final decree in divorce was given to nor required by law to be given to the accused. During the proceedings and in accordance with the usual practice in such cases the accused was represented by a court appointed attorney and interposed no defense to the divorce action.

4. On behalf of the defense it was shown that a Sergeant Morris Greenstein, Chief Clerk of the Officers' Pay Section at Camp Sibert whose duty it was to prepare pay vouchers for officers (R. 75), during the first week of March 1944 made out three vouchers for the accused for the months of March, April, and May so as to insure that the deduction of \$100 ordered by the court-martial for three months would be deducted. During April the accused was transferred to "RTC, Camp Sibert", which necessitated the preparation of a new voucher for May. Sergeant Greenstein prepared this voucher in April and forwarded it to "RTC" before 1 May 1944 for accused's signature. Prosecution's Exhibit 5 is the voucher which the witness prepared (R. 77,79).

With reference to Charge I it was shown that prior to August 1944 the accused performed his military duties in a satisfactory manner, but upon his return during that month from an emergency leave by reason of the "loss" of his son the accused appeared "very broken up and down in the dumps" and began to drink to excess and to neglect his duties (R. 80-81,84,87-88). The witness thought that the "loss" of his son meant that the son had died (R. 86,89). When accused learned of his "alert" orders on 9 September 1944 he appeared anxious to go overseas and wanted his orders as soon as possible (R. 82,84). On 10 September he was worried that his orders would be rescinded because of an investigation then taking place (R. 84). An examination of accused's home in Gadsden showed that he and his wife left hurriedly and had given no previous intimation of their departure (R. 91-92).

Having been advised of his rights the accused elected to make an unsworn statement (R. 93). In this statement the accused claimed that when Sergeant Greenstein made up the three vouchers in March 1944 for the months of March, April, and May so as to insure the entry in them of the court-martial fine he did not know that his wife had obtained a divorce from him. The voucher for May he signed during the first part of May. On 14 May he went to Fort Benning with another officer. Both were "broke" so he obtained a partial payment at Fort Benning and loaned the other officer some money. He intended to repay this money. In June his wife sent him papers for his signature so as to enable other persons to adopt their child. He started to drink heavily and in August he took the papers to Cincinnati where he had an appointment to meet his wife intending to turn over to her the signed adoption papers. She failed to appear. He got drunk and returned to Chattanooga where he married his present wife. He was too drunk to remember much about it. From the 7th to 9th of September he was ill at his home. Early on the morning of the 7th he telephoned headquarters. No one was there but an orderly. He told the orderly to notify the Battalion. On September 8, 1944 his wife told him that at his request she had telephoned. On 9 September 1944 two officers came to his home and told him that he was under arrest. On his way back to camp he learned of his orders. He was anxious to get them but instead was taken to the hospital for an examination, then to the General's office where he waited for 20 to 30 minutes, when he was told that the General could not see him, and then to the Investigating Officer's office where he was questioned and his answers were taken down by a stenographer. This made him nervous and caused him to fear that his orders would be rescinded. The following day he could get no information on the status of his orders. That afternoon officers came to his home and questioned his wife. This made him feel more certain in his mind that his orders had been rescinded. He returned to camp on Monday and while on his way to the office of the Judge Advocate he stopped in his own quarters and drank 3/4 pint of whiskey. He finally "blew his top" and went home to talk to his wife. From there he "just took off" and ended up at "Ralph's Place" where he stayed "drinking the white stuff" until he was apprehended. He made no effort to hide (R. 95-96).

5. At the instance of the court the prosecution called Lieutenant Colonel Soll Goodman, Medical Corps, as a witness regarding the sanity of the accused (R. 98). Colonel Goodman testified that in his opinion the accused was sane and could differentiate between right and wrong during May 1944 and from 11 September to the present date (R. 102).

6. With reference to Charge I (desertion) it was admitted by the accused that he absented himself without leave from his organization and station at Camp Sibert, Alabama, on 11 September 1944 and remained away without authority until he was apprehended near Knoxville, Tennessee, on 10 November 1944. The only averment in the specification not admitted was that of desertion. Desertion is absence without leave accompanied by the intention not to return, or to avoid hazardous duty, or to shirk important service (MCM, 1928, par. 130a, p. 142). There was ample evidence to support a finding of guilty of desertion based upon an intention not to return. The length of his unauthorized absence in a time of war (60 days); the distance (200 miles) he was away from his station; the fact that he was apprehended; his acceptance of employment; the seeking of other means of livelihood; his adoption of a fictitious name; his residence in an obscure place; his hurried departure motivated by his fear of investigation taking place concerning his former absence - all tended to show the intent to remain away indefinitely and together legally support the finding of guilty of the Charge and its Specification.

With reference to Charge II and its Specification the accused admitted that during the early part of May he signed a voucher to collect in full his pay for May intending that it should be presented in due course and be paid on 31 May 1944. Within two weeks after signing such voucher he procured a payment on account of his pay for May from another disbursing officer at a different military post, and upon his return on 22 May did nothing to prevent the full payment of his pay for the same period, and on the 31st of that month collected the full amount without deduction for the \$120 previously received. Nor did he deduct this \$120 from his pay voucher for the months of June, July, and August following. It was a reasonable inference from these circumstances that his intentions were dishonest and that when he obtained on 31 May 1944 the sum of \$153.40 he intended to defraud the Government of \$120.00. Notwithstanding the contention that the voucher presented to the Finance Officer at Camp Sibert may have been presented before the accused procured the \$120 part payment of the same pay at another camp, it was his duty to bring this to the attention of the Finance Officer, or, in failing to do so, to refuse to accept the payment without first deducting the \$120 paid him on account. The responsibility for the accuracy of the voucher even though assisted by other military personnel rests upon the officer presenting the voucher or for whom it is presented. The finding of the accused guilty of wrongfully presenting the claim against the United States in the amount of \$153.40 because he had previously received \$120 on account and that therefore his claim was false and fraudulent is amply sustained by the evidence.

The remaining part of the specification dealing with the false and

fraudulent character of the claim due to the fact that the name of the accused's divorced wife appeared on the voucher should not be sustained for two reasons: (1) There was no evidence that the accused knew at the time he signed or presented the voucher that his wife had obtained a divorce and was no longer his lawful wife; (2) although it was conclusively established that the accused's wife Mary had divorced him in January 1944, yet by the same evidence it was shown that the support and maintenance of their minor child was imposed upon the accused and the wife was named guardian for the minor. In so far as the Government was concerned accused was lawfully entitled to receive on his pay voucher for May the sum of \$153.40 (disregarding for the purposes of this phase of the specification the payment received on account), whether his wife Mary was named as his wife or in her capacity as guardian for their minor child. If entitled to receive the same amount in either event the evidence is not convincing that the accused intended to defraud the Government. The voucher was erroneous in describing Mary E. Ricker as his "lawful wife". If it had described her as guardian for the minor child the voucher would have been correct. Under these circumstances it would not be just to convict him of an attempt on these grounds to defraud the United States, when, as stated, he was entitled to the same amount in any event. That part of the Specification should therefore be disapproved in the findings.

7. At the end of the trial, after the court had properly reached the unannounced findings of guilty, the trial judge advocate stated that he had some evidence of previous convictions pertaining to the accused, and provided the court with a document (Pros. Ex. 11) entitled "Previous trials by Court-Martial", which contained the following information:

"PREVIOUS TRIALS BY COURTS-MARTIAL:

General Court-Martial

Violation of the 61st, 93rd, and 96th Articles of War

Synopsis of Specifications: AW 61 - Absent without leave 8 August 1943 to about 22 October 1943; AW 93 - embezzlement; AW 96 - Passing worthless checks.

Sentence announced and adjudged: 16 February 1944

Sentence as approved: To be restricted to the limits of your post for three (3) months and to forfeit one hundred dollars (\$100.00) per month for three (3) months.

Approved: 3 March 1944".

Contained in the accused's War Department 201 file is a copy of General Court-Martial Orders No. 251 of 3 March 1944 of Army Service Forces, Fourth Service Command. It shows that the accused was charged with the offenses listed in Prosecution Exhibit 11; that the court found the accused

not guilty of the charge and specification described as "AW 93 - Embezzlement", and that the reviewing authority disapproved all findings of guilty of the specifications and charge described as "AW 96 - Passing worthless checks". The only true and correct previous conviction which should have properly been disclosed to the court was the one described in Prosecution Exhibit 11 as "AW 61 - Absent without leave". The reception by the court of Prosecution Exhibit 11 containing the additional incorrect information with respect to accused's previous conviction was unfortunate, improper, and erroneous. Its reception, however, was not prejudicial to the substantial rights of the accused in so far as the findings were concerned because the findings had been properly reached prior to the reception of such erroneous matter. As was said by the Board of Review in CM 243015, Fisher (27 B.R. 257,259):

"Since, however, the evidence in question did not prejudice the accused's rights insofar as the findings of guilty are concerned and since the sentence imposed is within the legal limits provided by law, the error does not require the disapproval of either the findings or the sentence.* * *"

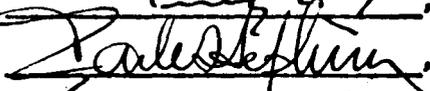
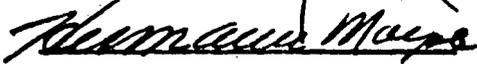
See also CM 244760, Cihos (29 B.R. 1).

Although it is impossible to measure the effect which the erroneous information had upon the court in assessing the punishment adjudged, the Board of Review is of the opinion that the error was purged and rectified by the action of the reviewing authority in reducing the sentence of confinement from life to 15 years.

8. War Department records show the accused to be 33 years of age, a high school graduate, and married. He was employed for nine years as a meat cutter or butcher. On 15 September 1940 he enlisted in the service and reached the grade of sergeant. On 11 October 1942 he was commissioned second lieutenant, Chemical Warfare Service, Army of the United States. On 3 March 1944 he was convicted of being absent without leave from 8 August 1943 to 22 October 1943 in violation of Article of War 61, and was sentenced to be restricted to the limits of his post for three months and to forfeit \$100 pay per month for a like period.

9. The court was legally constituted and had jurisdiction of the accused 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 sufficient to support the findings, except the words in the Specification of Charge II "for the alleged dependent wife of said Second Lieutenant Murry A. Ricker" and "in that the said Second Lieutenant Murry A. Ricker did not then have a lawful

dependent wife for whom he was entitled to claim an allowance for rental and subsistence", and legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized for a violation of either Article of War 58 or Article of War 94.

 Judge Advocate.
 Judge Advocate.
 Judge Advocate.

1st Ind.

Hq, ASF, JAGO, Washington 25, D.C.,

JAN 29 1945

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 Murry A. Ricker (O-1035581), Chemical Warfare Service.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings, except the words in the Specification of Charge II "for the alleged dependent wife of said Second Lieutenant Murry A. Ricker" and "in that the said Second Lieutenant Murry A. Ricker did not then have a lawful dependent wife for whom he was entitled to claim an allowance for rental and subsistence", and legally sufficient to support the sentence as approved by the reviewing authority and to warrant confirmation of the sentence. I recommend that the findings of guilty of the excepted words be disapproved, but that the sentence be confirmed. It is my opinion that the sentence approved by the reviewing authority will be rendered more proportionate as well as adequate by the remission of five years of the confinement. I therefore recommend that the sentence of confinement be reduced to ten years; that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement; and that the sentence as thus modified be carried into execution.

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



MYRON C. CRAMER
Major General
The Judge Advocate General

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

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but confinement reduced to ten years. G.C.M.O. 130, 9 Apr 1945)

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

(305)

SPJGN
CM 270477

29 DEC 1944

UNITED STATES)

SECOND AIR FORCE

v.)

Second Lieutenant HUGH V.
QUIGLEY (O-813777), Air
Corps.)

) Trial by G.C.M., convened
) at Alexandria Army Air
) Field, Alexandria, Louisi-
) ana, 15 November 1944.
) Dismissal, total forfeitures
) and confinement for five (5)
) years.

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 Charges and Specifications:

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

Specification 1: In that Second Lieutenant Hugh V. Quigley, 221st Army Air Forces Base Unit, Combat Crew Detachment, did, without proper leave, absent himself from his station and organization at Army Air Field, Alexandria, Louisiana, from about 4 August 1944, to about 12 September 1944.

Specification 2: In that Second Lieutenant Hugh V. Quigley, 221st Army Air Forces Base Unit, Combat Crew Detachment, did, without proper leave, absent himself from his station and organization at Army Air Field, Alexandria, Louisiana, from about 16 September 1944, to about 7 October 1944.

CHARGE II: Violation of the 69th Article of War.
(Finding of guilty disapproved by reviewing authority).

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

He pleaded guilty to Charge I and its Specifications and not guilty to Charge II and its Specification. He was found guilty of Charge I and its Specifications and guilty of the Specification, Charge II, excepting therefrom the words "in arrest" and "break his said arrest" of which excepted words he was found not guilty and substituting therefor the words "in restriction to the limits of the post" and "break said restriction" of which substituted words he was found guilty, and not guilty of Charge II but guilty of a violation of the 96th Article of War. Evidence of three prior convictions by General Court-Martial for three violations of Article of War 61 and two violations of Article of War 96 was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for 5 years. The reviewing authority disapproved the findings of guilty as made by the court of Charge II and its Specification, 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 to Charge I and its Specifications consists of a stipulation that he was absent without proper leave as alleged and the testimony of his Commanding Officer that the accused's absences were without authority (R. 5, 6; Ex. 1). The effect of his guilty pleas was explained to him and he permitted such pleas to stand (R. 5).

4. The accused, after explanation of his rights as a witness, elected to remain silent and the defense adduced no evidence (R. 7).

5. Specifications 1 and 2, Charge I, respectively allege that the accused absented himself without proper leave from his designated station and organization from about 4 August 1944 to about 7 October 1944 and from about 12 September 1944 to about 7 October 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 testimony and stipulated facts adduced by the prosecution conclusively establish the accused's unauthorized absences as alleged and abundantly supplement his pleas of guilty which were allowed to remain after full explanation of the nature and effect thereof and which do not appear to have been improvidently entered. All of the evidence and the accused's pleas of guilty, therefore, beyond a reasonable doubt support the court's findings of guilty of Charge I and its two Specifications.

6. The accused is about 25 years old. War Department records show that he attended high school for two years. He has had enlisted service from 12 February 1942 until 1 October 1943 when he was commissioned a second lieutenant upon completion of Officers Training School and he has had active duty as an officer since the latter date.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Charge I and its Specifications, 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.

Robert Plummer, Judge Advocate.

Isabel H. Golden, Judge Advocate.

(308)

SPJGN
CM 270477

1st Ind.

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

- To the Secretary of War.

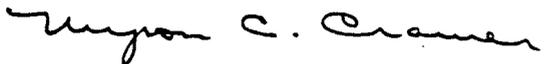
JAN 4 - 1945

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Hugh V. Quigley (O-813777), 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 as approved by the reviewing authority and the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but that the forfeitures be remitted, 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. Consideration has been given to the accused's letter of 11 December 1944 wherein he requests clemency and asserts that his actions were caused by domestic difficulties.

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 foregoing recommendation, should such action meet with approval.



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

4 Incls.

- Incl 1 - Record of trial.
- Incl 2 - Dft. of ltr. for
sig. Sec. of War.
- Incl 3 - Form Executive action,
- Incl 4 - Ltr. from accused.

(Sentence confirmed but forfeitures remitted. G.C.M.O. 91, 22 Mar 1945)

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

(309)

16 DEC 1944

SPJGK
CM 270549

UNITED STATES

FORT LEWIS, WASHINGTON

v.

Private FRED RICHMOND
(38097019), 1533rd Engineer
Dump Truck Company, Fort
Lewis, Washington.

Trial by G.C.M., convened at Fort
Lewis, Washington, 28 November
1944. Dishonorable discharge and
confinement for five (5) years.
Federal Reformatory, El Reno,
Oklahoma.

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

1. The Board of Review has examined the record of trial in the case of the soldier named above.
2. The accused was tried upon the following Charges and Specifications:

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

Specification 1: (Finding of not guilty).

Specification 2: In that Private Fred Richmond, 1533rd Engineer Dump Truck Company, did, at Fort Lewis, Washington, on or about 27 September 1944, unlawfully enter Building 11-D-18, a barracks of Company A, 53rd Engineer Training Battalion, with intent to commit a criminal offense, to wit, larceny, therein.

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

Specifications: In that Private Fred Richmond, * * *, did, at Fort Lewis, Washington, on or about 27 September 1944, feloniously take, steal, and carry away one olive drab field jacket, M-1943, of the value of \$6.10, property of the United States, furnished and intended for the military service thereof.

He pleaded not guilty to the Charges and their Specifications. He was found not guilty of Specification 1 of Charge I and guilty of Specification 2 of Charge I, Charge I, and Charge II and its Specification. No evidence was introduced of any previous conviction. 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 five (5) years. The reviewing authority approved

the sentence, designated the Federal Reformatory, El Reno, Oklahoma, 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 Specification 2 of Charge I and of Charge I and the sentence. In the opinion of the Board of Review the record of trial is not legally sufficient to support the findings of guilty of Charge II and its specification for the following reason:

The evidence for the prosecution showed beyond doubt that the accused stole a field jacket marked M-1943 of some value on the date alleged in the specification, but with reference to the ownership of the stolen article the prosecution by competent uncontradicted evidence (R.17) showed that the jacket was owned by an individual, Sergeant Joseph P. Shaheen. No effort was made to show that the article was the property of the United States. The production of the article at the trial before the court is not sufficient to prove ownership in the Government of an article susceptible of private ownership, particularly when coupled with direct evidence given by the prosecution's witness of private ownership. The record would have been legally sufficient to support a finding of guilty of larceny of the article as the property of Sergeant Shaheen in violation of Article of War 93, but accused was not charged with that offense and as it is not a lesser included offense of the one with which he was charged, the conviction of Charge II and its Specification must fall. The Manual for Courts-Martial, paragraph 150i, page 185, provides:

"Proof. - Larceny and embezzlement. - * * * (b) that the property belonged to the United States * * *."

4. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Charge II and its Specification, but legally sufficient to support the findings of guilty of Charge I and its Specification 2 and the sentence.

Ray E. Son, Judge Advocate.
Paul A. Johnson, Judge Advocate.
William M. [unclear], Judge Advocate.

1st Ind.

DEC 20 1944

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

TO: Commanding General,
Fort Lewis, Washington.

1. In the case of Private Fred Richmond (38097019), 1533rd Engineer Dump Truck Company, Fort Lewis, Washington, 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 II and its Specification but legally sufficient to support the findings of guilty of Charge I and Specification 2 and the sentence, which holding is hereby approved. Upon disapproval of the finding of guilty of Charge II 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 270549).

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.

(313)

SPJGQ
CM 270591

24 JAN 1945

UNITED STATES)

v.)

Private ELDON VANZANT)
(37357015), Battery B,)
52nd Field Artillery Training)
Battalion.)

INFANTRY REPLACEMENT TRAINING CENTER

Trial by G.C.M. convened
at Camp Roberts, California,
1 December 1944. Dishonorable
discharge, total forfeitures
and confinement for thirty
(30) years. Penitentiary.

REVIEW by the BOARD OF REVIEW
ANDREWS, FREDERICK and BIERER, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.
2. The accused was tried upon the following Charges and Specifications:

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

Specification 1: In that Private Eldon Vanzant, Battery B, 52nd Field Artillery Training Battalion, Camp Roberts, California, did, at Camp Roberts, California, on or about 17 May 1944, desert the service of the United States and did remain absent in desertion until he was returned to military control at Fort Douglas, Utah, on or about 15 August 1944.

Specification 2: In that Private Eldon Vanzant * * * did, at Camp Roberts, California, on or about 27 August 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Kansas City, Missouri, on or about 25 September 1944.

Specification 3: In that Private Eldon Vanzant, * * * did, at Camp Roberts, California, on or about 16 October 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Meeker, Colorado, on or about 22 October 1944.

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

(314)

Specification 1: In that Private Eldon Vanzant * * * having been duly placed in confinement in the 11th Regimental Guardhouse, Camp Roberts, California, on or about 26 August 1944, did, at Camp Roberts, California, on or about 27 August 1944, escape from said confinement before he was set at liberty by proper authority.

Specification 2: In that Private Eldon Vanzant * * * having been duly placed in confinement in the Post Stockade, Camp Roberts, California, on or about 10 October 1944, did, at Camp Roberts, California, on or about 16 October 1944, escape from said confinement before he was set at liberty by proper authority.

He pleaded not guilty to Charge I and its Specifications, guilty to Charge II and its Specifications. He was found guilty of both Charges and all Specifications. Evidence was introduced of two previous convictions by special courts-martial for absences without leave of forty-two days and forty-eight days respectively. 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 thirty years. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50 $\frac{1}{2}$.

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

The accused absented himself without leave from his station at Camp Roberts, California on 17 May 1944. (Morning Report, R. 7; Pros. Ex. 1). He was apprehended by civil authorities at Harrison, Arkansas, and returned to military control at Fort Douglas, Utah, on 15 August 1944. (Stipulation, R. 8).

From confinement at Camp Roberts, California, he absented himself without leave on 27 August 1944. (Morning Report, R. 7; Pros. Ex. 2). He was then in custody as a prisoner in the Regimental Guardhouse. Following a report of his escape, the Officer of the Day caused a thorough search of the area to be made and the accused could not be found. (Stipulated testimony, R. 8). He was apprehended by civil authorities at Kansas City, Missouri, and returned to military control on 25 September 1944, by order of the United States District Court for the Western District of Missouri, Western Division. (Stipulation, R. 8).

At about 0615 hours on 16 October 1944, the accused, then a prisoner in the Camp Stockade at Camp Roberts, California, was found to be missing from the line of prisoners returning from "chow". A search of the area discovered a hole in the fence. The accused was not found (R. 9). He was apprehended by civilian authorities at Meeker, Colorado, and returned

to military control at Lowry Field, Colorado, on 22 October 1944 (Stipulation, R. 8).

4. The accused, duly informed of his rights, elected to remain silent, and introduced no evidence (R. 10).

5. The three successive absences of the accused, all unauthorized, the latter two originating by escape from confinement and all terminating by apprehension at distant points, unexplained, show a determined resolve to avoid military service and form a substantial basis for the inference that his intention at all times was to desert the service.

6. The accused is 19 years of age, apparently unmarried. He was inducted 26 June 1943 at Fort Warren, Wyoming. Information accompanying the record of trial discloses that he came into the Army from the county jail at Green River, Wyoming, where charges against him for attempted robbery of a filling station were dropped in order that the Army might avail itself of his services. The Psychiatric Report, accompanying the record of trial, reveals that he has served thirteen months in the Missouri Training School for Boys, at Boonville, Missouri, for automobile theft, and indicates his connection with other depredations of like character.

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.

Fletcher R. Andrews, Judge Advocate.

Herbert R. Friedman, Judge Advocate.

W. H. Jones, Judge Advocate.



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

(317)

SPJGQ
CM 270640

30 JAN 1945

UNITED STATES	)	ARMY AIR FORCES
	)	WESTERN FLYING TRAINING COMMAND
v.)	
Second Lieutenant KEITH EDWARD	)	Trial by G.C.M., convened at
OTTERSON, (O-760978), Air Corps.	)	Stockton Field, California,
	)	10 November 1944. Dismissal,
	)	total forfeitures and con-
	)	finement for ten (10) years.

OPINION of the BOARD OF REVIEW		
ANDREWS, FREDERICK and BIERER, Judge Advocates		

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

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

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

Specification 1: In that 2d Lt. Keith Edward Otterson, did, at Merced, California, on or about 13 October, 1944, with intent to do him bodily harm, commit an assault upon Loren C. Buckman, by striking him on the head with a dangerous instrument, to wit, a bottle.

Specification 2: In that 2d Lt. Keith Edward Otterson, did, at Merced, California, on or about 13 October, 1944, by force and violence, feloniously take, steal, and carry away from the person of Loren C. Buckman, a wallet containing about Seventy-Five Dollars (\$75.00) lawful money of the United States, the property of Loren C. Buckman, value about Seventy-Five Dollars (\$75.00).

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

Specification 1: In that 2d Lt. Keith Edward Otterson, did, at Merced Army Air Field, Merced, California, on or about 14 October 1944, with intent to deceive 1st Lt. Francis F. Simmons, officially state to the said 1st Lt. Francis F. Simmons, that "he did not strike Mr. Buckman", which statement was known by the said 2d Lt. Keith Edward Otterson to be untrue.

(318)

He pleaded not guilty to and was found guilty of the Charges and all Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for fifteen years. The reviewing authority approved the sentence, but remitted five years of the confinement imposed, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution established the following state of facts.

Loren C. Buckman (R. 8), a civilian, was a prosperous merchant engaged in the automobile supply and wrecking business at Merced, California (R. 9,19). He maintained a living apartment at the rear of his business building (R. 10), at 16th and R Streets in Merced (R. 9). He was married (R. 9), and had recently moved his home from the apartment (R. 15) to a residence elsewhere in the city (R. 8). Mr. Buckman formerly had been a first sergeant in the Army (R. 18), and was an officer of the American Legion and a member of 40 and 8 (R. 14,19). It was his custom to invite soldiers in to have a drink, and to make them welcome (R. 15).

On the night of 12 October 1944, Mr. Buckman had spent the evening at the Elks Club (R. 16) and had had about eight drinks after dinner, between seven and twelve o'clock (R. 17). He felt somewhat exhilarated, but not intoxicated (R. 16). After midnight, on the early morning of 13 October, he met Lieutenant Rhodes, of the Merchant Marine, and invited Lieutenant Rhodes to his establishment for a drink. On the way there, they met the accused and a sailor (R. 9). Rhodes invited them to come along, with Buckman's approval (R. 15), and the four proceeded to Buckman's establishment, six blocks away (R. 9,10). The sailor left the party along the way (R. 10). Buckman, Rhodes and the accused reached and entered Buckman's apartment. As Buckman did not have his keys, the accused picked the lock with an ice pick, as Buckman had tried and failed to do (R. 10). The accused and Lieutenant Rhodes handled and inspected a .300 Savage hunting rifle which Buckman had there (R. 10). Buckman stepped between them and unloaded the rifle (R. 11). The three men remained there approximately an hour, the events of which were not clear in Buckman's recollection. He did not remember doing any drinking, there, but accepted as a fact that they did drink (R. 11,21). He had half a case of whiskey upstairs (R. 11). At one point, the accused commented that Buckman had been doing a lot of talking, and called on Buckman to identify himself. Buckman showed his identification cards, Army and otherwise, and in so doing showed his wallet containing about thirty-one one-dollar bills and about fifty dollars in other currency (R. 12,18,19). They engaged in conversation, which was all in good fellowship, without argument or altercation of any kind (R. 13,20). The accused did not seem to be intoxicated (R. 21).

Buckman's last recollection was that he turned around from the accused to pour a drink, and lost consciousness (R. 11). The accused and Rhodes both were there at his last recollection (R. 22). He did not remember feeling a blow (R. 11). Some time later, regaining consciousness, he found himself alone, on the floor, badly beaten about the head. He was "all over blood", which had "mostly dried", his head felt "like a jelly", his jaw was knocked "away down", he was breathing with difficulty, and "it was just all hurt all over" (R. 12). His wallet and money were gone (R. 14). He went outdoors for air (R. 13), and across the street to a creamery, where friends, after failing to recognize him at first, got him to a hospital and called the police. He remained in the hospital for a week and then in bed at home. At the time of trial, he still could not "think very good", and had to take things slowly (R. 14). His memory of events immediately preceding his injury was impaired (R. 17,20).

Stipulated testimony of the doctor who attended Mr. Buckman was that Buckman was brought to the hospital on the morning of 13 October 1944, in an unconscious condition. He had been struck on the back of the head and across the nose. His face was swollen and there was much hemorrhage around his eyes. He was suffering from concussion and did not become clear for several days. He also had one injured finger. X-ray pictures indicated what the x-ray technician felt to be a fracture in the thyroid cartilage and also a fracture well back in the nasal septum, but the doctor was very doubtful that there were any fractures. The man had undergone a terrific beating. He stayed quite dizzy for some time, but was apparently making a satisfactory recovery (R. 26).

Carlan H. Rhodes, Deck Engineer in the Merchant Marine (R. 26-27), was the officer of that service who was in the company of Buckman and the accused on the night in question. He testified that the accused and himself went with Buckman at Buckman's invitation to Buckman's establishment for a drinking party (R. 27) and entered by picking the lock with an ice pick. A sailor had been with them, but left before they went in to Buckman's place. Buckman went upstairs and got a bottle of whiskey. They drank and engaged in conversation (R. 28). Before they entered, Buckman showed the witness some receipts in a leather folder, to show that he owned the place, but did not show him a wallet (R. 29,30). The three remained there about an hour and a half to two hours, drinking straight bourbon whiskey and water, and talking (R. 28-32). There were no arguments, fights or altercations, and nothing unusual happened (R. 29). Rhodes decided that he had enough and went home. The accused said that he was going to stay a while and remained there in conversation with Buckman (R. 29-30). Buckman and the accused both were pretty well intoxicated (R. 31).

First Lieutenant Simmons, Provost Marshal (R. 33), interrogated the accused on 14 October 1944, concerning the affair, after first warning the accused under Article of War 24. The accused said that he

would answer voluntarily any questions that the witness cared to ask him. In response to questions, the accused said that he and Rhodes had gone with Buckman to have a drink, at Buckman's invitation, that they had had some drinks and that he and Rhodes had left together; that Buckman had sustained no injury at that time and that the accused did not strike him. The accused denied any knowledge of the wallet, or of the .300 Savage sporting rifle, which had also disappeared (R. 34). Later the accused made a similar statement in response to questioning by the District Attorney in the sheriff's office (R. 35). However, after further questioning, the accused on 24 October made a sworn statement to the investigating officer (R. 42; Pros. Ex. 2), who had advised him fully of his rights (Stipulated testimony, R. 41-42; Pros. Ex. 1). In that statement the accused recounted in some detail the events of his meeting and drinking session with Buckman and Rhodes and said that Buckman angered him by making certain indecent homosexual advances toward him, whereupon the accused grabbed Buckman by the hair and struck him over the back of the head with a milk bottle, then hit Buckman several times in the face with his fists, after Buckman cried out "Don't kill me". Buckman fell to the floor and lay there bleeding. The accused ran out. Rhodes was not there when this incident occurred. When the accused got back to his car he "noticed" that he "had the wallet". He did not want it and did not know what to do with it. He thumbed through the wallet and observed that it contained about fifty or sixty dollars, mostly one-dollar bills. He "decided" to go over on the other side of the railroad tracks and throw the wallet and money away, and did so. He threw it "in what appeared to be an Auto Court". He then drove to the Air Field, went to his quarters and went to sleep. On the way, he was "rather scared and worried" for fear that he might have killed or seriously injured Mr. Buckman. He, the accused, was intoxicated but not dead drunk. Rhodes had told him earlier in the night that he, Rhodes, was going to take Buckman's rifle (Ex. 2).

The Provost Marshal testified that at a preliminary hearing in Justice Court the day before the trial, on charges against Rhodes, the accused had testified on oath after due warning (R. 37,38) in substantial accord with his statement to the investigating officer (Ex. 1).

It was stipulated (R. 40) that Mr. Hugh Mitchell, a Pacific Gas and Electric Company employee, would testify if present that on 13 October 1944, at about 4:30 in the afternoon, the witness found a wallet lying in a street in Merced, about five feet from the curb. The wallet then contained Mr. Buckman's identification cards, but no money. The witness immediately turned it over to the police.

4. The defense attacked the voluntary character of the accused's statements. Undersheriff Morse testified (R. 43-44) that in the sheriff's office, when the accused first admitted striking Mr. Buckman, the witness had told the accused that he wanted to ask him some questions and wanted him to tell the truth, that the witness did not think the

accused was guilty, from looking at him, and would do what he could for him if he was not. The accused then denied striking Buckman. The witness told him that if finger prints found on the milk bottle were his, the accused would be in a bad way. The witness did not tell the accused that the prints were his, as they did not then have the accused's finger prints. The accused then said that he struck Buckman with a milk bottle. The witness "stopped him there and called the District Attorney and the court reporter". The accused was not threatened nor intimidated nor promised immunity (R. 44). He had been advised of his rights in previous questioning, at which time he had denied any knowledge of the offense. When the accused admitted to the witness that he had struck Buckman, nothing was said about the wallet (R. 45).

The accused testified (R. 46), after explanation of his rights (R. 45) and opportunity for conference with his counsel. On the night of 12 October 1944, he had been drinking at four or five different bars in Merced, with the Merchant Marine, Lieutenant Rhodes, and the sailor, Elwood. They quit at midnight because the bars closed. At about 12:30 Rhodes left for home, but they met him again about 1:00 with Buckman, going to Buckman's place for a drink. Rhodes invited the accused and the sailor to come along and Buckman said it was all right. They went to Buckman's place. Buckman did not have the key, and went across the street and got an ice pick to open the lock. Rhodes challenged his right to enter in that manner (R. 47). Buckman showed Rhodes his identification and his name on the building. Rhodes said it was all right. The accused took Buckman's ownership of the place for granted and helped pick the lock. They went through the building into the kitchen of the apartment, from which most of the furniture was gone. Rhodes said "I thought we came here for a drink". Buckman said "OK", and went upstairs and got a pint of whiskey. Buckman poured three drinks in one-ounce jiggers and said a good-will toast. They drank the pint and Buckman brought out another. The accused and Rhodes fenced playfully with some sabers which Buckman said were old master sergeant cavalry sabers, then hung them back on the wall. They played with the rifle and ejected the shells. They drank another pint of whiskey and talked about Army life (R. 47). On the third pint, Buckman asked the accused whether he had been out with any girls lately (R. 48). The accused said no, he hadn't. Buckman said that he would like to "take care of" the accused. It dawned on the accused what was happening. The accused stepped back a little bit and said that he didn't go in for that stuff. Buckman said "Come on", and started playing with the accused's privates. That "riled" the accused, who then struck Buckman a blow in the face. Buckman dropped down a bit, and the accused grabbed him, hit him with a milk bottle, struck him "a couple" more times with his fist, and cursed him for what he had done (R. 48). Buckman said "Don't kill me", more or less crying for mercy, and dropped to the floor. The accused was still mad, and thought that he would take Buckman's wallet and "teach him a lesson". On reaching his car, the accused discovered that he still had the wallet, and did not know what to do. He "kind of looked at it" and

found about fifty or sixty dollars in it. He did not want to return it to Buckman and did not know what to do, so took it to the other side of town and threw it into what he thought was a tourist court, with the money still in it, and proceeded on back to the base (R. 48). He did not see the wallet prior to the time he took it from Buckman (R. 48-50).

The accused struck Buckman because Buckman continued after him after the accused had said that he did not go in for that stuff. Buckman had grabbed hold of the accused and that is where the accused got mad (R. 48-49). That must have been about three o'clock. It seemed about an hour and a half that they had been there. They had drunk about two and a half pints there. Buckman was unsteady on his feet, and the accused was also, "a little bit. Not very much." (R. 49).

On cross-examination (R. 50), the accused testified that Rhodes had said that he, Rhodes, was going to take Buckman's rifle. The accused did not know where Rhodes was when the accused struck Buckman. The last time he remembered seeing Rhodes was a few minutes before that, and he did not see him afterwards (R. 50-51).

Prior to Buckman's advances, Buckman did not say anything to indicate that he was that type of man. If the accused had thought it was that way, he would not have gone there. Buckman had said that he always invited in soldiers and sailors (R. 51).

The accused hit Buckman only once with his fist, once with the bottle, and a couple of times with his fist (R. 52). The bottle broke. "It just seemed to explode". Buckman said "Don't kill me", and put his hands up behind his head (R. 53). The accused did not "believe" that he hit Buckman again with the broken bottle and cut Buckman's hand (R. 53-54). The blow with the bottle did not knock Buckman out. Buckman was standing with his hands over his head, repeating "Don't kill me", so the accused, still enraged, hit him until he dropped to the floor, unconscious (R. 54). There was a little pool of blood, not a big one. The accused then "got scared". He did not think that he had killed Buckman (R. 54), but stood there a minute and then started running (R. 55).

The accused took Buckman's wallet "just to teach him a good lesson". He had not seen Buckman's wallet, but most everybody carries one. He was not thinking of it when he hit Buckman (R. 55). The identification that Buckman had showed to Rhodes when they entered was in a folder that could look like a wallet, but the accused did not get a good look at it and did not see money in it (R. 56).

The accused began to realize "quite surprisedly" that he had the wallet when he got to his car, four blocks away. He thumbed through the wallet and more or less looked at it in general, but did not count the money. It just looked like fifty or sixty dollars, mostly ones (R. 56-57).

The accused was sobered up considerably when he got to his car. He was afraid that Buckman might bleed to death, but was scared and so did not go for medical attention. He decided to throw the wallet away, and felt that if somebody found it they could use the money (R. 57). He was not himself that badly in need of money (R. 58). It did not occur to him to throw the wallet away right there. The place where he threw it seemed like the best place to throw it, and wasn't much out of his way, since he was not walking (R. 58). He did not know why he drove out of his way back to the post (R. 59).

Driving back to the post, the accused was quite worried. He did not think that Buckman was killed, but was worried that he might be very seriously injured. He felt that he was justified in striking Buckman but not in taking his wallet. He "guessed (he) could" have gotten away from Buckman easily (R. 59).

Both the Provost Marshal (R. 60) and the Trial Judge Advocate (R. 61) explained his rights to the accused before he was questioned. He lied about the matter because, the first time, he had had only two hours sleep and was very sleepy and groggy, and thereafter "just let it stand" through two subsequent interviews because he had made his denial and was worried about the matter, as "they said it was pretty serious" (R. 61,62). When he admitted to the District Attorney that he had struck Buckman, he still at first denied taking the wallet because "it still looked like robbery". (R. 62). He finally admitted taking the wallet because he decided it was no use to continue lying and he might as well give up (R. 63).

He did not think up the story about Buckman making advances to him. That has happened to him, not on many occasions (R. 63), but on a few occasions (R. 64).

Before the accused signed his statement, the Trial Judge Advocate told him that Rhodes had said that he, Rhodes, was there and saw the whole thing; that the accused had taken the gun and wallet. The accused knew that to be a lie and saw that it was all going to be pushed on to him, which he didn't have anything to do with, so he made the statement (R. 64). He had made a statement just about identical the day before, but didn't state about the wallet (R. 65). He had been warned of his rights numerous times and was not forced to make a statement, but was tricked on that one. Given Prosecution's Exhibit 2 to read in court and asked if anything in it was false, he testified that the statement about the gun "could be partially false", in that he, the accused, did not play with the gun and did not take the gun. That statement is about Rhodes. Also, the accused was not sitting down, but was sitting on the back of a chair with one foot on the seat of the chair (R. 66). The general effect of Prosecution's Exhibit 2 contains the truth (R. 67).

Examined by the court (R. 68), the accused testified that the sailor, Elwood, who had been with him all evening, left the group before they got to Buckman's. The accused took the wallet from Buckman's hip pocket probably thirty seconds to a minute after Buckman fell to the floor (R. 68). He did not know why he thumbed through the money. He "just looked at it like anyone else would". He "more or less glanced at the other things" in the wallet, but did not go through them as he did the money compartment. He removed no money whatsoever at any time (R. 69).

5. Recalled for rebuttal, Mr. Buckman testified that he definitely and most certainly did not make any homosexual advances to the accused, though he did not remember everything that happened that night and did not remember the drinking (R. 69-70).

6. On all the evidence, the accused officer, after accepting the hospitality of Mr. Buckman at a drinking session through the small hours of the night, attacked and beat his host into unconsciousness with a milk bottle and with his fists, then robbed him of his wallet and his money, and fled, leaving Buckman battered, bleeding and unconscious on the floor. Then, having first voluntarily consented to answer any questions that the Provost Marshal would ask him about the matter, he denied all knowledge of the offenses, and stated that he had left Buckman uninjured, did not strike him, and knew nothing about the wallet. Later, he confessed his attack on Buckman and sought to justify it by the charge that Buckman had made indecent homosexual advances which enraged him. Still later, the accused confessed his theft of Buckman's wallet, and finally at the trial he sought feebly to justify that theft by asserting that he took the wallet to teach Buckman a lesson.

Proof of all the offenses specified is established beyond all reasonable doubt, and the facts are admitted by the accused in his sworn testimony at the trial. His belated explanations would not excuse him, even if believed. Annoying advances of the character attributed by the accused to Buckman admittedly could have been repelled or escaped without the use of any such force as that to which the accused resorted. Certainly they called for no such ferocity as to beat the man insensate while he was pleading "Don't kill me", with his hands held over his battered head. Certainly they would suggest to no sensible man the theft of a wallet from his victim's helpless and prostrate body as a "lesson" for that victim's future behavior. Whether the accused kept the money, as it is reasonable to infer that he did, or threw it away, as he says that he did, is wholly immaterial. The robbery was complete when he took it from his victim.

The only possible extenuation for the conduct of the accused, if such it might be, would have been that he was too drunk to be responsible for his actions, but he testified that he was not, and his prompt flight, clear memory, and subsequent attempts at concealment corroborate his sorry account in that one respect.

Oral evidence of the substance of testimony given by the accused at a preliminary hearing held on charges against Rhodes was admitted over the objection that the record of the hearing would be the best evidence. However, there was no showing that any record was made of such hearing, and as such records are by no means universally made in preliminary hearings before committing magistrates, the court was not required to assume, and this Board cannot assume, that one was made.

The admission in evidence of the accused's confession, Prosecution's Exhibit 2, was premature, as the defense stated its intention to produce testimony to discredit the basis for the admission of that statement, and later did introduce testimony intended so to do. That evidence should have been heard before the confession was admitted. However, on all the evidence introduced, the confession was admissible.

If, as the accused testified and inferred, the Trial Judge Advocate tricked him into a confession or further confession by misrepresenting evidence in his possession, that is, the purported expected testimony of Rhodes, then the Trial Judge Advocate permitted his seal to lead him into the commission of a grave impropriety. His duty was one of diligent and fair preparation and presentation of the evidence and case against the accused, with full regard for the rights of the accused, not to attempt to induce a confession or plea of guilty, least of all by misrepresentation and deceit.

In any event, the substantial rights of the accused were not prejudiced by any circumstances inducing his confession, nor by evidence of his previous testimony, as his testimony at the trial was to the same effect and practically identical in all material detail, adding only the specious assertion that his purpose in taking the wallet was to teach Buckman a lesson.

Lieutenant Simmons, as Provost Marshal, was clearly acting in the performance of his duty in investigating the reported assault and robbery, and the statements made to him by the accused were false official statements, regardless of whether the accused was warned of his rights or not. Such warnings affect the admissibility of a confession, not the duty to tell the truth in making an official statement. (CM 244159, Camp, 28 B.R. 201, 206). His right against self-incrimination was a right of silence, not of deceit.

7. The accused officer is 22 years of age, married, with one child and a second child expected. He is a resident of Emmett, Idaho, his birthplace. He has a high school education and some training in furniture designing and building. After enlisted service from 4 September 1940, qualifying as a weather observer, he was appointed aviation cadet and was commissioned a second lieutenant at Yuma Army Air Field, Yuma, Arizona, on 5 December 1943. An injury to his ankle, sustained in an airplane accident, later disqualified him for flying. His record shows no previous

trials by courts-martial, either as an enlisted man or as an officer, but he has twice incurred disciplinary punishment under the 104th Article of War. He was subjected to a forfeiture of \$25 and one week restriction in June, 1944, for a few hours absence without leave and to a forfeiture of \$75 on 23 August 1944 for drunk and disorderly conduct on 12 July 1944. The latter disciplinary action was accompanied by a written admonition from the commanding general, Army Air Forces Western Flying Training Command, to improve his conduct.

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 as approved by the reviewing authority and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 93 and mandatory upon conviction of a violation of Article of War 95.

Fletcher R. Andrews, Judge Advocate.

Nestor B. Frederic, Judge Advocate.

W. A. Sney, Judge Advocate.

Hq ASF, JAGO, Washington 25, D. C. FEB 14 1945

(327)

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 Keith Edward Otterson (O-760978), 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, as approved by the reviewing authority. I recommend that the sentence be confirmed but it seems to me that five years confinement is sufficient. Consequently, I recommend that the period of confinement imposed be reduced to five years, that the forfeitures be remitted, a disciplinary barracks be designated as the place of confinement, and that the sentence as thus modified be carried into execution.

3. Consideration has been given to the following letters attached to the record of trial: Letter from Mrs. Keith E. Otterson, Box 601, Route 5, Bremerton, Washington, wife of the accused, dated 18 November 1944, addressed to the President of the United States; letter from Mrs. Otterson dated 18 November 1944, addressed to the Secretary of War; letter from Mrs. William J. Nichols, 220 North Grant, Stockton, California, mother of the accused, dated 20 November 1944, addressed to the President of the United States; letter from Mrs. Nichols dated 18 November 1944, addressed to The Adjutant General; letter from Mr. Eldridge A. Malmstrom, Box 601, Route 5, Bremerton, Washington, father-in-law of the accused, dated 26 November 1944, addressed to Hon. Warren S. Magnuson, Member of Congress, and by him forwarded for the consideration of this office.

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 the foregoing recommendation into effect, should such action meet with approval.

Myron C. Cramer

8 Incls

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

4 - Ltr fr Mrs. K.E. Otterson,
dated 18 Nov 1944

5 - Ltr fr Mrs. K.E. Otterson,
dated 18 Nov 1944

6 - Ltr fr Mrs. W.J. Nichols,
dated 20 Nov 1944

MYRON C. CRAMER

Major General

The Judge Advocate General

7 - Ltr fr Mrs. W.J. Nichols,
dated 18 Nov 1944

8 - Memo fr Cong. W.S. Magnuson,
7 Dec 1944. w/incl

(Sentence confirmed but forfeitures remitted and confinement reduced to five years. G.C.M.O. 164, 9 May 1945)

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

(329)

SPJGH
CM 270641

11 JAN 1945

UNITED STATES

v.

Second Lieutenant PAUL R.
SMITH (O-754678), Air Corps.

ARMY AIR FORCES
WESTERN FLYING TRAINING COMMAND

Trial by G.C.M., convened at
Roswell Army Air Field,
Roswell, New Mexico, 14 November
1944. Dismissal.

OPINION of the BOARD OF REVIEW
TAPPY, GAMBRELL 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 96th Article of War.

Specification 1: In that Second Lieutenant Paul R. Smith, Air Corps, Section H, 3030th AAF Base Unit, did, at Roswell, New Mexico, on or about 2 September 1944, with intent to defraud, wrongfully and unlawfully make and utter to Flight Officer James H. Goodwin, a certain check in words and figures as follows, to wit:

THE FIRST NATIONAL BANK OF ROSWELL
United States Depository

95-11
432

Roswell, N.M. Sept. 2, 19 44 No. _____

Pay to Cash or order \$20⁰⁰
Twenty & no/100 Dollars

For _____ closed Lt. Paul R. Smith
O-754678

(FRONT OF CHECK)

James H. Goodwin
F/O T-3134

Pay to The First National Bank of Roswell
Roswell, N.M., or order
OFFICERS' CLUB, ROSWELL ARMY AIR FIELD
OFFICERS' MESS, ROSWELL ARMY AIR FIELD
ROSWELL, NEW MEXICO

BACK OF CHECK

and by means thereof, did fraudulently obtain from Flight Officer James H. Goodwin, cash of the value of \$20.00, then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank of Roswell, Roswell, New Mexico, for the payment of said check.

Specification 2: (Finding of not guilty).

Specification 3: In that Second Lieutenant Paul R. Smith, * * *, did, at Roswell, New Mexico, on or about 4 September 1944, with intent to defraud, wrongfully and unlawfully make and utter to the Officers' Mess R.A.A.F., Roswell, New Mexico, a certain check in words and figures as follows, to wit:

Name of Bank Valley National Bank

Address Phoenix, Arizona 432

Roswell, New Mexico, Sept. 4, 1944

Pay to OFFICERS' MESS R.A.A.F., or order \$25⁰⁰
with Exchange

Twenty Five & no/100 Dollars

Signature Paul R. Smith

Army Serial No. O-754678 Station R A A F

(FRONT OF CHECK)

Pay to The First National Bank of Roswell
Roswell, N.M., or order
OFFICERS' CLUB, ROSWELL ARMY AIR FIELD
OFFICERS' MESS, ROSWELL ARMY AIR FIELD
ROSWELL, NEW MEXICO

(Indistinguishable Bank Stamps)

(BACK OF CHECK)

and by means thereof, did fraudulently obtain from the Of-
ficers' Mess R.A.A.F., Roswell, New Mexico, cash of the
value of \$25.00, then well knowing that he did not have
and not intending that he should have sufficient funds in
the Valley National Bank, Phoenix, Arizona, for the payment
of said check.

Specification 4: In that Second Lieutenant Paul R. Smith, * * *,
did, at Roswell, New Mexico, on or about 4 September 1944,
with intent to defraud, wrongfully and unlawfully make and
utter to Second Lieutenant Howard H. Bloom, a certain check
in words and figures as follows, to wit:

Valley Natl Bank
~~THE-FIRST-NATIONAL-BANK-OF-ROSWELL~~ 95-11 432
United States Depository

Phoenix, Ariz.

Reswell-N.M. Sept. 4, 1944 No. _____

Pay to Cash _____ or order \$25⁰⁰
Twenty Five & no/100 _____ Dollars

For _____ Lt. Paul R. Smith
O-754678

(FRONT OF CHECK)

Howard H. Bloom
O-737525 2nd Lt. A.C.

Pay to The First National Bank of Roswell
Roswell, N.M., or order
OFFICERS' CLUB, ROSWELL ARMY AIR FIELD
OFFICERS' MESS, ROSWELL ARMY AIR FIELD
ROSWELL, NEW MEXICO

(Indistinguishable Bank Stamps)

(BACK OF CHECK)

(332)

and by means thereof, did fraudulently obtain from Second Lieutenant Howard H. Bloom, cash of the value of \$25.00, then well knowing that he did not have and not intending that he should have sufficient funds in the Valley National Bank, Phoenix, Arizona, for the payment of said check.

Specification 5: In that Second Lieutenant Paul R. Smith, * * *, did, at Roswell, New Mexico, on or about 4 September 1944, with intent to defraud, wrongfully and unlawfully make and utter to Second Lieutenant Howard H. Bloom, a certain check in words and figures as follows, to wit:

Valley Natl Bank
~~THE FIRST NATIONAL BANK OF ROSWELL~~ 95-11
United States Depository

Phoenix, Ariz.
Roswell, N.M. Sept 4, 1944. No. _____

Pay to Cash or order \$25/00

Twenty Five & no/100 Dollars

For _____ Lt. Paul R. Smith
Insf 0-754678

(FRONT OF CHECK)

Howard H. Bloom
2nd Lt. O-737525

(Indistinguishable Bank Stamps)

(BACK OF CHECK)

and by means thereof, did fraudulently obtain from Second Lieutenant Howard H. Bloom, cash of the value of \$25.00, then well knowing that he did not have and not intending that he should have sufficient funds in the Valley National Bank, Phoenix, Arizona, for the payment of said check.

Specification 6: In that Second Lieutenant Paul R. Smith, * * *, did, at Roswell, New Mexico, on or about 4 September 1944, with intent to defraud, wrongfully and unlawfully make and utter to Second Lieutenant Howard H. Bloom, a certain check in words and figures as follows, to wit:

Valley National Bank
~~THE FIRST NATIONAL BANK OF ROSWELL~~ 95-11
United States Depository

Phoenix, Ariz.
Roswell, N.M. Sept. 4, 1944 No. _____

Pay to Cash or order \$60⁰⁰
Sixty & no/100 Dollars

For _____ Lt. Paul R. Smith
0-754678

(FRONT OF CHECK)

Howard H. Bloom
2nd Lt. O-737525

(Indistinguishable Bank Stamps)

(BACK OF CHECK)

and by means thereof, did fraudulently obtain from Second Lieutenant Howard H. Bloom, cash of the value of \$60.00, then well knowing that he did not have and not intending that he should have sufficient funds in the Valley National Bank, Phoenix, Arizona, for the payment of said check.

Specification 7: In that Second Lieutenant Paul R. Smith, * * *, did, at Roswell, New Mexico, on or about 4 September 1944, with intent to defraud, wrongfully and unlawfully make and utter to First Lieutenant Patrick M. Maturo, a certain check in words and figures as follows, to wit:

THE FIRST NATIONAL BANK OF ROSWELL 95-11
United States Depository

Roswell, N.M. Sept. 4, 1944 No. _____

Pay to Cash or order \$25⁰⁰
Twenty Five & no/100 Dollars

For _____ Paul R. Smith
0-754678

(FRONT OF CHECK)

(BACK OF CHECK)

and by means thereof, did fraudulently obtain from First Lieutenant Patrick M. Maturo, cash of the value of \$25.00, then well knowing that he did not have and not intending that he should have sufficient funds in The First National Bank of Roswell, Roswell, New Mexico, for the payment of said check.

Specification 8: In that Second Lieutenant Paul R. Smith, * * *, did, at Roswell, New Mexico, on or about 4 September 1944, with intent to defraud, wrongfully and unlawfully make and utter to First Lieutenant Patrick M. Maturo, a certain check in words and figures as follows, to wit:

THE FIRST NATIONAL BANK OF ROSWELL 95-11
United States Depository

Roswell, N.M. September 4, 1944 No. ___

Pay to Cash or order \$100/00

One hundred and no/100 Dollars

For _____ Lt. Paul R. Smith
0-754678

(FRONT OF CHECK)

Patrick M. Maturo, 1st Lt.
Box 46 R.A.A.F.

(BACK OF CHECK)

and by means thereof, did fraudulently obtain from First Lieutenant Patrick M. Maturo, cash of the value of \$100.00, then well knowing that he did not have and not intending that he should have sufficient funds in The First National Bank of Roswell, Roswell, New Mexico, for the payment of said check.

Specification 9: In that Second Lieutenant Paul R. Smith, * * *, did, at Roswell, New Mexico, on or about 22 September 1944,

with intent to defraud, wrongfully and unlawfully make and utter to the Blue Moon Nite Club, a certain check in words and figures as follows, to wit:

THE FIRST NATIONAL BANK OF ROSWELL
95-11 United States Depository 95-11

Roswell, New Mexico, September 22, 1944

Pay to Cash or order \$10/00

Ten and no/100 Dollars

Lt. Paul R. Smith
0-754678

(FRONT OF CHECK)

Joe J. Scavarda

(BACK OF CHECK)

and by means thereof, did fraudulently obtain from the Blue Moon Nite Club, cash of the value of \$10.00, then well knowing that he did not have and not intending that he should have sufficient funds in The First National Bank of Roswell, Roswell, New Mexico, for the payment of said check.

Specification 10: In that Second Lieutenant Paul R. Smith, * * *, did, at Roswell, New Mexico, on or about 29 September 1944, with intent to defraud, wrongfully and unlawfully make and utter to the Green Haven Tourist Camp, Roswell, New Mexico, a certain check in words and figures as follows, to wit:

THE FIRST NATIONAL BANK OF ROSWELL
95-11 United States Depository 95-11

Roswell, New Mexico, September 29 1944

(336)

Pay to Cash or order \$10⁰⁰
Ten & no/100 Dollars

Lt. Paul R. Smith
0-754678

closed

(FRONT OF CHECK)

Pay to The First National Bank
Roswell, N.M., or order
148 GREENHAVEN 148

(BACK OF CHECK)

and by means thereof, did fraudulently obtain from the Greenhaven Tourist Camp, Roswell, New Mexico, cash and merchandise of the value of \$10.00, then well knowing that he did not have and not intending that he should have sufficient funds in The First National Bank of Roswell, Roswell, New Mexico, for the payment of said check.

Specification 11: In that Second Lieutenant Paul R. Smith, * * *, did, at Roswell, New Mexico, on or about 17 August 1944, with intent to defraud, wrongfully and unlawfully make and utter to the Bank Bar, Roswell, New Mexico, a certain check in words and figures as follows, to wit:

Valley National Bank
~~THE-FIRST-NATIONAL-BANK-OF-ROSWELL~~
95-11 United States Depository 95-11

Phoenix, Ariz.
Roswell, New Mexico, Aug. 17 1944

Pay to Cash or order \$50⁰⁰
Fifty & no/100 Dollars

Lt. Paul R. Smith
0-754678

(FRONT OF CHECK)

BANK BAR
BY E. L. Emerson
(Indistinguishable Bank Stamps)

(BACK OF CHECK)

and by means thereof, did fraudulently obtain from the Bank Bar, Roswell, New Mexico, cash of the value of \$50.00, then well knowing that he did not have and not intending that he should have sufficient funds in the Valley National Bank, Phoenix, Arizona, for the payment of said check.

Specification 12: In that Second Lieutenant Paul R. Smith, * * *, did, at Roswell, New Mexico, on or about 15 September 1944, with intent to defraud, wrongfully and unlawfully make and utter to the Nickson Cocktail Lounge, Roswell, New Mexico, a certain check in words and figures as follows, to wit:

THE FIRST NATIONAL BANK OF ROSWELL 95-11
United States Depository

Roswell, N.M. Sept. 15 1944 No. _____

Pay to Cash or order \$5.00

Five & no/100 Dollars

For _____ closed Paul R. Smith
O-754678

(FRONT OF CHECK)

Pay to The First National Bank
Roswell, N.M., or order
340 NICKSON COCKTAIL LOUNGE 340

(BACK OF CHECK)

and by means thereof, did fraudulently obtain from the Nickson Cocktail Lounge, Roswell, New Mexico, cash of the value of \$5.00, then well knowing that he did not have and not intending that he should have sufficient funds in The First National Bank of Roswell, Roswell, New Mexico, for the payment of said check.

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

Specification 1: In that Second Lieutenant Paul R. Smith, * * *, being indebted to The First National Bank of Roswell, Roswell, N.M., in the sum of \$101.00, for value received and monies advanced, which amount became due and payable on and after 6 September 1944, did, at Roswell, New Mexico, from about 6 September 1944 to about 14 October 1944, dishonorably neglect and fail to pay said debt.

Specification 2: (Finding of not guilty).

Accused pleaded not guilty to all Specifications and Charges and was found not guilty of Specification 2 of Charge I and Specification 2 of Charge II, not guilty of dishonorably failing to pay a debt but guilty of wrongfully failing so to do under Specification 1 of Charge II, not guilty of Charge II but guilty of a violation of Article of War 96, and guilty of Charge I and all other Specifications. No evidence of previous convictions was introduced. He was sentenced to dismissal. The reviewing authority approved only so much of the findings of guilty of Specifications 4, 5, 6, 7 and 8 of Charge I as involves findings that accused wrongfully failed to maintain a sufficient bank balance to pay the checks described therein, approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence introduced by the prosecution in support of Charge I, Specifications 1 and 3-12 inclusive, shows that the accused made and uttered certain checks more fully described as follows, viz (R. 13-19; Pros. Exs. 1-4, 6-15):

Charge and Specification	Pros. Date		Amount of Check	Payee	Check Cashed by or Negotiated to	Drawee Bank
	Ex. No.	of Check				
Ch I, Spec 1	#4	2 Sep 44	\$20	Cash	F/O James Goodwin	First Nat Bk of Roswell, N.M.
Ch I, Spec 3	#6	4 Sep 44	\$25	Officers' Mess RAAF	Payee	Valley Nat Bk, Phoenix, Ariz.
Ch I, Spec 4	#7	4 Sep 44	\$25	Cash	Howard H Bloom	" "
Ch I, Spec 5	#8	4 Sep 44	\$25	Cash	" " "	" "
Ch I, Spec 6	#9	4 Sep 44	\$60	Cash	" " "	" "
Ch I, Spec 7	#10	4 Sep 44	\$25	Cash	Patrick M Maturo	First Nat Bk of Roswell, N.M.
Ch I, Spec 8	#11	4 Sep 44	\$100	Cash	" " "	" "
Ch I, Spec. 9	#12	22 Sep 44	\$10	Cash	J J Scavarda	" "
Ch I, Spec 10	#13	29 Sep 44	\$10	Cash	Green Haven Tourist Camp	" "
Ch I, Spec 11	#14	17 Aug 44	\$50	Cash	Bank Bar, Roswell, N.M.	Valley Nat Bk, Phoenix, Ariz.
Ch I, Spec 12	#15	15 Sep 44	\$5	Cash	Nickson Cocktail Lounge	First Nat Bk of Roswell, N.M.

It was stipulated by the prosecution, defense and the accused that the foregoing checks were uttered by the accused for the following consideration given to him or to pay the following debts owed by him, viz (Pros. Exs. 1, 2):

<u>Check Described in Specification</u>	<u>Reason for Uttering</u>
Ch I, Spec 1	For cash of \$20 received from F/O James H. Goodwin.
Ch I, Spec 3	For cash of \$25 received from Officers' Mess, RAAF.
Ch I, Spec 4	To pay gambling debt of \$25.
Ch I, Spec 5	To pay gambling debt of \$25.
Ch I, Spec 6	To pay gambling debt of \$60.
Ch I, Spec 7	Postdated check given in August 44 to pay gambling debt of \$25 to Lt. Patrick M. Maturo.
Ch I, Spec 8	Postdated check given in August 44 to pay gambling debt of \$100 to Lt. Patrick M. Maturo.
Ch I, Spec 9	For cash of \$10 received from Blue Moon Nite Club, Joe J. Scavarda, owner.
Ch I, Spec 10	For cash and merchandise totaling \$10 received from Green Haven Tourist Camp.
Ch I, Spec 11	For cash of \$50 received from Bank Bar, Roswell, N.M.
Ch I, Spec 12	For cash of \$5 received from Nickson Cocktail Lounge, Roswell, N.M.

It was further stipulated by the prosecution, accused and the defense that when the checks described in Specifications 3, 4, 5, 6 and 11 of Charge I, all of which were drawn on the Valley National Bank, Phoenix, Arizona, were presented to the drawee bank for payment, the balance on deposit in accused's checking account with that bank was insufficient to pay all or any one of said checks, his account having been continuously overdrawn from 10 August 1944 to 10 October 1944, except for one day, 8 September 1944, when he had a balance of 35 cents on deposit (Pros. Ex. 1).

The remaining six checks, all drawn on The First National Bank of Roswell, New Mexico, bore various dates falling within the period from 2 September 1944 to 29 September 1944. The two checks given by accused to

Lieutenant Patrick M. Maturo were delivered during August 1944 but were postdated to 4 September 1944. On 31 August 1944, accused's balance on deposit with The First National Bank of Roswell was \$120.43 but a withdrawal of \$101 on 1 September 1944 reduced the balance to \$19.43 and it so remained until 7 September 1944 when a deposit of 57 cents increased the balance to \$20 all of which was withdrawn the same day thus closing the account (R. 21; Pros. Ex. 17). There were either insufficient funds or no funds on deposit when these six checks were presented to this bank for payment and they were returned unpaid (R. 22, 23).

In support of Specification 1 of Charge II, the prosecution introduced evidence to show that on 6 September 1944, accused borrowed \$100 from The First National Bank of Roswell, New Mexico, and at that time gave the bank his undated check for \$101, stating that his pay check for the month of September 1944 would be deposited in that bank about 1 October 1944 and that promptly thereafter his undated check could be cleared through his bank account to repay the loan. Accused's pay check for the month of September was not deposited with the bank. The bank wrote accused about this matter but received no reply and no payment of the loan of \$100 (R. 23-25, 28; Pros. Ex. 16). Accused's pay checks, less particular allotments, for the months of June, July and August 1944, had been deposited by the Army Finance Office to his account in this bank but his pay check for the month of September 1944 was received by accused personally (R. 34-45; Pros. Exs. 19-34). Apparently in anticipation of accused's defense, testimony was introduced to show that, although a permanent officer at accused's station who had received a new assignment as a student officer around 10 September 1944 "would go on a payroll", that system of paying would not prevent the student officer from directing the Finance Office to deposit his pay check in a designated bank (R. 47, 48).

4. After accused had been advised of his rights, he elected to give sworn testimony in his own behalf and thereafter he testified as follows:

With respect to the Specifications of Charge I, accused testified that when he gave the check for \$20 to Flight Officer Goodwin (Spec. 1) the balance in his account was sufficient to pay it but the check was not presented for payment for about two weeks and "by that time the other checks had gone through" (R. 49); that he cashed the \$25 check with the Officers' Mess (Spec. 3) on 4 September 1944 and inasmuch as he had made a monthly allotment of \$100 of his pay to the drawee bank (Valley National Bank) he believed his bank balance was sufficient to pay the check; that the checks given to Lieutenants Howard Bloom and Patrick Maturo and to the Officers' Mess were given on 15 August 1944 but were postdated to 4 September 1944 and the holders were requested not to present them until accused had deposited funds in his account (R. 49, 50). When Lieutenant Maturo told accused, around the first part of September 1944, that the two checks given him had been dishonored, accused told him to hold them until 15 September 1944 but,

although he tried to obtain funds to cover them, he was unable to do so (R. 68, 69). With respect to the smaller checks for \$5 and \$10, accused testified that he thought his bank balance was sufficient to pay them, using the following language, viz: "at the time they said my account was closed I thought there was money in the bank because my account showed there was \$20.00 in the bank" (R. 51). He had always tried to "keep a mentally accurate check" on his bank accounts although he made no check stub entries (R. 55, 62). He admitted that the only deposits made in his account in the Valley National Bank from 1 August to 15 October 1944, were three allotments to the bank in the amount of \$100 each, deposited in August, September and October 1944 (R. 54, 55). He further admitted that he had received bank statements from the Valley National Bank for the months of July, August and September 1944 (R. 53-55).

With respect to Specification 1 of Charge II, accused testified that after he had been transferred from his position as a permanent post officer to that of student officer, he was told his pay check for September 1944 would be delivered to him at the Student Officers' Quarters or Finance Office and that he eventually obtained it at the latter place. The worthless checks he had issued then began to be returned unpaid and, not knowing what to do, he used the proceeds of his September pay check to pay "other bills". No part of his September pay was used to redeem these worthless checks but a portion of it was used to pay his mess bill of \$40 and to discharge two gambling debts of \$20 each. He did not communicate with The First National Bank of Roswell after his failure to deposit his September pay check (R. 51, 59, 62, 65). He denied that, when he borrowed the \$100 from the bank which was used to pay gambling losses, he informed it that he would have his pay check for the month of September deposited with it (R. 70-71).

Accused also testified that he had hoped to obtain funds from a bank in Zanesville, Ohio, to replenish his accounts in both the Valley National Bank and First National Bank of Roswell. Funds of his parent's estate were on deposit in a Zanesville bank and, although accused had relinquished his rights therein to his two sisters, he had drawn checks on that bank in the past and they had been honored. However, his sisters had told him to cease drawing such checks and accused was not certain that any check he might draw thereon would be honored. He had subsequently drawn one such check for deposit in the Valley National Bank but the Zanesville Bank had refused to honor it (R. 52, 60, 61, 73). For over a year and a half prior to this trial, accused had allotted \$100 of his monthly pay to his account with the Valley National Bank (R. 67, 72).

There is no evidence that any of the worthless checks have been redeemed or the bank loan paid by the accused.

5. The reviewing authority approved only so much of the findings of guilty of Specifications 4, 5, 6, 7 and 8 of Charge I as involves findings of guilty of the lesser included offense of failing to maintain a sufficient bank balance to pay the checks uttered by the accused and described in these five Specifications. This action was in accordance with the recommendation of the staff judge advocate who concluded that these five checks given in payment of gambling debts were given without consideration in the eyes of the law and that since accused obtained nothing of value for them the intent to defraud had not been established. The proof amply establishes that accused uttered these five checks and failed, without justification or proper excuse, to maintain a sufficient balance in his bank accounts to pay them when presented to the drawee banks. That accused had actual knowledge of the condition of his bank account is established by his own admission that all five of these checks were given in August 1944 but postdated to September 1944 when he hoped to have sufficient funds on deposit to pay them. That these checks were postdated does not affect accused's guilt of the offense of uttering checks without maintaining a sufficient bank balance to pay them. The essential elements of the offense are (a) uttering a check and (b) having insufficient funds on deposit to pay it when presented in due course to the drawee bank, such insufficiency resulting not from an honest mistake but from accused's own carelessness or neglect (CM 249232, Norren, 32 B.R. 95, 3 Bull. JAG 290). Although the check be postdated and the delivery thereof be conditional until arrival of the date thereof, nevertheless, the delivery becomes absolute when that day arrives. The offense is committed if, on the day the check is dated and thereafter, the accused fails to maintain a sufficient bank balance so that, when presented for payment, this instrument which has been launched upon the public may not be discharged. The evidence sustains the approved findings of guilty as to these Specifications 4, 5, 6, 7 and 8 of Charge I (See CM 249006, Vergara, 32 B.R. 5; CM 249232, Norren, 32 B.R. 95, 3 Bull. JAG 289, 290).

When accused uttered the checks described in Specifications 1, 3 and 9 to 12 inclusive of Charge I, his account in the respective drawee banks was either insufficient to pay them or was overdrawn or the balance had been reduced to zero. The same conditions existed when the checks were presented to the drawee banks for payment and, accordingly, these checks were not paid. The evidence fully establishes that accused was not ignorant of the condition of these accounts and also that no person other than himself was responsible for it. His gambling losses had so impaired his financial position that he negotiated a bank loan of \$100 on 6 September 1944, to pay a portion of them. From his own testimony it appears that he hoped to replenish his depleted accounts in the drawee bank by issuing a worthless check on a Zanesville, Ohio, bank with the wishful expectation that it might be honored from funds of his parents' estate then on deposit but in which he had no legal interest. Such a solution was born of desperation and not of reason. The court was fully warranted in concluding

that accused intended to defraud when he issued these checks inasmuch as he knew his account was insufficient to pay them and he had no reasonable expectation of obtaining the necessary funds to cover them (CM 240347, Beserosky, 26 B.R. 33; 3 Bull. JAG 14). The evidence sustains the findings of guilty of Specifications 1, 3 and 9 to 12 inclusive of Charge I.

By exceptions and substitutions accused was found guilty, under Specification 1 of Charge II, of wrongfully neglecting and failing to pay his indebtedness of \$101 to The First National Bank of Roswell, Roswell, New Mexico, in violation of Article of War 96. Accused's conduct in failing to deposit his September pay check so as to afford funds to pay his undated check and his failure thereafter to explain his conduct to his creditor or to take any steps to repay this loan, which still remained unsatisfied at the time of trial, demonstrated his indifference to this obligation and constituted conduct discreditable to the military service and violative of Article of War 96 (CM 233182, Blue, 19 B.R. 339, 2 Bull. JAG 313; See CM 240754, Raquet, 26 B.R. 115, 3 Bull. JAG 7). The evidence sustains the finding of guilty of Specification 1 of Charge II.

6. Accused is 27 years of age. After graduation from high school he studied accounting for 1½ years at Meredith Business College. Prior to his entry into the military service he had been employed in private business and later by the United States under the Civil Service System in a bookkeeping and clerical capacity. He enlisted in the service on 12 September 1941 and served as an air cadet from 2 November 1942 until he received his commission as a second lieutenant on 30 August 1943. His academic rating as an air cadet was "Excellent".

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, as approved by the reviewing authority, and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 96.

Thomas N. Tally, Judge Advocate.

William H. Sambrell, Judge Advocate.

(On Leave), Judge Advocate.

(344)

SPJGH-CM 270641

1st Ind

Hq ASF, JAGO, Washington 25, D. C.

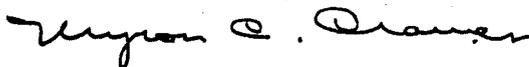
FEB 5 - 1945

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 Paul R. Smith (O-754678), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty as approved by the reviewing authority and the sentence and to warrant confirmation of the sentence. 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.



3 Incls

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

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed. G.C.M.O. 108, 26 Mar 1945)

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

(345)

SPJGQ
CM 270744

18 JAN 1945

UNITED STATES)

NEW YORK PORT OF EMBARKATION

v.)

Trial by G.C.M., convened at
Camp Kilmer, New Jersey, 24
November 1944. Dishonorable
discharge and confinement
for life. Penitentiary.

Private EARNEST BRAZELLE,
JR. (34909681), O809-EE,
Camp Kilmer, New Jersey.)

REVIEW by the BOARD OF REVIEW
ANDREWS, FREDERICK and BLERER, Judge Advocates.

1. The Board of Review has examined the record of trial in the case of the soldier named above.
2. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Earnest Brazelle, Jr., O809-EE, Camp Kilmer, New Jersey, did, at Camp Kilmer, New Jersey, on or about 16 November 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation, kill one Corporal William C. Brown, a human being, by stabbing him in the chest with a knife.

He pleaded not guilty to and was found guilty of the Specification and the Charge. 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, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The evidence for the prosecution established the following state of facts.

The members of the organization to which the accused belonged were engaged in a recreation period from 0800 to 1000 hours on the morning of 16 November 1944, taking part in various sports and exercises at a gymnasium. The accused and Corporal William C. Brown, the deceased, were playing basketball, on opposing teams (R. 19-21). The game was rough (R. 58). While competing for possession of the ball, the accused, according to one witness, held and "roughed" Corporal Brown (R. 46). Brown, who was older, broader and heavier than the accused, though shorter (R. 34, 77), struck the accused twice and knocked him unconscious (R. 46, 61). With the assistance of other players, the accused recovered consciousness in about a minute and a half (R. 46, 62). He was angry (R. 59). Corporal Brown then approached the accused to apologize, with his hand extended to shake hands (R. 47, 64), but the accused struck Brown in the mouth from one to three times (R. 47, 62, 72). Brown dropped his hands and let the accused hit him without resistance (R. 47, 62, 72). Lieutenant Lyons, officer in charge, saw the latter part of the affray from the balcony and came down to stop it, but the two were promptly separated by others present before the officer reached them (R. 21-22). Informed what had occurred, Lieutenant Lyons ordered Corporal Brown to leave the game, which Brown did, after saying that he was sorry he had hit the accused, and that he had let the accused hit him to get even (R. 22-23). Lieutenant Lyons then looked for the accused and found him in the latrine. Asked if he had been hurt, the accused showed the officer a small cut and bruise on his lip. The Lieutenant told the accused that the accused had got in his punches and to forget about the whole thing, but the accused said, "No, I will get even" (R. 23-24, 30). The accused did not then appear angry, though a little nervous (R. 30).

The affray occurred at about 0910 to 0920 hours (R. 21, 38, 47, 106). At 0940, the athletic instructor in charge called in the sports equipment and stopped the game (R. 105, 106). At about 1000 the men had dressed and the company was forming outside, in front of the gymnasium (R. 38, 48, 73). The accused waited just outside the door, where he could see anyone who came out (R. 39, 48, 66). There Private Henderson took him by the arm and said "Come on, let's line up", but the accused jerked his arm loose and said that he was coming right on out (R. 67, 48). He appeared to be angry, but very calm and cool (R. 63). The accused waited there facing the door (R. 50). As Corporal Brown came out, the accused stepped in front of him and, with a backhand stroke, stabbed Corporal Brown in the chest, a little to the right side, with a knife (R. 39, 41, 51, 54, 73-75). Brown staggered back with blood flowing from his chest (R. 74). Sergeant Hicks (R. 39) and Private Harris (R. 57) took the knife away from the accused. The accused did not resist, and at that time did not seem to be angry, but was "very calm" (R. 59-60).

Sergeant Hicks closed the knife and put it in his pocket. He later handed it to Lieutenant Lyons (R. 26, 40), who turned it over to officers who accounted for its custody to the time of trial (R. 32, 79, 82, 86). The knife was introduced in evidence (R. 86a, Pros. Ex. 1). It was a white-handled, single-bladed pocket knife, with a three-inch blade (R. 86a; Pros. Ex. 1; R. 40, 50, 57, 75, 76, 79, 83).

The accused was taken to the Provost Marshal's office (R. 25, 75). Corporal Brown was taken immediately to the hospital in a passing truck, by Lieutenant Lyons and three of the men (R. 26).

Corporal Brown was brought to the station hospital between 9:30 and 10:00 o'clock on the morning of 16 November 1944 (R. 9) in critical condition from shock and loss of blood resulting from a stab wound in the chest, roughly a half-inch long externally, just to the right of the breast bone and below the front end of the second rib (R. 10). An immediate operation was necessary (R. 13), because of laceration of the internal mammary artery (R. 14). The wound extended to a depth of about one and three-quarters inches (R. 17), through the skin and chest wall, through the artery, into the pleura, the membrane that lines the lungs (R. 11). The operation was performed (R. 10) and Corporal Brown remained under constant medical care at the hospital (R. 11, 15), but he died at 1:40 o'clock on the morning of 19 November 1944 (R. 11), from post-operative congestion of the lungs resulting from the stab wound (R. 11, 13, 14, 15, 16). The congestion, widespread, diagnosed as bronchial pneumonia, followed the operation, which was necessitated by the severance of the mammary artery, which was severed by the stab wound (R. 14, 15).

A sworn statement by the accused (R. 87; Pros. Ex. 2) was introduced in evidence, substantially in accord with his testimony at the trial.

4. The accused testified (R. 91), after explanation of his rights (R. 90). He was nineteen years old, had finished the eighth grade in school, and lived with his grandparents in Atlanta, Georgia. He had been in the Army not quite a year (R. 91). He had had no trouble previously. He got along all right with the other men of his organization, including Corporal Brown (R. 92). In the basketball game on the morning of 16 November 1944, he was holding on to the ball. Corporal Brown hit him in the mouth and in the stomach and knocked him out. The fellows picked him up. Corporal Brown came over. The accused did not remember Brown coming over, but it seemed to the accused that he walked toward Brown and hit him (R. 92). He hit Brown at least once (R. 98). Brown did not hit the accused back (R. 97). The accused went to the latrine to wash his mouth. There Lieutenant Lyons came to him and told him to forget about it. He

said, "No, sir, I won't forget it" (R. 92, 99). He did not say that he was going to get even with Corporal Brown (R. 99).

The accused was angry when Corporal Brown hit him. Brown was a heavier built man than he, and in his thirties (R. 93). The accused was "real mad", and "everything went across (his) mind". He did not get over his anger until he was arrested and heard the military police asking for the man who did the stabbing. Then he realized that he had stabbed Corporal Brown. He had never been in very many fights and had never been as angry as he was that day (R. 95). He got madder after the fight as he thought about it (R. 102). He did not know that Corporal Brown wanted to apologize and did not see him extend his hand to shake hands (R. 103). The accused had never used a knife in a fight before. He had found the knife in the company, and carried it to clean his finger nails (R. 103).

The accused took the knife from his pocket outside the gymnasium door, when he saw Brown coming to the door (R. 95). He was waiting for Brown because he was mad at him (R. 101). He did not use his fists because Brown was heavier than he, though shorter, weighing about 180 pounds to his 141, and the accused knew that he could not win. He intended to knife Brown, but just did not know that he was going to kill him (R. 103-104).

The defense introduced no other evidence.

5. The evidence clearly establishes the commission by the accused of murder as charged and specified. Angered by the deceased's fistic assault upon him in the basketball game some thirty to forty-five minutes earlier, the accused lay in wait for the deceased outside the door through which the deceased would come, and there sprang upon and stabbed him in the breast, inflicting a fatal wound. Meanwhile, the accused had rejected successively the apology and request for reconciliation made by the deceased, the admonition of the accused's superior officer to forget the affair, and the effort of his fellow soldier to dissuade him from lingering on the scene and reopening the affray.

"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. * * * A homicide 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. * * * Malice aforethought * * * may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: An intention to cause the death of, or grievous bodily harm to, any person, * * *

(except when death is inflicted in the heat of a sudden passion, caused by adequate provocation); knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, * * * 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, M.C.M. 1928).

The offense is reduced to voluntary manslaughter "where the act causing the death is committed in the heat of sudden passion caused by provocation", but to invoke that rule the passion must be sudden and the provocation must be "such as the law deems adequate to excite uncontrollable passion in the mind of a reasonable man". Assault and battery inflicting actual bodily harm may constitute such provocation, but "where sufficient cooling time elapses between the provocation and the blow the killing is murder, even if the passion persists". (Par. 149a, M.C.M. 1928)

All of the above is elementary law and its application to the facts of this case is too plain to require elaboration or embellishment.

Sufficient cooling time did elapse (C.M. 246101, Nickles, 29 BR 381, 387, 3 Bull. JAG 343, Aug. 1944 (450); C.M. 236723, Coker, 23 BR 109, 114), and with it there occurred cooling circumstances which rendered entirely unreasonable the persistence in uncontrollable force of any murderous rage engendered in the accused by reason of the blows inflicted upon him by the deceased, and removed therefrom all qualities of excuse or extenuation.

Death resulted in an unbroken chain of causation from the stab wound, and as a proximate consequence thereof. The intervention of bronchial pneumonia following the operation necessitated by the severance of the mammary artery, a direct consequence of the stabbing, did not render the original cause remote, but was a natural consequence thereof.

"It is not indispensable to a conviction that the wounds be necessarily fatal and the direct cause of death. It is sufficient that they cause death indirectly through a chain of natural effects and causes unchanged by human action. (26 Am. Jur. 195)". C.M. NATO 2295 (1944), 3 Bull. JAG 285-286, July 1944 (450)).

6. The accused is 19 years of age, apparently unmarried. He is a negro soldier from Atlanta, Georgia, with a grade school education. He was inducted 28 December 1943. No previous convictions appear.

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. A sentence either of death or life imprisonment is mandatory upon conviction of murder in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature, and so punishable by confinement for more than one year by Title 18, sections 452 and 454, United States Code.

Fletcher R. Andrews, Judge Advocate.

Herbert B. Frederica, Judge Advocate.

W. E. Jones, Judge Advocate.

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

(351)

SPGGQ
CM 270871

16 JAN 1945

UNITED STATES)

THIRD AIR FORCE)

v.)

Privates BENJAMIN T. SHIRLEY)
(34505144) and RALPH WRIGHT)
(13035442), both of Company E,)
1st Battalion, 1st Training)
Regiment, AWUTC, (Squadron E,)
315th Army Air Forces Base)
Unit (AWUTC)).)

Trial by G.C.M., convened at
Drew Field, Tampa, Florida, 15,
16 and 18 September 1944. Dis-
honorably discharge and confine-
ment for eighteen (18) years as
to each. Penitentiary.

HOLDING by the BOARD OF REVIEW
ANDREWS, FREDERICK and BIERER, Judge Advocates.

1. The Board of Review has examined the record of trial in the case of the soldiers named above.
2. The accused were tried upon the following Charges and Specifications:

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

Specification: In that Private Ralph Wright, Company E, First Battalion, First Training Regiment, AWUTC, (Squadron E, Three Hundred Fifteenth Army Air Forces Base Unit (AWUTC)), Drew Field, Tampa, Florida, and Private Benjamin T. Shirley, Company E, First Battalion, First Training Regiment, AWUTC, (Squadron E, Three Hundred Fifteenth Army Air Forces Base Unit (AWUTC)), Drew Field, Tampa, Florida, acting jointly, and in pursuance of a common intent, did, at Tampa, Florida, on or about 16 May 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Frank Kovach, a human being, by striking him on the head with a deadly weapon.

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

Specification 1: In that Private Ralph Wright * * * did, without proper leave, absent himself from his organization at Drew Field, Tampa, Florida, from about 0001 EWT 17 May 1944 to about 1600 EWT 17 May 1944.

Specification 2: In that Benjamin T. Shirley * * * did, without proper leave, absent himself from his organization, at Drew Field, Tampa, Florida, from about 0001 EWT 17 May 1944 to about 1600 EWT 17 May 1944.

Specification 3: In that Private Ralph Wright * * * did, without proper leave, absent himself from his organization at Drew Field, Tampa, Florida, from about 18 May 1944, and did so remain absent until apprehended by civilian authorities at Pulaski, Virginia, and returned to Military Control on or about 30 May 1944.

Specification 4: In that Private Benjamin T. Shirley * * * did, without proper leave, absent himself from his organization at Drew Field, Tampa, Florida, from about 18 May 1944, and did so remain absent until apprehended by civilian authorities at Pulaski, Virginia, and returned to Military Control on or about 30 May 1944.

CHARGE III: Violation of the 93rd Article of War.
(Finding of guilty of a violation of the 96th Article of War disapproved by reviewing authority.)

Specification: (Robbery of Mr. Frank Kovach on 16 May 1944.
Finding of guilty with substitutions and exceptions disapproved by reviewing authority.)

Both accused pleaded not guilty to the Charges and Specifications except Specifications 3 and 4 of Charge II and Charge II, to which they respectively pleaded guilty. The court's findings were as follows:

Specification, Charge I: Guilty, except the words "with malice aforethought, deliberately, and with premeditation, with deadly weapon", substituting therefor, respectively, the words "with striking him on the head and face with fist and or other weapon", of the excepted words not guilty, of the substituted words, guilty.

Charge I: Not guilty, but guilty of violation of the 93d Article of War.

Specifications 1 and 2, Charge II: (Wright and Shirley respectively) guilty, except the word "1600", substituting therefor, the word "0115", of the excepted word not guilty, of the substituted word, guilty.

Specifications 3 and 4, Charge II: (Wright and Shirley respectively) guilty.

Charge II: Guilty.

Specification, Charge III: Guilty, except the words "by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of one Mr. Frank Kovach, the sum of One Hundred Fifty Dollars (\$150) lawful currency of the United States, and a United States War Bond, of some value, property of Mr. Frank Kovach", substituting therefor respectively, the words, "did wrongfully attack one Frank Kovach by striking him on the head or face with fist and or other weapon", of the excepted words not guilty, of the substituted words guilty.

Charge III: Not guilty but guilty of a violation of the 96th Article of War.

Evidence of one previous conviction, by special court-martial, for absence without leave for 137 days in violation of the 61st Article of War was introduced as to the accused Shirley. Evidence of three previous convictions, by special court-martial, for (1) absence without leave for fourteen days, in violation of the 61st Article of War, (2) threatening to assault a non-commissioned officer, using insulting language toward a non-commissioned officer, and being drunk and disorderly in uniform in violation of the 65th and 96th Articles of War, and (3) absence without leave for 79 days and breach of arrest in violation of the 61st and 69th Articles of War, was introduced as to the accused Wright. Both accused were sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for eighteen years. The reviewing authority disapproved the findings of guilty of the Specification of Charge III and of Charge III, approved the sentence as to each accused, designated the United States Penitentiary, Atlanta, Georgia, as the place of confinement, and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The record of trial clearly supports the findings of guilty of absence without leave and no discussion of the evidence relative to these offenses is necessary.

There is, however, a lack of sufficient competent proof to sustain the findings of guilty of manslaughter (Charge I and Specification). The prosecution introduced the following evidence as to this offense.

Mr. Frank Kovach was assailed and beaten about the head by two soldiers on a street in Tampa, Florida, a little before dark on the evening of 16 May 1944 (R. 27,28,29). The motive for this attack apparently was robbery (R. 24). Only one witness to the incident testified at the trial, and he was unable to identify the assailants except that they were soldiers and that one of them was taller than the other (R. 28). The police were promptly summoned and Mr. Kovach, as soon as he was revived, stated that he had been talking to two soldiers in a bar and that

the soldiers had struck him on the head (R. 24,30). He felt in his pocket and said "they got my wallet" (R. 24). He too was unable to identify the soldiers, but stated that one was taller than the other (R. 24). The police took him to The Municipal Hospital in Tampa where he was given treatment and permitted to return to his home (R. 68,69). On 22 May 1944, Mr. Kovach was taken violently ill (R. 11,12) and was again taken to the Hospital (R. 12) where he died on 24 May 1944 (R. 13; Ex. F). The immediate cause of death was pneumococcic meningitis (R. 13; Ex. F) which in turn had been caused, according to the medical evidence, by the blows which the deceased received in the assault of 16 May 1944 (R. 14,15,19, 79,80).

Shortly after 2400, 16 May 1944, which was several hours after Mr. Kovach had been attacked, the accused were apprehended by a special officer for the Seaboard Airline Railroad while driving a truck without headlights in the vicinity of the railroad yards (R. 10). Since their passes had expired at midnight, the officer turned them over to the Military Police (R. 10) and they were placed in confinement at the Plant Park Stockade (R. 72,73). They were delivered to the stockade at about 0115, 17 May 1944 (R. 72,73), at which time Technical Sergeant Roy Bernard of the Military Police talked to them about the Kovach robbery and said that Kovach was coming to the stockade to see whether he could identify the two soldiers who had "assaulted him and robbed him" (R. 33). Upon their arrival at the stockade, both accused were searched, \$33.20 being found on Wright and \$70.43 on Shirley (R. 72,73).

The next morning (17 May 1944) Mr. Kovach was brought to the stockade for the purpose of identifying his assailants (R. 33,54,61). He was fully advised of this purpose (R. 54,61) and while he remained in one room, Sergeant Bernard lined up the accused and three other soldiers in another (R. 34,54). All five were privates and were dressed similarly, although the three other than the accused wore shoulder patches whereas the accused did not (R. 34,52,53,54,63). Mr. Kovach was then brought in and was told to think first and be sure of his decision (R. 34,44,47). He walked in front of the men and pointed one accused out and then pointed to the other accused (R. 44,55) saying "That is the two men. I know they had no insignias on their shirts and also one was a little shorter than the other"(R. 45,47,54,58). Mr. Kovach also stated that one of the accused had told him the night before that his home was in Tennessee and that the other one was from up North (R. 45). He was asked if he was certain of his identification to which he replied "Yes sir, this is the men" (R. 45,47,57). All of this occurred in a small room in the presence of the accused and of several witnesses to whom it appears to have been clearly audible (R. 44,45,54, 58,60,63). Neither of the accused, however, made any reply whatever (R.58,65). They had not been told that it was unnecessary for them to deny any identification that might be made (R. 49), nor were they given any opportunity to question Kovach (R. 49).

The accused were released from the stockade at 1630, 17 May 1944 (R. 74), and at 0001, 18 May 1944, both absented themselves without leave (R. 9; Ex. C), remaining absent until apprehended at Pulaski, Virginia, on 30 May 1944 (R. 9,10; Exs. D,E). While at the stockade on 17 May 1944, the accused Shirley was kept for a time in a room described as the "cage" (R. 81,82). On or about 27 May 1944, a prisoner confined in this room delivered to one of the guards two \$25 defense bonds issued to Mr. Kovach and his wife, which he stated that he had found in the room (R. 75,76,77,84,96). During the period from 17 May to 28 May 1944, approximately 169 prisoners passed through the stockade (R. 74), various of whom were confined from time to time in "the cage" (R. 75,83,84).

4. The accused, having been advised of their rights as to testifying, elected to remain silent (R. 95). The only evidence for the defense consisted of a report of Psychiatric Examination of the accused Shirley, showing him to be "a low grade moron * * * incapable of acting and living in accordance with the rules and customs of society" (Ex. 1).

5. Throughout the trial, strenuous objections were made by the defense to certain of the evidence offered by the prosecution and admitted by the court. The most vigorous of such objections was directed against the testimony relative to Kovach's identification of the accused at the stockade on 17 May 1944, the contention of the defense being that such evidence was hearsay and therefore inadmissible. This objection was overruled by the court, and the staff judge advocate recommended that the court's ruling be sustained on the ground that the silence of the accused in the face of the identification constituted an admission and that, accordingly, the evidence of Kovach's words and acts preliminary and leading up to the "admission" was properly received.

It appears, however, that this ruling was erroneous and that the evidence may not properly be admitted on this or any other grounds. The testimony as to what Kovach said and did at the stockade was pure hearsay and could be received only if it fell within one of the recognized exceptions to the hearsay rule. The mere fact that it dealt with the subject of identification does not make an exception of it (McCarthy v. US, 25 Fed. 2d 298; DiCarlo v. US, 6 Fed. 2d 364), nor does it come within either the dying declaration or res gestae exceptions to the rule. The former is predicated upon a realization of impending death by the declarant (26 Am. Jur., Homicide, Secs. 405, 406). The latter presupposes that the declarations were made at such time and under such circumstances as to be a part of the transaction which they purport to explain (26 Am. Jur., Homicide, Sec. 370). Clearly, neither of these conditions is met in this case. There remains, therefore, the question whether, as held by the court and the staff judge advocate, the silence of the accused under the circumstances constituted an admission, thus enabling the evidence to be received on the ground that it consisted of matters preliminary and

leading up to the making of such admission. On this point, there is some conflict among the authorities. As stated in 26 American Jurisprudence, Evidence, Sec. 574,

"***According to some decisions, the mere fact of arrest, alone, is not sufficient to render the testimony inadmissible, but such fact deserves consideration only as one of the circumstances under which the accusation was made, in determining whether the accused was afforded an opportunity to deny and whether he was naturally called on to do so. Another view supported by many authorities is that the mere fact that an accused was under arrest is sufficient to render inadmissible the fact of the failure of the accused to deny accusatory statements made in his presence and hearing."

The latter view has been adopted by the Board of Review in GM 248464, Adams, 31 BR 293, where it was held that incriminating statements made in the presence of the accused and not denied by him, although admissible under some circumstances, should not be received when made while the accused is in custody. It was therein stated that "under these circumstances, the accused has a right to remain silent and his failure to deny such a statement may not be considered as a tacit admission of its truth". This view has the support of many decisions of the Federal courts (See Hanger v. U.S., 173 Fed. 54 (CCA 4), DiCarlo v. U.S., 6 Fed. 2d 364 (CCA 2), McCarthy v. U.S., 25 Fed. 2d 298 (CCA 6), Yep v. U.S., 83 Fed. 2d 41 (CCA 10), U.S. v. LaBionde, 135 Fed. 2d 130 (CCA 2)); and while there are some contrary opinions, both in the State and Federal courts, the bulk of Federal authority on the subject appears to lean to the rule laid down in the cited cases. Such rule should therefore be applied in the trial of cases by courts-martial (MCM 1928, par. 111).

Of the decisions relied on by the Staff Judge Advocate, only Dickerson v. U.S., 65 Fed. 2d 824 (C. of A., D. C.) seems squarely to support the rule urged by him, and the holding in that case, as previously indicated, does not appear to be in line with the majority Federal view. As for DiCarlo v. U.S., 6 Fed. 2d 364, also relied on by the Staff Judge Advocate, the court specifically rejected the evidence as far as the admission theory was concerned, admitting it only on another ground not here material. To hold this kind of evidence admissible under the circumstances of this case would defeat the privilege of an accused to remain silent and, in the words of the court in McCarthy v. U.S. (Supra), would require the customary formula of warning to be changed to read "if you say anything, it will be used against you; if you do not say anything, that will be used against you".

Since the evidence of Kovach's identification of the accused must be disregarded, the finding of guilty of manslaughter necessarily must fall, there being no other substantial evidence linking the accused

with the assault which produced Kovach's death. There are only three additional evidential elements relative to the matter of identification: the absence without leave of the accused, giving rise to a possible inference of flight; the finding of the bonds in the "cage" where Shirley ten days previously had been confined; and the description of the assailants as two soldiers, one taller than the other. Whatever value these elements may have had as corroborative evidence, they are obviously insufficient, standing apart from Kovach's identification, to connect the accused with the crime. "Two soldiers, one taller than the other" is, of course, no identification at all, especially since the record fails to show that either of the accused was, in fact, taller than the other. Nor do the unauthorized absences of the accused, considered alone, constitute a "flight" capable of acceptance as compelling evidence of guilt. As for the bonds found in the "cage", it is shown that 169 prisoners passed through the stockade between the time Shirley was confined in the cage and the time the bonds were found. Not all of these were kept in the cage, and the record is silent as to what number of them were so confined. However, it is clear that a considerable number of prisoners were incarcerated there at one time or another, and hence, in the absence of other evidence connecting Shirley with the crime, it is not established that it was he who had concealed the bonds there. Indeed, the fact that he was searched upon his arrival at the stockade and that no bonds were found on him, if anything, tends to prove the contrary.

6. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Charge I and the Specification thereof. With this exception, the record of trial is legally sufficient to support the findings as approved by the reviewing authority, and it is legally sufficient to support the sentence.

Fletcher R. Andrew, Judge Advocate.

Herbert B. Frederica, Judge Advocate.

W. B. Binn, Judge Advocate.

(358)

SPJGQ - CM 270871

1st Ind

Hq ASF, JAGO, Washington 25, D.C Jan 26 1945

TO: Commanding General
Third Air Force
Tampa, Florida

1. In the case of Privates Benjamin T. Shirley (34505144), and Ralph Wright (13035442), both of Company E, 1st Battalion, 1st Training Regiment, AWUTC, (Squadron E, 315th Army Air Forces Base Unit AWUTC)), I concur in the foregoing holding by the Board of Review and for the reasons therein stated recommend that the findings of guilty of Charge I and the Specification thereof be disapproved as to each accused. Upon compliance with this recommendation, under the provisions of Article of War 50 $\frac{1}{2}$, you will have authority to order the execution of the sentences.

2. The disapproval of the manslaughter conviction leaves each of the accused convicted of two absences without leave, one for part of a day and the other for twelve days. In view of this fact, it is recommended that the period of confinement be reduced to five years. Since penitentiary confinement is not authorized for absence without leave in violation of Article of War 61, it is recommended that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

3. When copies of the published orders 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 orders to the record in this case, please place the file number of the record in brackets at the end of the published orders, as follows:

(CM 270871).



1 Incl
R/T

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.

(359)

SPJGK
CM 270910

6 JAN 1945

UNITED STATES)

ANTILLES DEPARTMENT

v.)

Second Lieutenant JOHN N.
PERSINGER (O-384121),)
Quartermaster Corps.)

Trial by G.C.M.,- convened at Camp
Savaneta, APO 811, U. S. Army 13
November 1944. Dismissal, total
forfeitures, and confinement for
three (3) years.

OPINION of the BOARD OF REVIEW
LYON, HEPBURN and MOYSE, 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 1: Violation of the 95th Article of War.

Specification 1: In that Second Lieutenant John N. Persinger, Quartermaster Corps, Force Aruba, being indebted to W. F. Craane, merchant, Oranjestad, Aruba, Netherlands West Indies, in the sum of Florins 300.00 (\$159.36 American currency), for money advanced to the said John N. Persinger on a promissory note, which amount became due and payable on or about 31 July 1944, did, at Oranjestad, Aruba, Netherlands West Indies, from 31 July 1944 to on or about 6 October 1944, dishonorably fail and neglect to pay said debt.

Specification 2: In that Second Lieutenant John N. Persinger, * * *, being indebted to Aruba Trading Company, Oranjestad, Aruba, Netherlands West Indies, in the sum of Florins 100.00 (\$53.12 American currency), for balance due on one (1) linen set, purchased by the said John N. Persinger on or about 5 May 1944, which amount became due and payable prior to the officer's departure from Aruba, on or about 31 July 1944, did, at Oranjestad, Aruba, Netherlands West Indies, from about 31 July 1944, to on or about 6 October 1944, dishonorably fail and neglect to pay said debt.

Specification 3: (Finding of not guilty).

Fls. 188.00 Dutch currency, he, the said John N. Persinger, then well knowing that he did not have and not intending that he should have sufficient funds in the Banco Progreso Financiero of San Juan, Puerto Rico, for the payment of said check.

Note: Specifications 2, 3 and 6 are identical in form with Specification 1 of Charge II except for the dates, the amounts and the name of the person alleged to have been defrauded. These differences were as follows:

<u>Spec.</u>	<u>Amount of Check</u>	<u>Person defrauded</u>	<u>Date</u>
2	\$150	C. H. G. Eman	31 July 1944
3	\$150	Post Exchange, Force Aruba	13 July 1944
6	\$100	United Service Organi- zations, Camp Savaneta, Aruba, Netherlands, West Indies.	28 July 1944

Specifications 4 and 5: (Findings disapproved by the reviewing authority).

He pleaded not guilty to all of the Charges and Specifications. He was found not guilty of Specifications 4 and 5 of Charge I, and guilty of the Charges and the remaining 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 for three years. The reviewing authority disapproved the finding of Specifications 4 and 5 of Charge II, 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. The evidence for the prosecution in support of the Specifications and Charges of which the accused was found guilty and the findings as to which were approved by the reviewing authority may be summarized as follows:

On 10 April 1944 accused, a second lieutenant, Quartermaster Corps, was assigned for duty to APO 811 effective 15 April 1944 (Pros. Ex. 1) and arrived at that place 22 April 1944. On 19 July 1944 he was relieved from this assignment and transferred to APO 846 (Pros. Ex. 2). He departed from APO 811 30 July 1944 (R. 10).

As to Specification 1, Charge I, Mr. William F. Craane stated that he is a merchant at Oranjestad, Aruba; that on 25 July 1944 the accused

visited his establishment and solicited from him a loan of money in the amount of 300 guilders, stating that his wife was sick in the hospital and that he needed the money to send to her. Witness granted the loan and upon receipt of the money the accused wrote and gave to the witness his signed memorandum, as follows: "I will pay on July 31st to W. F. Craane, Oranjestad the sum of F300⁰⁰ lent to me this date" (Pros. Ex. 4, R. 10-11). The accused did not "show up" as promised on the 31st of July 1944 to pay the loan, and, when the witness inquired about him on the 2nd of August 1944, he was advised that the accused had left for Puerto Rico. The accused has since failed to pay the debt (R. 11). The witness sent a personal letter to the Commanding Officer of Force Aruba advising him of the circumstances (R. 12).

As to Specification 2, Charge I, Miss Annie Croes, an employee of the Aruba Trading Company, testified that on or about the 5th or 6th of May 1944 the accused visited the Aruba Trading Company at Oranjestad, Aruba, and purchased a blue linen set for the sum of 180 guilders and stated that he desired to pay 80 guilders in cash and to have the balance charged to him (R. 13). No mention was made at that time of any specific date when the balance of the debt would become payable (R. 13). As a part of the transaction, the accused signed the sales slip which was identified by the witness and submitted in evidence as Prosecution's Exhibit 5 (R. 14). Mrs. Leonie Croes, bookkeeper of the Aruba Trading Company, testified that she had charge of the accounts of that concern. She stated that the accused was indebted to the company in the sum of 100 guilders and that the account had been outstanding since 5 May 1944. Mrs. Croes further stated that it is the policy of the Aruba Trading Company to extend credit on their accounts for periods extending from 30 to 60 days, but that the maximum term of credit is 60 days (R. 15).

As to Specification 5, Charge I, First Lieutenant Don P. Davis testified that on the 29th of July, while the witness was the Secretary and Treasurer of the Force Aruba Officers' Club, the accused came to see him to collect and pay the chits which he, the accused, owed to the club. Accused told the witness that he had orders to leave the Island. In payment of his account the accused gave witness a check in the amount of \$38.99, drawn on a bank in Puerto Rico. The check was identified and admitted in evidence as Prosecution's Exhibit 8 (R. 20). The witness indorsed the check and deposited it for collection with the Aruba Bank. On 28 August 1944, the witness went to the United States on leave. He was succeeded by First Lieutenant Douglas A. Catlin (R. 21). Lieutenant Catlin testified that he was the Secretary and Treasurer of the Officers' Club at Aruba (R. 21) when, about the latterpart of September 1944, the accused's check in the amount of \$38.98 (Pros. Ex. 8) was brought to the witness by a "Lieutenant McMichael". By reason of the Club's indorsement on the check the witness refunded the amount of the check to Lieutenant McMichael from the Officer's Club funds and entered the voucher on

the book showing the nature of the transaction (R. 21). The witness further stated that since that date no remittance has been received by the club from Lieutenant Persinger. Prosecution's Exhibit 13 shows that accused did not have sufficient funds in his bank account 29 July 1944, or at any reasonable time thereafter to cover the payment of the check.

With reference to Specification 1, Charge II, Mr. N. Habibe, Jr., testified that he is a merchant and owns a store at Oranjestad, Aruba. He knew accused who had visited his establishment once or twice for business (R. 28). On or about 29 July 1944 the witness cashed a check for accused in the amount of \$100. The check was drawn on a bank on Puerto Rico. After obtaining the cash, accused bought from witness' place of business a bottle of whiskey (R. 28-30). The check was identified by the witness and admitted in evidence as Exhibit 14 for the prosecution (R. 28-29). Two or three days later the witness sent the check to the Aruba Bank to have it cashed, but the bank would not cash it for the reason that other bad checks of accused had been returned unpaid (R. 29). Prosecution's Exhibit 13 shows that on 29 July 1944 accused did not have sufficient funds in his bank account or at any reasonable time thereafter to cover the payment of the check. The witness stated that the debt is still outstanding (R. 29).

With reference to Specification 2, Charge II, Mr. C. H. G. Eman testified that he is a merchant from Oranjestad, Aruba, and that he knew the accused because he used to visit his establishment (R. 31). During one of the last days of July 1944 the accused requested the witness to cash a personal check for him in the amount of \$150 drawn on a bank in Puerto Rico. Witness cashed the check for him (R. 31). The check was identified by the witness and admitted in evidence as Prosecution Exhibit 15 (R. 31). After cashing the check, the witness retained it for a couple of days and then sent it to his bank for deposit. About two weeks later the check was returned to him by the bank with a "note stating that there were no funds in Puerto Rico to cover the check". The witness further stated that he had never received payment for the check (R. 32). Prosecution Exhibit 13 shows that accused did not have sufficient funds in his bank account on 29 July 1944, or at any reasonable time thereafter to cover the payment of the check.

With reference to Specification 3, Charge II, Mr. A. Jhillo Elias testified that he is the bookkeeper at the Post Exchange, Force Aruba; that he has occupied that position for the last 20 months; that on 14 July 1944 the accused came to the Post Exchange and approached the cashier, Miss Tommy Richey, and asked her to cash his personal check for \$150. Miss Richey cashed the check by giving accused 282.74 Florins. The transaction was made in the presence of the witness who saw the accused indorse the check. The check was admitted in evidence as Prosecution's Exhibit 11 (R. 23-24). About five or six weeks later witness saw the check back at the Post Exchange with a small memorandum attached to it. He further stated that he had to make a

voucher for the check to use in his bookkeeping (R. 24-25). First Lieutenant John W. Maxwell testified he was the Post Exchange Officer, Force Aruba, and that during the month of September 1944 the Post Exchange received from the Aruba Bank the accused's check in the amount of \$150 (Pros. Ex. 11) in which bank it had previously been deposited by the Post Exchange (R. 25). Lieutenant Maxwell stated that during the evening of 14 July 1944 he saw the accused and asked him if he had cashed a check for \$150.00 in the Exchange that day. The accused said that he had. Witness then told him that the amount was beyond their limit and asked if he was sure that he had that much money in his bank. The accused assured him that he did and that the check was good (R. 49). At the time the check was returned to the Post Exchange, the accused had been transferred from that station. A letter was submitted to Force Headquarters reciting the facts but accused has failed to pay the \$150 and the indebtedness is still outstanding (R. 26). Exhibit 13 for the Prosecution shows that accused did not have sufficient funds in his bank account on 29 July 1944, or at any reasonable time thereafter to cover the payment of this check (R. 25-26).

As to Specification 6, Charge II, Mr. Robert H. Vint, the USO Director at Aruba, stated that he had known the accused for about seven months (R. 41-42). On or about 24 July 1944 the witness cashed accused's personal check in the sum of \$100. The check was drawn on a bank in Puerto Rico, and signed by accused in the presence of the witness (R. 42). The check was identified and admitted in evidence as Prosecution's Exhibit 19 (R. 43). A few days later the check was deposited in the Holland Sche Bank in Oranjestad. During September 1944, because the check had been returned, the manager of the bank called and asked the witness to come to the bank and make good the check (R. 42). Up to the date of trial, the accused has failed to make payment on the check (R. 43). Mr. Frederik Jan Eman testified that he is the cashier of the Holland Sche Bank-Unie, and that he handles the accounts of the USO in Aruba. The accused's check (Prosecution's Exhibit 19) was shown to the witness, who stated that that check was deposited in his bank on 26 July 1944, and that it was thereafter sent for collection to the National City Bank, New York, New York, and was later returned to his bank on 26 August 1944 (R. 47-48). Prosecution's Exhibit 13 shows that accused did not have sufficient funds in his bank account on 29 July 1944, or at any reasonable time thereafter, to cover the payment of the check.

Lieutenant Colonel Calhoun D. Cunningham testified that about the first of August he was acting as Executive Officer, Force Aruba, and was detailed by verbal order of the Commanding Officer to investigate the alleged financial irregularities charged against the accused. Upon his showing to accused a list of these irregularities, the accused stated that he wanted to pay his creditors and requested 15 days before any action was taken. During this time the accused was unable to make any arrangements by mail to pay the obligations, so the witness granted to the accused a four day leave to go to Puerto Rico in order to obtain the money. Upon the accused's return from Puerto Rico, accused advised the witness that he had had no success in raising the money required and that he had no means with which to pay his obligations (R. 49-50).

It was shown that all of the checks made the basis of the specifications were deposited by the various payees thereof in their own banks for collection within a reasonable time after they were received by the payees and all were in due course returned unpaid (R. 44, 47-48).

The account of the accused with the bank upon which all of said checks were drawn showed that there were not sufficient funds on deposit to pay the checks or any of them at the time they were dated nor at any time thereafter. On 5 June 1944 his balance was \$213.00. His balance on pertinent dates thereafter was as follows:

15 June 1944	-	\$	3.00	
30 June 1944	-		2.00	
5 July 1944	-		193.18	
2 Aug. 1944	-		46.03	
8 Aug. 1944	-		.03	
9 Aug. 1944	-		137.32	
9 Aug. 1944	-		2.32	(Pros. Ex. 13).

The prosecution and the defense, by joint stipulation, offered in evidence a certified copy of the statement of the accused's checking account with the Banco Progreso Financiero, Puerto Rico. It was admitted in evidence and marked Exhibit 13 (R. 27). It was further jointly stipulated by the prosecution and the defense that the English translation attached to Exhibit 13 is a true translation of the original (R. 38).

4. Accused, after being fully advised of his rights, elected to testify. He stated that he arrived in Aruba 22 April 1944. Concerning his financial transactions he stated that at the time he wrote the checks described in the several specifications, he had no intent to defraud the parties concerned. He thought he would be able to obtain the necessary funds at that time. He further stated that he made written requests to a few persons, some of whom are his relatives, to obtain the money, and that he intended to obtain sufficient funds to pay all of his debts as quickly as possible (R. 51-52). Upon cross-examination, accused admitted that he was the Mess Officer of the Officers' Mess, Force Aruba, during the month of June and up to 24 July. He admitted that on 30 June 1944 he substituted for \$185 cash of the Officers' Mess fund his check for that sum drawn on the Banco Progreso Financiero, and that he did the same thing on 5 July 1944 for \$200 additional (Pros. Ex. 16, 17). He also admitted that on 30 June 1944 the balance of his account with that bank was \$2.00 (Pros. Ex. 13). In his capacity as Mess Officer he deposited the two checks in the Officers' Mess bank account and the checks were returned. On 5 July 1944 his monthly pay check of \$191.18 was deposited in his account. The prosecution then asked the accused to explain how, with a balance of only \$193.18 for the entire month in his bank account, he expected to cover the amount of the two checks which had been shown to him totaling \$385.00. To this the accused replied, "I usually sent a deposit of my own

to the bank whenever I had any cash myself", but, in answer to a further question, added, "I don't think around those particular days I did" (R. 54). The check cashed by accused at the Post Exchange on 13 July (Pros. Ex. 11), in the sum of \$150, was shown to the accused and he was asked to explain how he expected to pay this check when his only deposit at the bank during the month of July was \$191.18, and during the same month accused had already written two other checks for \$385.00. Accused replied that he believed he would be able to make sufficient deposits to cover the amount of all of these checks, since he was "under the assumption" that he would have some money coming to him "from the States", although he was not certain of any particular date when he would receive it (R. 54). Accused admitted that on 19 July he received orders to report to the Casual Center at Puerto Rico, and that he knew that it was a permanent change of station (R. 55). The prosecution then asked accused to explain to the court why after 19 July, when he was first given orders to report to Puerto Rico, he wrote checks totaling approximately \$500, when the maximum balance which he had in his bank account was only \$193.18 during that time. Accused explained that he had "the surest intentions and the knowledge that before these checks were presented in Puerto Rico I would have the money", and that "I assumed that I was going by air but that was changed and I did not go by air but by boat" (R. 55). Upon further cross-examination, accused admitted that on 30 July he gave a note to Mr. Craane and received 300 guilders (R. 55-56).

5. With reference to Charge I the evidence for the prosecution not denied nor contradicted by the accused clearly shows that the accused, knowing of his financial inability to meet his debts and knowing that he had outstanding numerous worthless checks and knowing that he was within a few days going to leave Aruba permanently, borrowed 300 guilders from an Aruban merchant giving his written promise to repay that sum on 31 July 1944. He not only failed to keep his promise but left Aruba and made no effort to pay the obligation or arrange for its payment. It was still unpaid at the time of trial on 13 November 1944. Shortly after his arrival in Aruba in May 1944 accused purchased merchandise from a merchant in Aruba for 180 guilders, paying only 80 guilders in cash. He made no effort to pay the balance of 100 guilders which was still unpaid at the time of trial. Just before leaving for his newly assigned permanent station the accused gave in exchange for his chits at the Officers' Club his worthless check for \$38.99.

Ordinarily the mere failure on the part of an officer to pay his debts promptly is not sufficient to constitute a violation of the 95th Article of War, but where the nonpayment of the debt or the incurring of the debt followed by nonpayment is shown to be coupled with deceit, evasion, fraud, or other dishonorable conduct, the failure to pay does constitute a violation of that Article of War. In this case the facts and circumstances warrant the inference that when the accused incurred the loan described in Specification 1 he had no intention of repaying it. He did not disclose to the person from whom he borrowed the money that he was in serious financial difficulties and was about to depart permanently from the Island. His conduct was clearly indefensible and dishonorable. So, too, was his conduct

in incurring and in neglecting his obligation to the other merchant under the circumstances as shown. The giving of his worthless check in payment of his Officers' Club chits when he knew it was worthless and that he was permanently leaving was also a clear violation of Article of War 95 even though it was in payment of a debt past due (CM 202601, 6 B.R. 171,219). We find no difficulty in concluding that the evidence of record was clearly and legally sufficient to support the findings of guilty of Specifications 1, 2, and 5 of Charge I and of Charge I.

With reference to Charge II the evidence for the prosecution and the admissions of the accused in his testimony established that the accused in exchange for cash gave his personal checks in the amounts and at the times and places set forth in the respective specifications. All of these checks were deposited in due course by the various payees from whom the cash was obtained. Eventually all were returned unpaid. The account of the accused with the bank upon which the checks were drawn, admitted in evidence by stipulation, clearly showed that the checks were at all times worthless as there were not sufficient funds on deposit in the account to meet the checks. Accused admitted in his testimony that he knew at the time he gave the checks that he did not have sufficient funds on deposit with the bank upon which the checks were drawn with which to pay the checks. He had no means of obtaining further funds with which either to bring his deposit up to the required amount or to redeem the checks after they were dishonored. He had no source of income but his pay as an officer. His checks totaled his pay three and four fold. By means of his worthless checks he obtained over \$500 just before leaving Aruba for a foreign permanent station. It was apparent that his intent was to collect as much money as possible in this fraudulent manner and then disappear from Aruba. The circumstances show beyond any reasonable doubt that the accused intended to defraud those from whom he obtained the money in exchange for his checks. Further discussion seems unnecessary: The issuance of worthless checks with intent to defraud clearly constitutes a violation of Article of War 96.

6. War Department records show the accused to be 30 years of age, married, and a high school graduate. He enlisted in the service on 17 April 1934 and served honorably and with a character rating of "excellent" until 9 September 1941, when he was ordered to active duty as a second lieutenant, Finance Department, Army of the United States. On 25 April 1942 he was temporarily promoted to first lieutenant, Army of the United States, and at a later date not appearing in the records to Captain. On 11 May 1943 he was demoted to "permanent grade of 2nd Lt. Finance Department". During his military service he served for at least several years in the Philippine Islands and in Puerto Rico.

7. The court was legally constituted and had jurisdiction of the accused and of the offenses charged. No errors injuriously affecting the

(368)

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 as approved by the reviewing authority and the sentence and to warrant confirmation of the sentence. Dismissal is mandatory for a violation of Article of War 95 and authorized for a violation of Article of War 96.

Wm. C. Son, Judge Advocate.
Earle Stephens, Judge Advocate.
Wm. M. Moore, Judge Advocate.

1st Ind.

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

JAN 15 1945- 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 N. Persinger (O-384121), Quartermaster Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings as approved by the reviewing authority and the sentence and to warrant confirmation of the sentence. Despite his previous good military record the evidence in this case clearly shows that accused is morally unworthy to remain an officer. His dishonest financial transactions whereby he defrauded his victims of merchandise and cash amounting in all to approximately \$760.00 merit the punishment which was imposed upon him. I recommend that the sentence be confirmed but that the forfeitures be remitted, that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement, and that the sentence as thus modified be carried into execution.

3. Consideration has been given to the attached letters from Honorable Claude Pepper, United States Senate, Honorable H. M. Kilgore, House of Representatives, and Honorable Matthew M. Neely, Governor of West Virginia.

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



Myron C. Cramer,
Major General,

The Judge Advocate General.

6 Incls.

Incl.1-Record of trial.

Incl.2-Draft of ltr.

for Sig. Sec. of War.

Incl.3-Form of Ex. action.

Incl.4-Ltr. fr. Hon. Claude Pepper.

Incl.5-Ltr. fr. Hon. H.M. Kilgore.

Incl.6-Ltr. fr. Hon. Matthew M.
Neely.

(Sentence confirmed but forfeitures remitted. G.C.M.O. 89, 22 Mar 1945)



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

(371)

SPJGH
CM 270939

11 JAN 1945

UNITED STATES)

v.)

Corporal ROBERT W. O'GARA)
(36767868), Company C,)
222d Infantry Training Bat-)
talion, 68th Infantry Train-)
ing Regiment.)

INFANTRY REPLACEMENT TRAINING CENTER
CAMP BLANDING, FLORIDA

Trial by G.C.M., convened at
Camp Blanding, Florida, 1
December 1944. Dishonorable
discharge and confinement
for life. Penitentiary.

REVIEW by the BOARD OF REVIEW
TAPPY, GAMBRELL and TREVETHAN, Judge Advocates.

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

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

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

Specification 1: In that Corporal Robert W. O'Gara, Company "C", 222d Infantry Training Battalion, 68th Infantry Training Regiment, Camp Blanding, Florida, did, at Camp Blanding, Florida, on or about 26 June 1944 desert the service of the United States and did remain absent in desertion until he was apprehended at Chicago, Illinois, on or about 15 July 1944.

Specification 2: In that Corporal Robert W. O'Gara, Company "C", 222d Infantry Training Battalion, 68th Infantry Training Regiment, Camp Blanding, Florida, did, at Camp Blanding, Florida, on or about 23 July 1944 desert the service of the United States and did remain absent in desertion until he was apprehended at Forrest Park, Illinois, on or about 15 August 1944.

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

Specification 1: In that Corporal Robert W. O'Gara, Company "C", 222d Infantry Training Battalion, Camp Blanding, Florida, did, at or near Chicago, Illinois, on or about 27 June 1944, with intent to defraud, wrongfully, unlawfully, and falsely alter United States Postal Money Order, Number 558341, issued at Chicago, Englewood Station, Illinois, by changing the amount for which said money order was made out from four dollars (\$4.00) to forty dollars (\$40.00).

(372)

- Specification 2: Same allegations as Specification 1 except postal money order was No. 559209 and was altered on 5 July 1944 from \$6 to \$60.
- Specification 3: Same allegations as Specification 1 except postal money order was No. 2006, was issued at Roseland Station, Chicago, Illinois, and was altered on 8 July 1944.
- Specification 4: Same allegations as Specification 1 except postal money order was No. 2007, was issued at Roseland Station, Chicago, Illinois, and was altered 8 July 1944.
- Specification 5: Same allegations as Specification 1 except postal money order was No. 722730, was issued at Oak Park, Illinois, and was altered on 8 July 1944.
- Specification 6: Same allegations as Specification 1 except postal money order was No. 592500, was issued at Station L, Chicago, Illinois, and was altered on 12 July 1944.
- Specification 7: Same allegations as Specification 1 except postal money order was No. 384910, was issued at Kenwood Station, Chicago, Illinois, and was altered on 25 July 1944.
- Specification 8: Same allegations as Specification 1 except postal money order was No. 472528, was issued at Station G, Chicago, Illinois, and was altered on 4 August 1944.
- Specification 9: Same allegations as Specification 1 except postal money order was No. 636470, was issued at South Shore Station, Chicago, Illinois, and was altered on 7 August 1944.
- Specification 10: Same allegations as Specification 1 except postal money order was No. 812075, was issued at Stock Yards Station, Chicago, Illinois, and was altered on 8 August 1944.
- Specification 11: Same allegations as Specification 1 except postal money order was No. 184962, was issued at Station 134, Chicago, Illinois, and was altered on 9 August 1944.
- Specification 12: Same allegations as Specification 1 except postal money order was No. 199941, was issued at River Grove, Illinois, and was altered on 15 August 1944.
- Specification 13: In that Corporal Robert W. O'Gara, Company "C", 222nd Infantry Training Battalion, Camp Blanding, Florida, did at or near Chicago, Illinois, on or about 27 June 1944, with

intent to defraud Charles Lorenz, wrongfully and unlawfully utter and pass to Charles Lorenz, United States Postal Money Order, Number 558341, issued at Chicago, Englewood Station, Illinois, he the said Corporal Robert W. O'Gara, then well knowing that said money order was materially and falsely altered, to wit, the amount for which said money order was made out had been falsely changed from four dollars (\$4.00) to forty dollars (\$40.00).

Specification 14: Same allegations as Specification 13 except postal money order was as described in Specification 2 above and was uttered to The Great Atlantic & Pacific Tea Company, Chicago, Illinois, on 5 July 1944.

Specification 15: Same allegations as Specification 13 except postal money order was as described in Specification 3 above and was uttered to one J. Medestow on 8 July 1944.

Specification 16: Same allegations as Specification 13 except postal money order was as described in Specification 5 above and was uttered to Kroger Store, Chicago, Illinois, on 8 July 1944.

Specification 17: Same allegations as Specification 13 except postal money order was as described in Specification 7 above and was uttered to Pietro DiPietro on 25 July 1944.

Specification 18: Same allegations as Specification 13 except postal money order was as described in Specification 8 above and was uttered to Mrs. H. E. Foley on 4 August 1944.

Specification 19: Same allegations as Specification 13 except postal money order was as described in Specification 9 above and was uttered to J. Pines & Sons, Chicago, Illinois, on 7 August 1944.

Specification 20: Same allegations as Specification 13 except postal money order was as described in Specification 10 above and was uttered to Ralph Jaffe on 8 August 1944.

Specification 21: Same allegations as Specification 13 except postal money order was as described in Specification 11 and was uttered to Prima Bismarck Brewing Company, Chicago, Illinois, on 9 August 1944.

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

Specification: In that Corporal Robert W. O'Gara, Company "C", 222nd Infantry Training Battalion, Camp Blanding, Florida, did, at Camp Blanding, Florida, on or about 1 September 1944 desert the service of the United States and did remain absent in desertion until he was apprehended at or near Tucson, Arizona, on or about 9 October 1944 and returned to military control 11 October 1944.

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

Specification: In that Corporal Robert W. O'Gara, Company "C", 222nd Infantry Training Battalion, Camp Blanding, Florida, having been duly placed in confinement in the camp stockade, Camp Blanding, Florida, on or about 19 August 1944, did, at Camp Blanding, Florida, on or about 1 September 1944, escape from said confinement before he was set at liberty by proper authority.

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

Specification: In that Corporal Robert W. O'Gara, Company "C", 222d Infantry Training Battalion, Camp Blanding, Florida, in conjunction with Private Carmelo F. Mazze, Company "E", 193rd Infantry Training Battalion, Camp Blanding, Florida, Private Arthur Ferry, Company "B", 205th Infantry Training Battalion, Camp Blanding, Florida, did, at Camp Blanding, Florida, on or about 1 September 1944, with intent to commit a felony, viz, murder, commit an assault upon Private Harold D. Castner, Surplus Detachment, S.C.U. No. #1448, Camp Blanding, Florida, by willfully and feloniously striking the said Private Harold D. Castner on and about the head with fists and with a rake handle.

The accused pleaded guilty, by appropriate substitutions and exceptions, to so much of Charge I, Specifications 1 and 2 thereof, and to so much of Additional Charge I and its Specification as involves absence without leave for the periods alleged in violation of Article of War 61; pleaded guilty to Charge II and all twenty-one Specifications thereof and to Additional Charge II and its Specification, and not guilty to Additional Charge III and its Specification. Accused 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 for life. The reviewing authority approved only so much of the finding of guilty of the Specification of Additional Charge III as involves a finding that accused feloniously assaulted Private Harold D. Castner with the intent alleged by striking him "on and about the head with a rake handle", 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 prosecution introduced the following evidence which is hereinafter summarized under appropriate headings indicating the particular Charges and Specifications to which it is pertinent.

a. Charge I, Specifications 1 and 2.

Accused absented himself without leave on 26 June 1944 from Camp Blanding, Florida (Pros. Ex. A). It was stipulated by the prosecution, defense and the accused that he was apprehended by civil authorities in Chicago, Illinois, on 15 July 1944, and returned to military control the same day. He was clothed in civilian shoes, officers' trousers and shirt, leather belt and without tie or cap when taken into custody (Pros. Ex. V). On 23 July 1944, upon return to his organization at Camp Blanding, accused was placed in arrest in quarters at 0315 hours but at 0400 hours that same day he broke arrest and again absented himself without leave (Pros. Ex. B). It was stipulated by the prosecution, defense and the accused that he was apprehended in proper uniform by civil authorities in Forrest Park, Illinois, on 15 August 1944, and returned to military control the same day (Pros. Ex. V).

As will be subsequently shown, during accused's first absence from 26 June 1944 to 15 July 1944, he altered six United States postal money orders, raising the amounts of five of them from \$4 to \$40 and the amount of the other from \$6 to \$60. He cashed three of the money orders which had been raised to \$40, cashed the one which had been raised to \$60 and had the other two on his person when arrested by civil authorities. (See par. re Ch. II, Specs. 1-6, 13-16 incl., infra.) During his absence from 23 July 1944 to 15 August 1944, accused altered six United States postal money orders, raising the amounts of all of them from \$4 to \$40, and he cashed five of these raised money orders (See par. re Ch. II, Specs. 7-12, 17-21 incl., infra).

b. Charge II, Specifications 1-21 inclusive.

It was stipulated by the prosecution, defense and the accused that the following United States postal money orders were issued on the following dates in the following face amounts in exchange for payment of the face amounts thereof, viz (Pros. Ex. C, and H, I, J, K, L, M, N, O, P, Q, R, S):

<u>Specification</u>	<u>Number of money order</u>	<u>Amount of money order</u>	<u>Date purchased</u>
Spec. 1	#558341	\$4	27 June 1944
Spec. 2	#559209	\$6	5 July 1944
Spec. 3	#2006	\$4	8 July 1944
Spec. 4	#2007	\$4	8 July 1944
Spec. 5	#722730	\$4	8 July 1944

(376)

<u>Specification</u>	<u>Number of money order</u>	<u>Amount of money order</u>	<u>Date purchased</u>
Spec. 6	#592500	\$4	12 July 1944
Spec. 7	#384910	\$4	25 July 1944
Spec. 8	#472528	\$4	4 August 1944
Spec. 9	#636470	\$4	7 August 1944
Spec. 10	#812075	\$4	8 August 1944
Spec. 11	#184962	\$4	9 August 1944
Spec. 12	#199941	\$4	15 August 1944

It was also stipulated by the prosecution, defense and the accused that United States postal money orders bearing the following serial numbers were cashed by the following persons for the accused and the following amounts were paid to accused thereon, viz (Pros. Ex. C):

<u>Specification</u>	<u>Number of money order</u>	<u>Cashed by</u>	<u>Amount cashed for</u>
Spec. 13	#558341	Charles Lorenz	\$40
Spec. 14	#559209	Great A & P Tea Co.	\$60
Spec. 15	#2006	J. Medestow	\$40
Spec. 16	#722730	Kroger Store	Cash & merchandise of \$40
Spec. 17	#384910	Pietro DiPietro	\$40
Spec. 18	#472528	Mrs. H.E. Foley	\$40
Spec. 19	#636470	J. Pines & Sons	\$40
Spec. 20	#812075	Ralph Jaffe	Drinks & cash of \$40
Spec. 21	#184962	Prima Bismarck Brewing Co.	\$40

It was further stipulated by the prosecution, defense and the accused that on 8 July 1944, accused attempted to cash postal money orders numbered 2007 and 592500 at the Moskin Credit Clothing Store, both money orders being in the face amount of \$40. It was also stipulated that when accused was arrested by civil authorities on 13 July 1944, he had both of these postal money orders on his person and that on 15 August 1944, when again apprehended, he had in his possession postal money order number 199941 in the face amount of \$40 (Pres. Ex. C).

Accused voluntarily admitted that he had purchased all of the money orders mentioned in Specifications 1-12 inclusive of Charge II for the amounts set forth in the first itemization contained above; that he raised the amount of money order number 559209 from \$6 to \$60 and the amounts of the other eleven from \$4 to \$40; that he cashed nine of them as recited above,

receiving \$60 for one and \$40 for each of the others; that he attempted to cash two more of them (Nos. 2007 and 592500) at Moskin Credit Clothing Store on or about 12 July 1944 and was arrested at the time; that when arrested on 15 August 1944, he had another raised money order (No. 199941) in his possession. The money he so obtained he expended in night clubs in and about the city of Chicago (Pros. Exs. D, E, F).

c. Additional Charges I, II and III and Specifications thereunder.

On or about 19 August 1944, accused was confined in Stockade No. 1, Camp Blanding, Florida (R. 15, 16; Pros. Ex. T). On 1 September 1944, about 7:30 a.m., accused and five other prisoners were taken by a prison guard, Private Harold D. Castner, from the stockade to the vicinity of the post laundry where they proceeded to rake grass. The guard divided the prisoners into two groups and one group which included accused and prisoners Mazze and Ferry proceeded to rake leaves a short distance from the guard. Suddenly accused struck the guard several blows on the head with the metal end of his rake (R. 19; Pros. Ex. W). Although none of the prisoners testified that they actually saw the assault, one of them, prisoner Pio, testified that he saw the guard lying on the ground with accused, Mazze and Ferry standing beside him. Both Mazze and Ferry fled after the assault and accused, having taken possession of the guard's carbine, proceeded to follow them (R. 20, 21). The three of them were observed running from the scene by another prison guard, Private John R. Lentz. Although he was able to halt Ferry and Mazze, accused escaped and disappeared among a number of trucks parked nearby (R. 18; Pros. Ex. U). It was stipulated by the prosecution, defense and the accused that he was apprehended by civil authorities at Tucson, Arizona, on or about 9 October 1944, while clothed in proper uniform, and that he was returned to military control on or about 11 October 1944 (Pros. Ex. V).

The prison guard, Castner, was taken to the Regional Hospital at Camp Blanding promptly after the assault had been made upon him. Medical examination revealed that he was suffering from a compound fracture of the skull, concussion, and lacerations about the right side of his head and about his right ear. His condition was critical and so continued for about a week. He remained at the Regional Hospital for about twenty days. Inasmuch as a serious infection had developed in his lacerated ear, he was then taken to Lawson General Hospital, Atlanta, Georgia, where he was still confined on 9 November 1944, at the time his deposition was taken for use at this trial (R. 11, 12; Pros. Ex. W).

4. The defense introduced prisoner Ferry as a witness and he testified that he did not see accused strike the prison guard on 1 September 1944 nor did he know who did assault him (R. 24, 25).

After his rights had been explained to him, accused elected to take the stand and testify under oath. He stated that he had no intention

of deserting when he absented himself on 26 June 1944 and 23 July 1944, having departed only to attend to some personal matters (R. 26). He further testified that on 1 September 1944 he was some ten feet from the prison guard when he heard a shout, saw Ferry and Mazze assaulting the guard and then observed the guard's carbine fly some six feet through the air in his direction. He hurried to the carbine, picked it up and then proceeded to flee. He denied that he struck the guard (R. 26-28). He asserted that his absence on 1 September 1944 was "involuntary" because, as he stated, "if you were on a work detail and saw two men attack a guard and you expected to be shot you would run to" (R. 27). It was stipulated by the prosecution, defense and the accused that both Ferry and Mazze were convicted by general court-martial for assaulting the guard (R. 28).

5. Accused was found guilty of twice deserting the service under Specifications 1 and 2 of Charge I. His first absence from Camp Blanding, Florida, extended from 26 June 1944 to 15 July 1944, when he was apprehended in Chicago, Illinois, clothed in portions of an officer's uniform. During his absence he had fraudulently obtained approximately \$160 by forging and cashing United States postal money orders. Accused's second absence from Camp Blanding was commenced by breach of arrest and extended from 23 July 1944 to 15 August 1944 when he was apprehended by civil authorities in Forrest Park, Illinois, after having fraudulently obtained approximately \$180 by again forging and cashing postal money orders. Although his absences were not of long duration, the evidence relative to his conduct and the distance he traveled during each absence, the manner of their termination, and the manner of commencement of the second absence, was legally sufficient to justify the court in concluding that, during both of these absences, accused intended not to return to military service (MCM, 1928, par. 130a). The evidence supports the findings of guilty of Specifications 1 and 2 of Charge I.

Accused pleaded guilty to Specifications 1 to 21 inclusive of Charge II and the evidence introduced by the prosecution amply demonstrates that the pleas were not improvidently entered. The evidence sustains the findings of guilty of these 21 Specifications.

The evidence introduced under the Specifications of Additional Charges I, II and III demonstrates that accused commenced his third absence after viciously beating a prison guard about the head with a rake and then escaping from confinement at Camp Blanding, Florida. The guard suffered such serious head injuries from this assault, including a compound fracture of the skull, that his condition remained critical for about one week. About five weeks after the escape, accused was apprehended in Tucson, Arizona. The evidence fully establishes accused's escape from confinement. Proof of his absence for five weeks, initiated by

such escape and terminated by apprehension a substantial distance from his station, was quite sufficient to justify the court's conclusion that accused intended not to return to military service at the time he absented himself (MCM, 1928, par. 130a).

If the guard had expired as a result of the assault made upon him, accused would have been guilty of murder, inasmuch as the intent to murder would have been established by the proof of accused's intent forcibly to oppose the guard lawfully charged with keeping him and his companions in custody (MCM, 1928, par. 148a). Similarly, the intent to murder, which is an essential element of the offense with which accused is charged, was established by proof that accused viciously assaulted and caused grievous bodily injury to the guard lawfully engaged in keeping him in custody (CM 265699, Ferry; CM 262735, Kaslow). Although the Specification of Additional Charge III alleges that accused assaulted the guard with a rake handle, the proof establishes that the metal end of the rake was so used. This slight variance is immaterial. The Specification fully advises accused of the offense charged and the weapon used. Furthermore, the proof establishes all of the essential elements of the offense charged. Accordingly, the evidence sustains the findings of guilty of the Specifications of Additional Charges I, II and III.

6. The accused is 29 years of age. He was inducted into the military service on 29 October 1943.

7. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of 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. Assault with intent to murder and forgery of United States postal money orders are offenses of a civil nature, the former being punishable by penitentiary confinement for more than one year under Section 22-501, District of Columbia Code and the latter being similarly punishable under Section 218 of the United States Criminal Code. Accordingly, under the provisions of Article of War 42 accused's entire sentence of confinement may be executed in a penitentiary.

Thomas M. Falley, Judge Advocate.

William H. Sambrell, Judge Advocate.

(On Leave), Judge Advocate.

The accused pleaded not guilty to, and was found guilty of, both Charges and the 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 six months. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that on the morning of 23 September 1944 the accused, a pilot, decided to "get in" four hours of flying time (R. 16, 43; Pros. Ex. 3). Corporal Edward L. Peterson, the crew chief who inspected the A-25 airplane in which the flight was to be made, requested permission to accompany him as a passenger (R. 16-17; Pros. Ex. 3). This proposal being acceptable to the accused, the two men took off from the Army Air Field, Abilene, Texas, at about 9:20 a.m. (R. 17; Pros. Ex. 3). Before leaving the base the accused was warned that the engine was new and that "it needed some slow time" (R. 17).

After flying about the "local" area, "from one extreme to another", for about two hours and ten minutes, he found himself over Brownwood Lake some eighty miles from Abilene (R. 19; Pros. Ex. 3). From an island in this body of water to a state park on the west bank two power lines were suspended. Both sagged considerably, "the exact amount depending on the temperature". At their lowest points as of 23 September 1944 their respective heights were approximately forty-three feet, eight inches, and thirty-five feet, eight inches (R. 20, 27, 30, 35; Pros. Exs. 1, 2, 4). Descending to an altitude of about eighty to ninety feet, the accused proceeded in a northeasterly direction along the channel between the island and the west bank at a speed of about two hundred and seventy miles per hour (R. 21, 28, 34). Near the power lines he dropped down further to fifty feet above the water. Crossing over them, he continued his northeasterly course for some distance and then reversing himself retraced the same route at the same speed. This time the plane did not clear the wires. Striking and severing both of them, the plane "seemed to fall off on its left wing," corrected itself momentarily, plunged downward again, hit the water, cart-wheeled, turned upside down, and broke into several pieces (R. 17-18, 21, 23-25, 29, 32,34; Pros. Exs. 2, 3, 4).

Unable to extricate himself from the rear cockpit, Corporal Peterson suffered death in the crash. When his body was ultimately recovered, it was slightly swollen. His right eye and the edge of his nose were discolored, his chin was cut, and there were lacerations on his legs (R. 37, 39, 42). The accused was more fortunate. He was knocked unconscious by the impact and thrown into the water free of the wreckage. When he regained his senses, he found himself "holding on to some sort of object". A few minutes later he was rescued by two young men in a motor boat (R. 24; Pros. Ex. B).

4. After being apprised of his rights relative to testifying or remaining silent, the accused took the stand on his own behalf. Two other witnesses were offered by the defense. Captain George M. Burt, the Operations Officer of the training unit to which the accused was attached as an instructor, listed the purposes of low flying as safety, strafing, and the avoidance of radar detection. While serving overseas and participating in sorties from Sicily to Italy, Captain Burt had personally "had to go on the deck" at two hundred feet for this last reason (R. 46-48, 67, 69). On the basis of his experience he was able to state that it was difficult to judge altitude over water because of the flat perspective and the lack of anything "to break the symmetry...". One who was "not used to it" could easily make a mistake of one hundred feet (R. 47, 63). Although he realized that such training was dangerous, he "definitely" recommended instruction in low flying over water. As of the date of the crash low altitude missions could be performed any "place where the weather permitted and the instructor decided was flat enough country" (R. 56, 66). Subsequently, Lake Brownwood was designated as an area in which "low altitude work" was permitted, despite the following language in 72nd Fighter Wing Regulation Number 60-11, dated 4 September 1944:

"a. No low-altitude mission will be so routed that it passes over any large body of water.

b. Every effort will be made to route these flights so as to avoid all high tension lines..." (R. 64, 66, 68; Pros. Ex. 5; Def. Exs. E, F).

Other directives of the 72nd Fighter Wing, which controlled the training of pilots at Abilene, prescribed minimum heights for low level navigation of from two hundred to five hundred feet (R. 49-50; Def. Ex. C). No notice of the existence of the power lines at Lake Brownwood had been given to personnel at Abilene (R. 67).

According to Captain Burt, instructors were required to complete all of the training missions of the Wing's program, "Either with trainees, or alone, if the ship is available" (R. 54, 59). The court sustained an objection to his further statement that, "Everybody takes it as understood" that:

"Any time an instructor was not on duty with his flight, and he felt, in order to help himself, he should obtain more training, we had planes in the miscellaneous pool and also the 47's on the line. He could schedule himself and fly the missions on which he thought he was the weakest, if the planes were available and time permitted" (R. 50).

Written clearance was required for travel at a distance greater than fifty miles from Abilene but not for local "flights" (R. 60-61). Air-

(384)

craft assigned to a training unit were cleared through operations; those in the miscellaneous pool through the Director of Flying (R. 60). "Whoever had charge of the airplane had permission to designate the type of mission". Without the approval of the Director of Flying or his assistant flights in a plane taken from the miscellaneous pool were not authorized (R. 60, 63).

Captain Burt had known the accused since December of 1943. From that time forward the accused had served at Abilene as a pilot instructor in P-47 aircraft and had been in charge of seven or eight classes (R. 55, 62). His Individual Instructors Card, Form 10, showed that he had completed his low level navigation training (R. 53, 62; Def. Ex. D). After his accident and some two weeks before his trial he had been appointed assistant operations officer (R. 57-58).

Captain Calvin C. Moody, the second witness for the defense, had also had extensive services overseas. While in Panama he had flown "over water practically all the time". His own experiences confirmed the previous testimony concerning the difficulties inherent in estimating height over that element. He explained that "you have no relations as to what the horizon is, where it is located; the way to show you what altitude you might be at". On one occasion he had so misjudged his altitude that his propellor struck the water (R. 72-74). In his opinion flying over "a narrow strip of water" with land visible on each side would be easier than over a large body of water. He could not rely upon altimeters to gauge height because they would normally lag in their readings taking "more than a hundred feet or so to catch up" (R. 80, 82-83).

In his remaining testimony he corroborated several other statements by Captain Burt. Instructors were under obligation to undertake the same missions as the trainees but could fly alone on their own initiative (R. 75-76, 79). Low level navigation was permitted at Lake Brownwood (R. 77). The prescribed minimum altitudes were two hundred to five hundred feet above the terrain (R. 75-76). About thirty-five or forty per cent of all missions at Abilene were under five hundred feet (R. 79). Before setting out in an individual flight it was necessary to place one's name and to state the nature of one's mission on a "sign-out sheet" maintained by the Director of Flying (R. 79-80, 82).

Upon taking the stand himself the accused gave a minutely detailed account of his mishap. A graduate of the United States Military Academy at West Point and the son of a "full Colonel" in the Regular Army, he had received his wings in May of 1943. In December of 1943 he had been appointed an instructor in the use of the P-47 at Hammond, Louisiana, and upon being transferred to Abilene he had retained that position (R. 86). Against the background provided by the two preceding witnesses for the defense, he testified that, since there were no P-47s

available on the morning of 23 September 1944, he solicited Captain Lynn F. Jones, the Assistant Director of Flying, for permission "to fly an A-25 ship". The conversation which ensued was summarized by the accused as follows:

"He asked me whether I was going to fly locally, or make a cross country, referring to whether I was going to land at another field. I told him no, I was going to take off and land at this field, and that was strictly local flying and I wouldn't have to make any clearance. He asked me what I was going to do. I told him I hadn't flown the previous month, and I was going to go up and fly every type of mission allowable in that type of ship. He said that was perfectly all right with him. I again asked him if he was absolutely sure about that, and he said yes, you are clear to go" (R. 87, 101).

When Corporal Peterson, the crew chief, "finished putting on the nose piece on the prop", he asked leave to participate in the flight. The accused was agreeable upon the condition that his proposed passenger obtain a parachute. In about five minutes Corporal Peterson returned with the required equipment and entered the plane. After contacting the control tower, the accused took off and for about fifteen to twenty minutes circled the airport "to make sure the engine was running smoothly enough to fly it around" (R. 88).

He had previously determined "to do everything [he] could with the ship", for he "wanted to make sure [he] was in good flying shape before [he] left for overseas". It was his "understanding" that he "could designate [his] own missions and fly them, inasmuch as [he] had done so the previous eight months with trainees and also by [him]self, alone" (R. 88). This authority extended even to low level flying (R. 97).

As he approached Lake Brownwood he remembered that it was a low flying area and that thought inspired him to practice low level navigation "over something besides land" (R. 92). Once over the "long part of the lake" he dropped down to what he considered to be two hundred feet, an altitude which he knew to be sanctioned by the regulations for that area. It was not his intention to go below that height or "to do anything but just straight and level flying inasmuch as the contours of the lake permitted" (R. 88, 94). He failed to see the power lines when he "passed over" the lake the first time and did not suspect their existence (R. 89, 96-97). As he approached the extreme north end of the lake he increased his altitude to approximately eight hundred to one thousand feet because of the proximity of land. Upon retracing his course back over the water he again descended (R. 89). Although he did not depend upon his altimeter which was "zeroed" for Abilene, he checked the instrument and, relying principally upon his judgment, concluded that he was traveling at a height of two hundred feet (R. 89, 95, 96, 102). To assure himself that "everything was all right" he "took a

little time out" to examine his instrument board. As he looked up from the panel he was blinded by the reflection of the sun in the water. "At the same time... [he] thought [he] saw something out there ahead of [him]". He reacted instinctively by pushing the stick forward. In the same instant his head struck a metal support in the top of the canopy and he was rendered unconscious. His next sensation was that of "bobbing up and down" on the surface of the lake (R. 89). He had several gashes on his head, his arms and sides were bruised, and his right shoulder blade was out of place. Although extremely weak and in pain when rescued, he informed the two men who came to his aid in a "speedboat" that "there was another passenger in the rear cockpit of the airplane", but, after looking around, they reported that they "could not see anything" (R. 90).

Practically all of the flying regulations pertaining to safety had been read by the accused. Specifically, he had examined the provisions of Army Air Forces Regulation No. 60-16, Second Air Force Memorandum 62-16, and Operational Memorandum Number 9 (R. 97, 99-100, 101; Pros. Exs. 6, 8; Def. Ex. H). He had never seen Circular 60-8 which was issued by the Headquarters of the 72nd Fighter Wing and which quoted a letter from General Arnold denouncing low flying and recommending dismissal as an appropriate punishment (R. 100; Pros. Ex. 7).

5. On rebuttal the prosecution called Major Thomas G. Lanphere, the Director of Training of the 72nd Fighter Wing, and the author of its training program (R. 104). He knew of "quite a few" training missions below five hundred feet but all required specific authority. Except when on such a flight no pilot was exempt from compliance with the Army Air Forces requirement that flights be made at a minimum altitude of five hundred feet (R. 105). Upon obtaining local clearance from the Director of Training, instructors were, however, permitted to fly "miscellaneous" aircraft such as A-25s or C-78s for missions of their own choosing pertaining to training (R. 107-108). Prior to 1 November 1944 it was perhaps possible for one pilot to constitute a low navigation flight (R. 110). Although A-25s were "miscellaneous", they were not used for low altitude navigation and could not lawfully be diverted to that purpose by the Director of Flying, their principal function being to tow targets (R. 107-109). Flights by instructors for the purpose of accruing flying time were "local" and not "training" missions (R. 112).

Captain Lynn F. Jones, the Assistant Supervisor of Flying Training at Abilene, was the second rebuttal witness called by the prosecution. The accused had called him on the telephone on the morning of the accident to request permission "to fly an A-36 type". None of these being available, the accused asked for an A-25. "He said it would be a local flight, he might fly down near Brownwood, Texas". Captain Jones informed him "that was OK" and the conversation terminated. The accused never stated that he desired to fly any and every type of

mission that could be flown in an A-25 and never asked permission to fly below five hundred feet. A-25s were not prescribed for training at Abilene, but Captain Jones did not know of any regulation which prohibited their use for low level navigation (R. 114).

6. The Specification of Charge I alleges that the accused did, "on or about 23 September 1944, wrongfully, unlawfully and with culpable negligence cause the death of Corporal Edward L. Peterson by flying an A-25 type military aircraft in which the said Corporal Peterson was a passenger at such an altitude as to bring the said aircraft into contact with a wire or other obstruction to flight causing said aircraft to crash". This offense was laid under Article of War 93. The Specification of Charge II alleges that the accused did, "on or about 23 September 1944, wrongfully violate paragraph 16 a (1), AAF Regulation 60-16, by flying the military aircraft of which he was pilot within less than 500 feet above an electric power line or other obstruction to flight while not in takeoff or landing". This was set forth as a violation of Article of War 96.

Like all other pilots, the accused was required to familiarize himself with the various published rules governing low flying. By his own admission he had read Army Air Forces Regulation No. 60-16 and Second Air Force Memorandum 62-16. Paragraph 16a of the former contained the following language:

"Except during take-off and landing, aircraft will not be operated:

(1) Below the following altitudes:

(a) 1,000 feet above any building, house, boat, vehicle, or other obstructions to flight.

* * * * *

(d) 500 feet above the ground elsewhere than as specified above.

(2) Within 500 feet of any obstruction to flight."

Paragraph 1j of Second Air Force Memorandum 62-16 dated 17 March 1944 similarly stated that:

"The absolute minimum altitude above terrain is 500 feet...."

Both of these regulations were by their own terms subject to such modification as circumstances demanded. Thus paragraph 16b of the Army Air Forces Regulation permitted any maneuver to

"be conducted at such altitude above the ground or water as is necessary for its proper execution in places other than specified above, when such maneuver is required to accomplish an ordered tactical flight, engineering or training mission".

Memorandum 62-16 likewise provided certain exceptions, including "low altitude missions of fighter aircraft," and permitted "waivers" to be made "when ordered by competent authority."

The 72nd Fighter Wing which prescribed the rule for the training of pilots at Abilene had apparently exercised the discretion conferred by paragraph 16b of the Army Air Forces Regulation No. 60-16 to sanction low level navigation missions at altitudes of from two hundred to five hundred feet. The flights contemplated, however, were such as had been designated or approved by the Director of Flying Training or other "competent authority". Free lance flying could not have been intended, for obviously it would have afforded an all too facile means for the evasion of the regulations.

Although the accused asserted that he had obtained official permission from Captain Jones to fly any and every type of mission "allowable" in an A-25, Captain Jones categorically denied that the subject had even been discussed. Evidently relying only lightly upon his claim of official approval, the accused further contended that, while trainees could lawfully participate only in flights designated by competent authority, he was in a different category. It was his position that, as an instructor pilot, he was empowered to designate and schedule his own missions subject only to obtaining a clearance of the plane from the proper authority, who in some cases was the Operations Officer and in others the Director of Flying. Although the record contains considerable credible evidence of the existence and condonation of such a practice, Major Lanphere who wrote the training program of the 72nd Fighter Wing testified that a pilot was permitted to fly under five hundred feet only when on a "numbered" mission specifically approved by the Director of Flying Training and that under no circumstances could an A-25 plane be properly employed on any flight of this character. Be that as it may and regardless of whether instructors were empowered to schedule their own missions, the absolute minimum altitude prescribed for low level navigation was two hundred feet. Since the highest power lines struck by the accused were only some forty feet above the surface of the water, his authority to designate his own training program becomes irrelevant. In descending so far below two hundred feet he flagrantly violated not only the basic Army Air Forces Regulation No. 60-16 and Second Air Force Memorandum 62-16 but all exceptions thereto. The argument that altitude over water is more difficult to judge than over land and that consequently his mishap may have been due to a mere error of judgment must be given short shrift in the light of his extensive

experience and his unusual ability as a pilot, factors to which recognition was accorded by his appointment as an instructor. Since the lake was only some fifteen hundred feet wide at the point at which it was crossed by the power lines, he could easily have gauged his height by reference to the land on either side (R. 95; Pros. Ex. 2).

Since the accused was violating the flying regulations at the time of his mishap he must be held responsible for the death proximately caused by his negligence. On this point the holdings of the Board of Review are explicit. Thus in II Bull JAG, July 1943, p. 271, sec. 441 (1), it was said that:

"Accused was found guilty of negligently suffering a Government airplane to be destroyed in violation of A.W. 83, of manslaughter in violation of A.W. 93, and of violating flying orders in violation of A.W. 96, and sentenced to dismissal. Accused was a pilot with considerable flying experience and was piloting a plane on a scheduled instrument flight. He flew the plane over a crash boat at an altitude of 25 or 30 feet, and after circling a nearby island he returned toward the crash boat. This time his plane collided with the boat, resulting in the destruction of the plane and damage to the boat as well as causing the death of his two companions in the plane. The evidence showed that the group commander had ordered pilots not to fly below an altitude of 1000 feet. Held: The record is legally sufficient to support the findings and sentence. Flying his plane within such close range of the boat in violation of existing regulations and instructions clearly shows negligence, and establishes his culpability of the charges. Although all the charges involve the same transaction, there was no assessment of multiple punishment nor any prejudice to the rights of the accused. CM 233196 (1943)."

The following language in III Bull, JAG, May 1944, p. 191, sec. 451 (50) is equally pertinent:

"Accused, an officer, was found guilty of involuntary manslaughter in violation of A.W. 93. He was the commanding officer of a detail of troops for the purpose of giving a demonstration of overhead machine gun firing with ball ammunition, and it was alleged that as a result of his failure to use due caution and circumspection for the safety of the soldiers witnessing the demonstration he did 'negligently, carelessly, feloniously, and unlawfully kill' one of the soldier-observers. The accused, who had had considerable experience in such demonstrations, was the sole officer in charge and had full responsibility for the conduct of the demonstration. Deceased was killed by a burst of machine-gun fire during the demonstration.

* * * *

"Another question is as to the quality of the negligence. The demonstration involved obvious perils, and the accused knew

(390)

that slight deviations in the line of fire could produce disastrous results. Notwithstanding this knowledge and the mandates of the Secretary of War with respect to safety precautions, he elected to proceed in either defiance or reckless disregard thereof. It was not for him to set his own judgment over the considered directions of the manual. His negligence was clearly of the quality designated as 'criminal', 'gross' or 'culpable' CM ETO 1554 (1944).

The record leaves no doubt that but for the accused's willful violation of the flying regulations Corporal Peterson would today be alive and contributing his skilled services to the prosecution of the war effort. This is the one ultimate fact which neither the excuses of the accused nor the arguments of defense counsel can obviate or depreciate. The findings of guilty of both Specifications and both Charges have been sustained beyond any reasonable doubt.

The restoration to duty and the appointment of the accused as assistant operations officer subsequent to the accident was seized upon by the defense as evidence of constructive condonation. This contention was utterly without merit, for, even if constructive condonation were applicable to crimes other than desertion (an assumption which is most doubtful), only the authority competent to order trial has the power to condone an offense. Since the accused was assigned to duty and designated assistant operations officer by Captain Burt, the operations officer, who obviously was not such an authority, no condonation was effected.

Several motions of a technical nature were made by counsel for the defense at various stages of the proceedings and were renewed at the conclusion of the case. All were properly denied. The only one requiring discussion was a jurisdictional challenge on the ground that the court at the inception of trial was rendered "unable to function by virtue of the fact that with the exercise of a peremptory challenge there were not sufficient members left to constitute a court" and that thereafter the court could not be "reconstituted by the addition of two members". This position was predicated upon the following quotation from Dig. Op. JAG, 1912-1940, sec. 395 (46):

"The adding of new members to a general court-martial, where, for any cause, the membership is reduced below five during a trial, after material proceedings have been recorded, should be avoided and the trial recommenced, except in rare cases where the delay incident thereto would operate needlessly to inconvenience the service and injuriously affect discipline, or under the accused's rights to a speedy trial."

The principle enunciated is applicable only after witnesses have testified. It is completely irrelevant to cases in which new members have been added before any evidence has been adduced. The correct rule is succinctly stated in the following sentence from Dig. Op. JAG, 1912, page 158, par. LXXV B3:

"A court reduced to four members and thereupon adjourning for an indefinite period does not dissolve itself. In adjourning it should report the facts to the convening authority and wait his orders. He may at any time complete it by the addition of a new member or members and order it to reassemble for business. R. 5, 319, supra; 39, 328, Nov., 1877."

This is precisely the procedure adopted in this case.

7. The accused, who is single, is about 22 years old. He was appointed to the United States Military Academy on 9 September 1940 upon the nomination of Senator L. Frazier of North Dakota and was graduated with the rank of second lieutenant on 1 June 1943. On 1 December 1943 the accused was promoted to first lieutenant. Several months later on 12 September 1944 he was given punishment under Article of War 104 for flying a P-47 airplane with an Army nurse sitting on his lap. He has been on active duty as an officer since 1 June 1943.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the 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. Lipscomb Judge Advocate.
Robert Plummer Judge Advocate.
Daniel H. Golden Judge Advocate.

(392)

SPJGN-CM 270941

1st Ind.

Hq ASF, JAGO, Washington 25, D. C. FEB 8 1945

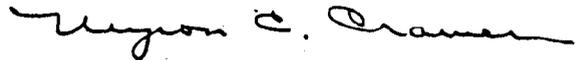
TO: The Secretary of War.

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 Ernest F. Boruski, Jr. (O-26232), Air Corps.

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

3. Colonel Ernest F. Boruski, the father of the accused, presented an oral argument before the Board of Review relative to the issues of the case. Consideration has been given to a letter from M. A. Steele, addressed to General George C. Marshall, and a memorandum from Major General Archer L. Lerch, The Provost Marshal General, addressed to The Judge Advocate General.

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



6 Incls.

- Incl 1 - Record of trial
- Incl 2 - Dft. of ltr. for sig. Sec. of War
- Incl 3 - Form of Executive action
- Incl 4 - Ltr. fr. M. A. Steele
- Incl 5 - Memorandum from Major General Archer L. Lerch
- Incl 6 - Memorandum from Deputy Commander, Army Air Forces

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed but forfeitures and confinement remitted.
G.C.M.O. 174, 20 Jul 1945)

SPJGN-CM 270941

6th Ind

Hq ASF, JAGO, Washington 25, D. C.

TO: The Secretary of War

JUL 14 1945

1. Upon trial by general court-martial First Lieutenant Ernest F. Boruski, Jr. (O-26232), Air Corps, was found guilty of manslaughter, in violation of Article of War 93; and of wrongfully violating paragraph 16a (1), Army Air Forces Regulations 60-16, by flying an airplane within less than 500 feet above the ground, in violation of Article of War 96. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for six months. The Deputy Commander, Army Air Forces and Chief of Air Staff, after personally considering the evidence, stated that,

"This case presents an example of serious, willful violation of flying regulations resulting in the death of a soldier. * * *

"I recommend that the sentence be confirmed and executed but that so much thereof as provides for confinement at hard labor for six months be remitted."

I concurred in this recommendation.

2. On 1 June 1945 you confirmed the sentence in Lieutenant Boruski's case but remitted the forfeitures and confinement imposed. On 8 June Lieutenant Boruski submitted to you through military channels a letter protesting his innocence. Thereafter, on 14 June, following a conference with Lieutenant Boruski and his father, Colonel Ernest F. Boruski, you directed that the sentence of dismissal be held in suspension pending consideration of certain allegedly newly discovered evidence. Lieutenant Boruski's letter to you and five indorsements attached thereto, together with the so-called newly discovered evidence in the form of affidavits, have been received in my office and carefully considered.

3. The principle contentions presented by the accused in his letter are that there was an unwritten policy in his organization that instructors should devote a part of each mission to flying at a low altitude of from 15 to 50 feet and that he was prevented from introducing evidence of such a policy at his trial with the result that his material rights were prejudiced. His position in these particulars is not supported by the record. The reference to the unwritten policy is obviously an afterthought, for at no time was any mention made of it during the trial and it was urged for the first time only after the sentence had been confirmed. It is entirely inconsistent with the defense advanced at the trial to the effect that the accused was permitted to schedule himself on low flying missions at an altitude of 200 feet and that at the time of the accident he believed

he was maintaining that altitude. There is no contention by him in the record to the effect that he thought he was entitled to fly at a lower altitude than 200 feet.

4. The allegedly newly discovered evidence presented by the accused consists of affidavits from First Lieutenant Harold H. Hill and Captain Joseph E. Durham and a radiogram from Major John J. Tuite. The two affidavits state in effect that prior to the time of the offense in question a squadron policy was announced by Major John J. Tuite that in the future flight instructors should spend part of each flight at an altitude of from 15 to 50 feet.

The radiogram procured from Major Tuite reads as follows:

"I don't understand that part of message which states that instructors should have report of each flight at altitude of 15 to 50 feet above ground period about 15th July 1944. I had a meeting in Abilene Texas in which made it a policy of Section D that instructors of scheduled low altitude missions, in connection with training student pilots for combat, should fly at altitudes of approximately 50 feet in designated area.

"Lt E F Boruski accident in connection with GCM was to my knowledge neither as a low altitude nor was it in connection with student training".

In supplemental affidavits Lieutenant Hill and Captain Durham state that instructors in their organization were privileged to decide the type of mission to be flown and that they were also privileged to fly such missions in all areas except those containing populated places or where known obstructions to flight existed. In transmitting the supplemental affidavits the accused, in a letter dated 9 July 1945 addressed to The Judge Advocate General, states that Major Tuite's radiogram confirms the accused's assertion that instructors were given permission to fly at approximately 50 feet and summarizes his contentions, as follows:

- "a. I was ordered to fly in A-25 type airplanes.
- b. Orders required me, as an instructor, to train myself for duty overseas.
- c. Instructors were authorized to schedule the training missions.
- d. Capt. Jones authorized me to fly the particular A-25.
- e. Capt. Jones authorized me to fly over Lake Brownwood, an area designated by 72nd Fighter Wing for low altitude flights.
- f. Major Tuite gave orders to fly at approximately 50 feet.
- g. The obstruction to flight was not shown on the map, nor was it shown in any other way.
- h. Since I flew in compliance with these orders, I can not be held responsible for any accident which was out of my control."

Brigadier General John E. Upston, in his indorsement to the accused's letter has remarked, in connection with the accused's contention on this point, that:

"His statement in paragraph 2 f to the effect that 'policy in the Squadron had been that instructors should devote part of each flight to flying on-the-deck at an altitude of from 15 to 50 feet.' No such authority can be found in any 72nd Fighter Wing directive issued prior to February 1945 nor in directives issued by Abilene Army Air Base prior to the above date. The inclusion of 'on-the-deck' flying which he states was later made in the Instructors Guide was not a part thereof until February 1945, approximately five (5) months after the time of his accident."

Similarly Major General Robert B. Williams, in his indorsement to Lieutenant Boruski's letter, has asserted that:

"The accused was using a type plane (A-25) which was not and never had been authorized for training purposes at Abilene. Low flying for training purposes in such an aircraft was never authorized, particularly when the pilot was accompanied by a passenger. As a senior instructor at Abilene, undoubtedly these facts were known by accused.

* * *

"In any event, it is not considered that such practice, if it existed at the time of the accident, would in any way have affected the accused's case, in view of his sworn testimony that he intended at all times to fly at 200 feet or above and that he never intended to fly on the deck."

5. In Lieutenant Boruski's basic communication he invited attention to his excellent military record. The information received by this office shows, however, that he has been guilty of misconduct, as follows:

(a) Brigadier General Upston reports that on 30 May 1944 Lieutenant Boruski damaged a plane as the result of reckless and careless operation of his airplane.

(b) Major General Williams reports that on 16 August 1944 Lieutenant Boruski violated flying regulations by carrying an Army nurse on his lap in a P-47 airplane from Lowry Field, Colorado, to Abilene Army Air Field, Abilene, Texas. For this offense he was punished under Article of War 104.

(c) The offense which is now under consideration.

(d) Major General Williams reports that subsequent to the accused's trial by general court-martial he was granted

a leave of absence in order to permit him to plead the present case in Washington. He overstayed this leave thereby constituting himself absent without leave from his organization for eight days. He is now in restriction as a result of this recent offense.

6. The questions involved in the present case are whether the accused wrongfully violated the low flying regulations issued by the Army Air Forces and whether his violation was of such a culpably negligent character as to have caused the death of one Corporal Edward L. Peterson. The specific acts of misconduct of the accused prior and subsequent to the instant trial by court-martial are relevant only to the extent that they indicate a propensity for irresponsible and reckless action. As has already been pointed out, he asserted at the trial that throughout his flight over Lake Brownwood he had attempted to maintain an altitude of 200 feet, the minimum altitude for low flying missions prescribed by the wing directives with which he was familiar. It was only after his conviction had been approved by this office that he insisted for the first time that he had been privileged to operate under a more liberal policy, orally pronounced by Major Tuite, authorizing low flying missions at an altitude of from 15 to 50 feet. Had this mitigating circumstance been available to the accused at the trial, it is difficult to understand why it was not advanced when he had so much at stake. Granting him, however, the benefit of every reasonable doubt on this point and assuming that he had ample reasons for not presenting evidence of such a mitigating circumstance, his present contentions cannot exonerate him for the following reasons:

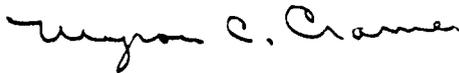
(1) Flights at 50 feet were permitted, according to Major Tuite, only when duly scheduled, and no such flight was in fact scheduled.

(2) Low altitude missions were not authorized to be performed in an A-25 type plane, the plane used by the accused on the occasion in question. In fact the record shows that such planes were only used to tow targets at high altitudes or for administrative cross-country flights and that even the Director of Flying Training at Abilene had no authority to authorize their use at an altitude below 500 feet (R. 108-109).

Since the accused was not on a duly scheduled low flying mission and since he was piloting an A-25 airplane which was never intended for low altitude flying, his flight, at an altitude of between 40 and 50 feet over Lake Brownwood, was a willful violation of regulations and was in reckless disregard of the dangers obviously involved. Accordingly I concur with the opinions of Major General Williams and Brigadier General Upston that the accused has had a fair and impartial trial and that the further extension of clemency is not warranted.

(397)

7. A notice directing that the order of dismissal be ordered executed is attached herewith for your signature, should such action meet with your approval.



5 Incls - 1 Added.
Incl 5 - Form of action

MYRON C. CRAMER
Major General
The Judge Advocate General

(The Adjutant General was authorized and directed to execute sentence of dismissal, by order of the Secretary of War, 16 Jul 1945)

