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1900

1901

1902

1903

1904

1905

1906

1907

1908

<u>CM No.</u>	<u>Accused</u>	<u>Date</u>	<u>Page</u>
280034	Conroy	15 May 1945	1
280050	Carothers	6 Jun 1945	9
280077	McGhee	13 Jun 1945	21
280085	McLean	15 Jun 1945	31
280093	Hughes	5 Jun 1945	47
280115	Semioli	23 May 1945	65
280124	Payne	19 Jun 1945	73
280144	Baer	18 May 1945	89
280159	Murray	30 May 1945	93
280174	Friel	31 May 1945	103
280221	Kline	25 May 1945	109
280227	Stirewalt, Jr.	18 May 1945	115
280244	Wilson	18 May 1945	129
280245	Branche	14 Jun 1945	133
280300	Wallace	23 May 1945	141
280302	Nelson	30 May 1945	149
280307	Ammons	23 May 1945	161
280308	Jackson	23 May 1945	169
280335	Alexander	24 May 1945	177
280356	Weidemann	13 Jul 1945	185
280375	Parent	25 May 1945	193
280450	Buckner	13 Jun 1945	197
280470	Hillary	9 Jun 1945	203
280537	Williams	23 May 1945	215
280538	Corby	27 Jun 1945	219
280581	Campbell	15 Jun 1945	227
280587	Swan	25 May 1945	237
280595	Gilbert	15 Jun 1945	245
280627	Tyree	14 Jun 1945	253
280635	Alexander	5 Jul 1945	265
280656	Messer	7 Jun 1945	279
280661	Terro	8 Jun 1945	285
280665	Matheron	26 May 1945	293
280680	Madison	30 May 1945	299
280747	Duncan	2 Jul 1945	305
280789	Hughes	10 Jul 1945	317
280795	Sherman	6 Jun 1945	329
280802	Easterly	12 Jul 1945	335
280803	Moreland	7 Jun 1945	351
280805	White	30 May 1945	357
280840	Fischer	13 Jun 1945	361
280875	Bechard	20 Jun 1945	385
280882	Hofferber	10 Jul 1945	391
280898	Dannelly	10 Jul 1945	403



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

SPJGK - CM 280034

15 MAY 1945

UNITED STATES)
))
 v.)
))
Second Lieutenant JOHN A.)
CONROY, JR. (O-838744),)
Air Corps.)

ARMY AIR FORCES
EASTERN FLYING TRAINING COMMAND

Trial by G.C.M., convened at Courtland Army Air Field, Courtland, Alabama, 25 April 1945. Dismissal and total forfeitures, and confinement for one (1) year.

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 Specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that Second Lieutenant John A. Conroy, Jr., Section "H", 2115th AAF Base Unit, Army Air Forces Pilot School (Specialized 4-Engine), Courtland Army Air Field, Courtland, Alabama, did, at Buckingham Army Air Field, Fort Myers, Florida, on or about 8 January 1945, feloniously take, steal, and carry away one (1) gabardine wool coat, value about Sixty-five Dollars (\$65.00), the property of Second Lieutenant William R. Landefeld.

He pleaded guilty to and was found guilty of the Charge and its Specification. 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 two years. The reviewing authority approved the sentence but remitted one year of the confinement imposed and forwarded the record of trial for action under Article of War 48.

3. After the effect of his plea of guilty had been explained to accused, accused conferred with defense counsel and announced that he still desired to plead guilty (R. 4,5). No witnesses were offered by the prosecution, but the following stipulation was accepted in evidence as Prosecution's Exhibit 1 with the consent of accused and defense counsel (R. 5):

"It is agreed by and among the Defense, the Accused, and the Prosecution to stipulate to the following facts:

"On 8 January 1945, 2nd Lieutenant William R. Landefeld was the

(2)

owner of one (1) gabardine wool coat, approximate value Sixty-five Dollars (\$65.00). On this date, Lieutenant Landefeld, together with 2nd Lieutenant John A. Conroy, Jr., were stationed at Buckingham Army Air Field, Fort Myers, Florida, and were in the process of clearing that field for shipment to this station.

"It was necessary for each officer clearing the station to undergo a clothing check. Lieutenant Conroy had been away over the week-end, and did not know that he had to have an overcoat or trench coat to clear until informed by his barracks mates on Monday morning. The barracks being empty at the time it was necessary for Lieutenant Conroy to leave for processing, and Lieutenant Landefeld's coat in plain view, he decided to borrow it for the purpose of clearance with intent to return afterwards. Meantime, the coat was missed by the owner who immediately began questioning the other officers of the barracks. Lieutenant Conroy appeared on the scene, driving a motor vehicle and wearing the coat because of the rain. This created an embarrassing situation in that Lieutenant Conroy did not wish to admit that he did not have a coat or that he had borrowed without permission. Trusting to the similarity of the garment to others being commonly worn, Lieutenant Conroy stated that he had not seen the coat, and the owner went away apparently satisfied.

"Later, when Lieutenant Conroy had had a chance to think a little he began to realize the position in which he had placed himself by denying any knowledge of the coat. If he returned the coat to the owner now, it would be still more embarrassing than if he had admitted borrowing when directly questioned. On the other hand, because of a recent marriage and because he had not known that a coat was necessary to clear the station, he found himself low in funds and without a coat. As no one had seen him take the coat, and as no one knew that he had it, at this point he decided that he would keep the coat for his own personal use.

"Lieutenant Conroy kept the coat and brought it with him to Courtland Army Air Field, Courtland, Alabama, where, on or about 16 January 1945, Lieutenant Landefeld saw the coat and notified the proper authorities that Lieutenant Conroy had the coat in his possession.

"At first, Lieutenant Conroy denied Lieutenant Landefeld's ownership and claimed the coat as his own. Later the same day and without duress, he voluntarily admitted that the coat was Lieutenant Landefeld's, and voluntarily returned it to the owner."

4. Accused, after a full explanation of his rights, elected to make a sworn statement, and reiterated in substance the facts contained in the stipulation (R. 5,6,11,12). Testifying as to his personal history, he stated that he was born and raised in a small farming community in Florida, where he knew and was favorably known by everyone (R. 9,10). He attended grammar school and high school in nearby towns, graduating in May 1941 (R. 12,13). He worked at an airplane factory for fourteen months until he was "drafted at the age of 19, on 4 March 1943" (R. 8). He was commissioned on 20 November 1944 and was married the following day. He and

his wife lived in a trailer at Fort Myers, Florida, where he attended a "co-pilot school" until 5 January 1945, at which time he was sent to Courtland Army Air Field, Courtland, Alabama (R. 7,8). As a civilian he had had no experience in handling money, the largest amount over which he "had control" being one month's salary of \$150.00 (R. 8). Referring to his family, accused stated that as a result of an attack of infantile paralysis which his mother had suffered when she was young, her health "had been poor all her life" and she was compelled to walk on crutches; and that his father, who was a farmer, had suffered a heart attack on 31 January 1944 (R. 10).

On examination by the court, accused stated that when he took the coat he "realized" that he "was borrowing" it, but that he had no intention of keeping it. He considered Lieutenant Landefeld a close friend of his and explained his failure to admit possession of the coat, when the latter inquired about it, in the following manner:

"Well, sir, I was very embarrassed at the time, me having the coat, and him being in such an upstir about losing it" (R. 11).

His sole explanation of his retention of the coat was:

"I decided I was very low in funds at this time and I needed a coat. And it would have been very embarrassing after saying I had not seen the coat" (R. 12).

5. Since all material and pertinent facts are contained in the stipulation offered by the prosecution as its Exhibit 1, and are not affected by the accused's testimony, a repetition of the evidence is not necessary for the purpose of the discussion. The record thus shows that accused, without the permission, knowledge or consent of one of his barracks mates, took a wool coat, belonging to the latter, with the intention of using it to enable him to obtain a clearance from his station, and of then returning it to its owner. As a result of placing himself in an equivocal and embarrassing position by denying to the owner that he had seen the coat, and because he needed a coat to clear the station, and "found himself low in funds," accused decided that he would keep the coat for his own personal use.

Accused pleaded guilty to the larceny of this coat, the stipulated value of which was \$65, as charged. Larceny is described by the Manual for Courts-Martial, 1928 (par. 149g), as:

"* * * the taking and carrying away, by trespass, of personal property which the trespasser knows to belong either generally or specially to another, with intent to deprive such owner permanently of his property therein. (Clark)"

Normally the "felonious or evil intent" must exist at the "time of the taking

(4)

and carrying away" (M C M, p. 173). However, the Manual (p. 173) points out the following exception to the general rule:

"* * * However, when the original taking was wrongful, a subsequent felonious or evil intent makes the offense larceny in all cases in which there is concurrently with such intent, although subsequent to the taking a fraudulent conversion of the goods."

While this latter rule does not exist in all of the States, it is generally accepted as the correct one, as evidenced by the following extracts:

"To constitute larceny it is not only necessary that there shall be a trespass, but, as will be hereafter explained, it is also necessary that there shall be felonious intent, and they must always concur in point of time. It is not always necessary, however, in order that there shall be such a concurrence of trespass and felonious intent, that there shall be such an intent at the time the property is first taken. If a man wrongfully takes another's property without his consent, he commits a trespass, however innocent his intention may be. The trespass continues during every moment in which he holds the property without right, and if he afterwards forms and carries out the felonious intent to steal it, there is then the concurrence of trespass and felonious intent necessary to make out the crime of larceny." (Clark and Marshall on Crimes, 4th Edition, par. 318, page 418.)

"The statement is frequently met with that to constitute larceny the intent to steal must exist at the time the taker obtains possession of the property, and that it is not enough that this intent came into existence at the time he converted the property to his own use. * * * But it does not state a rule of general recognition where the original taking was without the consent of the owner and was consequently a trespass. * * * If, after such taking, the property is converted by the taker to his own use, the conversion in most jurisdictions is held to constitute larceny, even though the felonious intent did not exist at the time of the taking; but in some jurisdictions the contrary rule seems underscoring supplied to obtain." (36 Corpus Juris 772.)

Accused's action in taking Lieutenant Landefeld's coat without his knowledge, permission or consent, was wrongful and constituted a trespass, despite his stipulated intention merely to borrow it (Clark and Marshall, supra; CM 207466, Philpott, 8 B.R. 342; CM 208699, Crowder, 9 B.R. 27, Dig. Ops. JAG, 1912-40, 451 (40) x). Consequently when he later decided permanently to retain the coat and thus to deprive the owner of his property therein, and carried out his felonious intent, the larceny was consummated. The Board of Review, therefore, is of the opinion that the record of trial is legally sufficient to support the findings of guilty.

6. Attached to the record of trial is a plea for clemency, filed by the defense counsel, in which he urges that the sentence imposed be suspended. In support of the plea there are attached letters from the County Judge, Ex-Sheriff, Tax Collector, Tax Assessor, and High School Principal of Hardee County, Florida, in which is located accused's home, and from a local minister and merchant, all attesting to accused's high character and the splendid record of his parents. By indorsement, the trial court unanimously approved that part of the request only "which relates to the suspension of confinement at hard labor."

7. War Department records show that accused is almost 22 years of age, and unmarried, but the record of trial shows that he was married on 21 November 1944. He graduated from high school in 1941, and worked in an airplane factory for fourteen months. He was inducted into the Army on 3 March 1943, and received his commission as Second Lieutenant, Air Corps, Army of the United States, on 20 November 1944, upon completion of the prescribed training as an airplane pilot.

8. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. A sentence of dismissal is authorized upon conviction of a violation of Article of War 93.

Wm. G. Goss, Judge Advocate.
Charles Stebbins, Judge Advocate.
Wm. M. Magee, Judge Advocate.

(6)

SPJGK - CM 280034

1st Ind.
21 JUN 1945

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

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556 dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant John A. Conroy, Jr. (O-838744), Air Corps.

2. Upon trial by general court-martial this officer pleaded guilty to, and was found guilty of, the larceny of a coat belonging to a fellow officer, valued at \$65, in violation of Article of War 93. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for two years. The reviewing authority approved the sentence but reduced the period of confinement to one year, and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence as approved by the reviewing authority and to warrant confirmation of the sentence.

On the morning that accused, a 21 year old airplane pilot, was to leave for a new station he learned that in order to clear the field where he was located it was necessary for him to have an overcoat or trench coat. A coat belonging to one of his barracks mates, who was also being transferred, was hanging in an adjoining room. In the absence of the owner, accused borrowed the coat with the intention of returning it after he had completed his clearance. However, when upon returning to the barracks he was questioned by the owner, who had been looking for the coat, accused on the spur of the moment denied that he had seen it. Later, realizing that he had placed himself in an embarrassing and equivocal position which it would be difficult for him to explain, that he needed a coat in order to clear the field, and that, because of the expenses resulting from his recent marriage, he was not in a position to purchase one, he decided to keep the coat. About two weeks later the coat was seen and identified by the true owner.

Attached to the record of trial is a petition for clemency filed by defense counsel. The plea for clemency is based on accused's youth, his value to the service as a trained pilot, his previous good record in the Army and in civilian life, his lack of experience in handling money, the temporary shortage of funds and lack of social adjustment resulting from his recent commission and marriage, and the absence of wrongful intent at the time that the coat was originally borrowed. The petition advanced

the view that accused's offense was not one deliberately committed, but was the result of "temporary emotional instability and maladjustment to the circumstances in which he found himself." Attached to the petition, which requests that the sentence of dismissal and the confinement imposed be suspended, are letters from several officials and residents of accused's home county attesting the high character and standing of accused. The trial court approved accused's plea for clemency to the extent of unan- imously recommending that so much of the approved sentence as imposed confinement at hard labor be suspended.

The Staff Judge Advocate in his review states:

"In view of the background of the accused the facts and circumstances surrounding the case and the many pleas for clemency of practically everyone having any connection with the accused, it is believed that one year of the two year sentence should be remitted at this time. The exercise of further clemency is left to the discretion of the confirming authority."

In view of all the circumstances of the case I recommend that the sentence as approved by the reviewing authority be confirmed but that the forfeitures and confinement be remitted and that the sentence as thus modified be sus- pended during good behavior.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.



- 3 Incls
- 1. Record of trial
- 2. Form of action
- 3. Ltr fr Col Gross,
28 May 1945 w/incl

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed, forfeitures and confinement remitted. As modified execution suspended. GCMO 320, 9 July 1945).



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

SPJGH-CM 280050

6 JUN 1945

UNITED STATES

v.

First Lieutenant LEONARD
W. CAROTHERS (O-510007),
Air Corps.

SAN BERNARDINO
AIR TECHNICAL SERVICE COMMAND

Trial by G.C.M., convened at
Los Angeles, California, 27,
28 and 29 March 1945. 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 85th Article of War

Specification: In that First Lieutenant Leonard W. Carothers, 18th Army Air Forces Base Unit (Motion Picture Unit), Culver City, California, was, while on an authorized flight from Metropolitan Airport, Van Nuys, California, to Davis-Monthan Field, Tucson, Arizona, in a Government C-60 type aircraft, on or about 7 February 1945, found drunk on duty as the pilot of said aircraft.

CHARGE II: Violation of the 95th Article of War

Specification 1: In that First Lieutenant Leonard W. Carothers, * * *, did while on an authorized flight from Metropolitan Airport, Van Nuys, California, enroute to Davis-Monthan Field, Tucson, Arizona, on or about 7 February 1945, operate a Government C-60 aircraft while under the influence of intoxicating liquor.

Specification 2: In that First Lieutenant Leonard W. Carothers, * * *, did, while piloting a Government C-60 aircraft on an

authorized flight from Metropolitan Airport, Van Nuys, California, enroute to Davis-Monthan Field, Tucson, Arizona, on or about 7 February 1945, imbibe intoxicating liquor.

Specification 3: In that First Lieutenant Leonard W. Carothers, * * *, did, while on an authorized flight from Metropolitan Airport, Van Nuys, California, enroute to Davis-Monthan Field, Tucson, Arizona, on or about 7 February 1945, offer intoxicating liquor to Private Nathan L. Frisbie, who was then acting as crew chief of said aircraft.

CHARGE III: Violation of the 96th Article of War

Specification 1: In that First Lieutenant Leonard W. Carothers, * * *, did, while on an authorized flight from Metropolitan Airport, Van Nuys, California, enroute to Davis-Monthan Field, Tucson, Arizona, on or about 7 February 1945, operate a Government C-60 aircraft while under the influence of intoxicating liquor, to the prejudice of good order and military discipline.

Specification 2: In that First Lieutenant Leonard W. Carothers, * * *, did, while piloting a Government C-60 aircraft on an authorized flight from Metropolitan Airport, Van Nuys, California, enroute to Davis-Monthan Field, Tucson, Arizona, on or about 7 February 1945, imbibe intoxicating liquor, to the prejudice of good order and military discipline.

Specification 3: In that First Lieutenant Leonard W. Carothers, * * *, did, while on an authorized flight from Metropolitan Airport, Van Nuys, California, enroute to Davis-Monthan Field, Tucson, Arizona, on or about 7 February 1945, offer intoxicating liquor to Private Nathan L. Frisbie, who was then acting as crew chief of said aircraft, to the prejudice of good order and military discipline.

Specification 4: In that First Lieutenant Leonard W. Carothers, * * *, did, while on an authorized flight from Metropolitan Airport, Van Nuys, California, enroute to Davis-Monthan Field, Tucson, Arizona, on or about 7 February 1945, operate a Government C-60 aircraft in a reckless and careless manner so as to endanger the safety of the enlisted personnel in the aforesaid aircraft, to the prejudice of good order and military discipline.

Specification 5: In that First Lieutenant Leonard W. Carothers, * * *, did, while on an authorized flight from Metropolitan

Airport, Van Nuys, California, enroute to Davis-Monthan Field, Tucson, Arizona, on or about 7 February 1945, at or near Coolidge Army Air Field, Arizona, operate a Government C-60 type aircraft in a reckless and careless manner so as to endanger the aforesaid aircraft and friendly aircraft in the air and property on the ground, in violation of Paragraph 1a, Army Air Forces Regulation Number 60-16D, dated 20 September 1944, to the prejudice of good order and military discipline.

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

3. At approximately 11:00 a.m. (apparently Pacific War Time) on 7 February 1945 a C-60A, a twin-engine plane, took off from Metropolitan Airport, Van Nuys, California, for Davis-Monthan Field, Tucson, Arizona, a distance of some 586 miles. On board were accused and Private Nathan L. Frisbie who were detailed as pilot and crew chief, respectively, to fly two enlisted men, Staff Sergeant James H. Scanlon and Private John J. Harris to Tucson (R. 8, 31, 46, 74, 75). Accused and Private Frisbie sat in the pilot's compartment while the two passengers sat in the rear. There was a door between the pilot's compartment and the rear which was closed, and a curtain over its window drawn, after they had been in the air about 20 minutes (R. 16, 32, 47). Accused had four-fifths of a quart of Southern Comfort with him and both he and, at his suggestion, Private Frisbie had a drink. By the time the plane was over Blythe, California, both had had two more drinks. Between Blythe and Phoenix, Arizona, accused had "several" more drinks in which Private Frisbie declined to join him (R. 9, 10). They flew over Phoenix, continued on for about 20 minutes, and then circled back over the city. Private Frisbie had some difficulty in communicating with the air tower at Phoenix to check their position but was finally successful. By this time the liquor had begun to affect accused. He was "more or less blank, he stared, and his talking was labored." Private Harris had occasion to observe accused when Private Frisbie left the pilot's compartment for a short time. Accused's eyes were "glassy" and he would "over-control" the plane; that is, if the plane fell off to the left, accused instead of leveling it, would go to the other extreme and the plane would fall off to the right. In the opinion of both Staff Sergeant Scanlon and Private Harris accused was drunk. This so disturbed the latter that he asked Private Frisbie to keep his hands on the controls (R. 10, 11, 13, 35, 41, 48, 55). After flying over Phoenix for the second time they headed out over the desert. Accused's flying became more "irregular." Several times he put the plane into a "semi-stall" and it was necessary for Private Frisbie to push forward on the "stick" to level the plane. Accused was also making "sharp turns"

and flying around in a circle. When Private Frisbie asked if he knew where he was accused replied that he did not (R. 11, 22, 36, 51). Becoming more alarmed Private Harris and Sergeant Scanlon donned parachutes and only refrained from jumping because they felt they did not have sufficient altitude (R. 36, 37, 51, 52). By using a map Private Frisbie was able to locate Coolidge Field which is some sixty miles from Davis-Monthan Field at Tucson, their destination, and he told accused to circle it. Over the field, Private Frisbie asked the operator there for a "long count" - a device used to assist in tuning the radio - but received no reply. He then asked, and was given, a "compass heading" for Tucson and reported it to accused. The latter, however, decided to land at Coolidge Field and Private Frisbie, accordingly, requested landing instructions. Accused asked Private Frisbie to land the plane but the latter declined (R. 11, 12, 20, 59, 60). They were told to fly a left-hand pattern and land on runway #5. Flying a left-hand pattern means that "the plane makes a 180 degree or 360 degree turn to the left, and fly (sic) for that runway" (R. 28, 60). Accused made the turn as directed but came into the runway from the wrong direction - with the wind - and because of this and the fact that a P-38 was taking off, Private Frisbie pulled back "the stick" to prevent a landing (R. 14). Accused made another turn to the left and came in on runway #5 but as he made the final approach the field informed him that the landing gear had not been lowered and he was forced to make another attempt to land. This time, however, he flew a right-hand pattern - in violation of instructions - but was too wide of the runway to land. Accused made a left turn and for the fourth time approached the runway. He came in quite high and began to drop with the nose of the plane higher than the tail - "mushing in." Afraid that the plane might stall Private Frisbie pushed "the stick" forward and leveled the plane. Although the runway was 5500 feet long, accused landed on the last 1200 feet with the left wheel off it. He ground-looped to the right (R. 14, 15, 37, 38, 52, 53, 61, 63, 78, 88; Pros. Ex. B). Before the plane was landed Staff Sergeant Scanlon and Private Harris made preparations to leave and as soon as it stopped both jumped out the back door, the former forgetting his cigarettes and camera (R. 38, 39, 54). Both were badly frightened (R. 79). Accused taxied the plane off the runway to the parking area but he had difficulty in keeping it on a straight line (R. 91). Private Frisbie alighted and then returned to the plane to lock the controls. Accused asked him if anybody had been hurt; at what place they had landed; and the reason for landing there (R. 27). It was then 2:57 p.m. (Pacific War Time). Approximately four hours had elapsed since they left Van Nuys. At normal cruising speed of 180 miles per hour the flight should have taken 2½ hours (R. 66, 75).

Accused had trouble in getting out of the plane. He clung to the door for support. His shirttail was out, he had no blouse on, his tie was askew, his hat was cocked on the back of his head, he was not wearing any insignia, and his speech was impaired. In the opinion of First Lieutenant Gilbert L. Warrick and First Lieutenant Charles H. Onasch, Director of Operations and Provost Marshal at Coolidge, respectively,

accused was drunk (R. 81, 91). The bottle from which accused had drunk was removed from the plane and found to be somewhere between one quarter and one half full. Private Frisbie had consumed only about one half inch of liquor from the bottle, although he had spilled some of it on his shirt when he took the first drink (R. 24, 26, 82; Pros. Ex. A). Accused was arrested and about one hour later taken to the hospital for a blood-alcohol test. At that time he was staggering and had to be supported by the two guards who accompanied him. He was unable to make an intelligible reply when asked his name and it was necessary to secure it from his A.G.O. card. In the opinion of Lieutenant Herman Kolkowitz, medical inspector on duty at the hospital, accused was drunk (R. 101-104).

4. Captain Raymond M. Fahringer, Air Corps, testified for the defense. He stated that he has had 17 years experience in aviation and has been a licensed pilot for 10 years. He has flown approximately 3000 hours and is co-author of a textbook on aviation, the Student Pilot's Handbook. He stated further that if more than one person attempted to fly a dual control plane at the same time it would result in erratic flying. However, unless all of the controls are accessible to the pilot and he is competent and familiar with the plane, a ship the size of a C-60A should have a co-pilot. Normally the co-pilot handles the landing gear. A plane stalls at the point where its forward progress is so slow that its wings are no longer able to sustain the weight of the plane in flight. Each plane has a "stalling speed" but the witness was unable to say at what speed a C-60A would stall. He was of the opinion that if that type of plane was to stall 50 feet off the ground and "the stick" were pushed forward, the plane would crash. A plane is "mushing in" when its weight is such that it cannot be sustained in level flight by the wings. It is caused by a semi-stall or by an accelerated stall. If a plane were in a semi-stall and "the stick" were pushed forward it would have a tendency to increase the speed of the plane and possibly eliminate the stall. A ground loop is a very abrupt turn on the ground. Normally if a plane landed with the left wheel off the runway in the dirt it would ground loop to the left, if at all, because of the drag on the left wheel. The witness always removed his blouse and made himself comfortable when flying. It is a practical necessity to hold on to the door when getting out of a C-60A plane (R. 105-110).

First Lieutenant Roland W. Kibbee testified that he has held a private pilot's license since 1937. He stated that it would not be "highly irregular" for a pilot approaching a strange field to make more than two attempts to land. The witness usually takes off his blouse when flying and in alighting from the plane he holds onto the door (R. 111, 116).

Mr. Al Gilhousen testified that he has been flying since 1919. He has had 18,000 hours of flying and spent 14 years as a pilot for

commercial airlines. For the last 6 years he has been a test pilot for the Lockheed Aircraft Corporation, producer of the C-60A and as such he has had 1,000 hours flying experience with the C-60A and the Hudson, which is quite similar to it. He, too, was of the opinion that a C-60A would crash if it were in a stall 50 feet from the ground and "the stick" were pushed forward, for the reason that there would not be enough height for the plane to recover. A plane is not considered to have "ground-looped" unless it makes a sharp turn of at least 180°. It is not unusual for a pilot to make two turns around the field before coming in on the final approach (R. 112-117).

The accused, after an explanation of his rights, elected to remain silent.

5. a. The Specification. Charge I:

This Specification alleges that accused was found drunk on duty as a pilot of a "C-60 type aircraft" while on an authorized flight from Van Nuys, California, to Tucson, Arizona, in violation of Article of War 85. There is an abundance of evidence, all of it uncontradicted, that accused was drunk in the sense that the "rational and full exercise of [his] mental and physical faculties [were] impaired" (MCM, 1928, par. 145). A more difficult question is presented, however, by the allegations that accused was on duty and engaged in an authorized flight. If accused took the plane without authority and, in the conventional phrase, was "on a frolic of his own", it seems clear that he would not be on duty within the meaning of Article of War 85. Consequently, some proof is necessary to establish that this flight was ordered by superior, competent authority. At the request of the prosecution, directed to this end, the court took judicial notice of paragraph 3, Special Orders No. 32, 6 February 1945, detailing accused and Private Frisbie on temporary duty for the purpose of ferrying personnel from Van Nuys to Tucson. Similarly, the court took judicial notice of paragraph 2, Special Orders No. 32, 6 February 1945, Headquarters, 18th Army Air Forces Base Unit (Motion Picture Unit), Culver City, California, directing that Staff Sergeant James F. Scanlon and Private John H. Harris proceed from Culver City to Tucson on seven days temporary duty. Although the record does not reveal which Headquarters issued the orders referring to accused and Private Frisbie we assume from the coincidences of dates and numbers that it was the same Headquarters which issued the order dealing with Staff Sergeant Scanlon and Private Harris, viz: Headquarters 18th Army Air Forces Base Unit (Motion Picture Unit), Culver City, California. Paragraph 125, Manual for Courts-Martial, 1928, authorizes the court to take judicial notice of "general orders, bulletins, circulars and general court-martial orders of the authority appointing the court and of all higher authority". (underlining supplied). The court was appointed by Headquarters, San Bernardino Air Technical Service Command, obviously an authority higher than that of the 18th Army Air Forces Base Unit. While the itemization in the Manual

of matters of which the court can take judicial notice is not exhaustive, it has been held that a court-martial has no power to take judicial notice of the general orders of an authority lower than that which appointed it (CM 207523, McKinnon, 8 B.R. 347). The rule is similar as to circulars (CM 244946, Forbes, 29 B.R. 73). We think the principle of these cases applies with equal, if not more, force to special orders and, accordingly, we hold that the court was in error in judicially noticing the orders in question. There is, however, sufficient evidence to establish that accused was detailed from the 18th Army Air Forces Base Unit to fly Staff Sergeant Scanlon and Private Harris to Tucson and that the latter were under orders to proceed there and accordingly, we hold that the record is legally sufficient to support the finding of guilty of this Specification.

b. Specification 1 of Charge II and Specification 1 of Charge III:

Specification 1 of Charge II alleges that accused operated a "C-60 aircraft" under the influence of intoxicating liquor while on an authorized flight from Van Nuys, California, to Tucson, Arizona, in violation of Article of War 95. Specification 1 of Charge III is laid under Article of War 96 and contains the same allegations as Specification 1 of Charge II with the addition of an allegation that the conduct described therein is "to the prejudice of good order and military discipline." There is no doubt that accused was drunk in the popular sense of the word. The quantity of liquor he consumed in a relatively short period, his inability to pilot the plane properly, the disarray of his clothing, his ignorance as to his whereabouts, and the opinion of all the witnesses who saw him are ample proof of that fact. It is unnecessary for us to decide whether accused was grossly drunk. "Whether in a particular instance drunkenness is of such a character as to constitute conduct unbecoming an officer and a gentleman depends not only upon the degree of intoxication but also upon the time, place, occasion and other attendant circumstances" (CM 232604, Brennan, 19 B.R. 139). On accused's skill as a pilot there depended not only the lives of his passengers and crew but the lives of others. The slightest miscalculation would very likely cause a disaster. When an officer of the Army of the United States occupies such a position of responsibility and by the use of intoxicating liquor voluntarily unfits himself from performing it to the extent that accused did then we think he has violated Article of War 95. A fortiori he is guilty of conduct "to the prejudice of good order and military discipline" in violation of Article of War 96. It is well settled that there is no unreasonable multiplication of charges in laying identical specifications under Articles of War 95 and 96. The record, therefore, is legally sufficient to support the findings of guilty of Specification 1 of Charge II and Specification 1 of Charge III.

(16)

c. Specifications 2 and 3 of Charge II and Specifications 2 and 3 of Charge III:

Specification 2 of Charge II alleges that accused imbibed intoxicating liquor while acting as a pilot on an authorized flight from Van Nuys, California, to Tucson, Arizona, and Specification 3 of that Charge alleges that on the same flight accused offered intoxicating liquor to Private Nathan L. Frisbie who was acting crew chief on the plane, both in violation of Article of War 95. Specifications 2 and 3 of Charge III are laid under Article of War 96 and contain the same allegations, respectively, as Specifications 2 and 3 of Charge II with the addition of an allegation that the conduct described therein was "to the prejudice of good order and military discipline." As to Specification 2 of Charges II and III we think that they state an offense violative of the Articles of War 95 and 96, respectively. Whether or not the drinking in a particular instance violates Article of War 95 or 96 may be determined by the amount consumed. The proof shows that accused imbibed enough intoxicating liquor to become quite drunk. We have already held that accused in piloting the plane in that condition violated Article of War 95 and similarly we think that in drinking the quantity of liquor necessary to get himself in that condition he is guilty of an infraction of the same article. Of course, he is also guilty of a violation of Article of War 96. The record is, accordingly, legally sufficient to sustain the findings of guilty of Specification 2 of Charges II and III. As to Specification 3 of Charges II and III, it is clear that accused proffered a bottle of alcoholic liquor to Private Frisbie on several occasions during the flight. Accused was unconcerned as to the amount Frisbie consumed or as to the effect such consumption might have upon him. It has been held to be disgraceful conduct violative of Article of War 95 for an officer to offer intoxicating liquor to an enlisted man who is on duty driving a Government vehicle (CM 247161, Bradford, 30 B.R. 279). Clearly the conduct of accused in repeatedly offering intoxicating liquor to Frisbie, an enlisted man, who was performing a duty which required full and complete possession of all his mental and physical faculties constituted a violation of that Article. That such conduct also constituted a violation of Article of War 96 is clear (CM 236868, Minton, 23 B.R. 159). The record of trial is legally sufficient to support the findings of guilty of Specification 3 of Charges II and III.

d. Specification 4 of Charge III:

This Specification alleges that on the same flight with which all the foregoing Specifications are concerned accused operated the plane in a reckless and careless manner so as to endanger the safety of the enlisted personnel therein in violation of Article of War 96. The evidence shows that accused, due to his intoxication, repeatedly put the plane into a semi-stall and that it was only the alertness and ability of Private Frisbie that prevented it from stalling and subsequently crashing. Over Coolidge Army Air Field, accused attempted to

land in the wrong direction and again if it were not for Private Frisbie would probably have crashed into a plane which was taking off. On his second attempt to land accused was coming into the runway when the field notified him that his landing gear was not down. He then flew a right-hand pattern, contrary to instructions and on his fourth and final attempt to land, again almost stalled the plane only to have Private Frisbie once more seize the controls and level it off. When he finally did get the plane on the runway he managed it so unskillfully that he ground-looped. In becoming drunk accused was shockingly heedless of the lives and safety of the occupants of the plane, and none the less so because his own life was similarly endangered. This is not a case where because of intoxication accused was unable to react promptly and energetically when confronted with an emergency. The evidence shows that accused himself created the emergency. By his fumbling with the controls he repeatedly put the plane in danger of crashing. We think that he showed such lack of care in operating this plane that his conduct may properly be described as "reckless." The record accordingly is legally sufficient to support the finding of guilty of this Specification.

e. Specification 5 of Charge III:

This Specification which likewise is laid under Article of War 96 alleges that accused operated a C-60 type aircraft at or near Coolidge Field in a reckless and careless manner so as to endanger "the aforesaid aircraft and friendly aircraft in the air and property on the ground, in violation of Paragraph 1a, Army Air Forces Regulation Number 60-16D, dated 20 September 1944." This regulation provides that,

"No aircraft will be operated in a reckless or careless manner, or so as to endanger friendly aircraft in the air, or friendly aircraft, persons or property on the ground."

The evidence as to accused's handling of the plane while he was over Coolidge Field has been summarized in paragraph 5d of this opinion. Likewise our reasons for holding that accused's conduct was reckless have been set out there and need not be repeated here. Obviously this recklessness endangered the aircraft he was piloting. A crash would in all probability have severely damaged, if not destroyed, that plane. Also, it may very well have destroyed or damaged planes, hangars, or what-else might have been in the vicinity when it crashed. There is, however, no evidence to show that accused endangered friendly aircraft "in the air." There is testimony that Private Frisbie frustrated the first attempt to land because a P-38 was taking off, but there is no evidence as to whether it was on the ground or in the air. In addition there is some indication in the record that there was at least one plane in the air when accused was over the field but we cannot conclude from that alone that it was in fact endangered by accused's handling of his plane. The record accordingly

(18)

is legally sufficient to sustain only so much of the finding of guilty of this Specification as involves a finding that accused operated this plane in a reckless and careless manner so as to endanger his own plane and property on the ground in violation of the mentioned regulation.

6. War Department records show that accused is 44 years of age and is married. He attended high school but did not graduate. From 1930 until he entered the Army he worked as a "mapping pilot" for various concerns. He was appointed a first lieutenant, Army of the United States, on 7 January 1943 and reported for active duty on 26 January 1943.

7. The court was legally constituted and had jurisdiction of the accused and the subject matter. 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 only so much of the finding of guilty of Specification 5 of Charge III as involves a finding of guilty that accused operated a Government plane in a reckless and careless manner so as to endanger the aforesaid plane and property on the ground in violation of paragraph 1a, Army Air Forces Regulation No. 60-16D, dated 20 September 1944, and legally sufficient to support all other findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 96 and is mandatory upon conviction of a violation of either Article of War 85 or Article of War 95.

Thomas M. Jaffy, Judge Advocate

William H. Lambrell, Judge Advocate

Robert E. Newthau, Judge Advocate

SPJGH-CM 280050

1st Ind

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

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Leonard W. Carothers (O-510007), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of being drunk on duty while piloting a Government aircraft, in violation of Article of War 85 (Chg. I & Spec.); guilty of operating a Government aircraft while under the influence of liquor, of imbibing liquor while piloting such aircraft on an authorized flight, and of offering liquor to an enlisted man serving as his crew chief on said flight, each in violation of both Articles of War 95 and 96 (Chg. II, Specs. 1-3 incl., Chg. III, Specs. 1-3 incl.); guilty of operating a Government aircraft in a reckless manner endangering the safety of enlisted men aboard the plane, in violation of Article of War 96 (Chg. III, Spec. 4); and guilty of operating said aircraft in a reckless manner endangering the aircraft itself, friendly aircraft in the air and property on the ground, in violation of Article of War 96 (Chg. III, Spec. 5). He was sentenced to dismissal. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support only so much of the finding of guilty of Specification 5, Charge III as involves a finding of guilty of recklessly operating the aircraft so as to endanger the aircraft itself and property on the ground, and legally sufficient to support all other findings of guilty and the sentence and to warrant confirmation of the sentence. I concur in that opinion. On 7 February 1945 accused, accompanied by an enlisted man as crew chief and two enlisted men traveling under official orders, piloted a Government aircraft from Metropolitan Airport, Van Nuys, California, on an authorized flight bound for Davis-Monthan Field, Tucson, Arizona. During the flight accused consumed so much of an alcoholic beverage known as Southern Comfort that he became drunk while operating the plane. He also offered some of the liquor to his crew chief who consumed only a portion of that offered. In his drunken condition accused over-controlled the plane, put it into a semi-stall several times from which it was recovered only by prompt control action of his crew chief, lost all ability to operate it on compass direction and flew it in circles. When finally the plane approached an air field, which was not its destination however, accused

(20)

sought to land it. He made four attempts to do so during which he violated landing instructions given by the control tower, sought to land the plane once without lowering its wheels and again as another plane was about to take off from the field, and on one approach almost stalled the plane from which it was recovered only by prompt control action of his crew chief. He finally landed the plane on the last 1200 feet of a 5500 feet runway with but one wheel of the plane on the runway causing the craft to ground-loop before coming to rest.

Transmitted with the record of trial is a Memorandum for The Judge Advocate General, dated 2 June 1945, from the Commanding General, Army Air Forces, and signed by Lieutenant General Ira C. Eaker, Deputy Commander, Army Air Forces. It is recommended therein that the sentence be confirmed and ordered executed. The following sentiments concerning accused's conduct are also expressed in the memorandum:

"* * * His outrageous conduct in piloting an airplane while under the influence of alcohol could not be condoned had he been on a solo flight. As it is his glaring and reckless disregard for the safety of his passengers brands his performance as reprehensible in the very highest degree. His long experience as a commercial pilot and his mature age aggravate the seriousness of his offenses. It was only extreme good fortune which prevented serious injury and possible death to himself and the three enlisted men who were with him on the flight."

I concur with the opinion expressed by the Commanding General, Army Air Forces, and I recommend that the sentence, although inadequate, be confirmed and carried into execution.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.



- 3 Incls
1. Record of trial
2. Ltr fr Hq AAF,
2 Jun 45
3. Form of action.

MYRON C. CRAMER
Major General
The Judge Advocate General

Findings disapproved in part. Sentence confirmed. GCMO 292, 7 July 1945).

twenty five and $\frac{00}{100}$ - - - - - Dollars

Account No. 1526

/s/ Lt. Arthur W. McGhee O-745922
Plant Park, Tampa, Fla.

and by means thereof, did fraudulently obtain from the Exchange National Bank Twenty-five (\$25.00) dollars, he the said Lieutenant Arthur W. McGhee, then well knowing that he did not have and not intending that he should have sufficient funds in the Citizens and Southern National Bank, Columbia, South Carolina, for the payment of said check.

Specification 2: Same as Specification 1 but alleging check drawn on same bank, at Tampa Florida, 14 December 1944, in the amount of \$40.

Specification 3: Same as Specification 1 but alleging check drawn on same bank, at Tampa Florida, 16 December 1944, in the amount of \$25.

Specification 4: Same as Specification 1 but alleging check drawn on same bank, at Tampa Florida, 17 December 1944, in the amount of \$25.

Specification 5: In that Arthur W. McGhee, Second Lieutenant, Air Corps, Seventh Detachment, 301st AAF Base Unit, Squadron "R", Third Air Force Personnel Depot, Plant Park, Tampa, Florida, did, at Tampa, Florida, on or about 18 December 1944, with intent to deceive, wrongfully and unlawfully make and utter to the First National Bank, Tampa, Florida, a certain check in words and figures as follows to wit:

Dec 18 1944 No. 64

Bank of America
8th and J St. Sacramento, Calif.

Pay to the
Order of Cash - - - - - $\frac{00}{100}$ \$50.
fifty and $\frac{00}{100}$ - - - - - Dollars

/s/ Lt. Arthur W. McGhee O-745922
7th Det. Plant Park, Tampa, Fla.

and by means thereof, did fraudulently obtain from the First National Bank, Tampa, Florida, fifty (\$50.00)

dollars, he the said Lieutenant Arthur W. McGhee, then well knowing that he did not have and not intending that he should have any account with the Bank of America for the payment of said check.

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

Specification 1: In that Second Lieutenant Arthur W. McGhee, Air Corps, Seventh Detachment, 301st Army Air Forces Base Unit, Squadron "R", Third Air Force Personnel Depot, Plant Park, Tampa, Florida, did, at Tampa, Florida, on or about 18 December 1944 with intent to deceive, wrongfully and unlawfully, make and utter to the Exchange National Bank, Tampa, Florida, a certain check, in words and figures, to wit:

Dec 18 19 44 No. 63

Bank of America
8th and J. St. Sacramento, Calif.

Pay to the
order of Cash ----- \$ 40.00

Forty and 00/100 ----- Dollars

/s/ Lt Arthur W. McGhee O-745922
Plant Park 7th Det Tampa, Fla.

and by means thereof, did fraudulently obtain from the Exchange National Bank forty (\$40.00) dollars, he the said Second Lieutenant Arthur W. McGhee, then well knowing that he did not have and not intending that he should have any account with the Bank of America, 8th and J Street, Sacramento, California for the payment of said check.

Specification 2: In that Second Lieutenant Arthur W. McGhee, Air Corps, Seventh Detachment, 301st Army Air Forces Base Unit, Squadron "R", Third Air Force Personnel Depot, Plant Park, Tampa, Florida, having been restricted to the limits of Third Air Force Personnel Depot, Plant Park, Tampa, Florida, did at Plant Park, Tampa, Florida, on or about 20 January 1945, break said restriction by going to Tampa, Florida.

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

Specification 1: In that Second Lieutenant Arthur W. McGhee, Air Corps, Seventh Detachment, 301st Army Air Forces Base

(24)

Unit, Squadron "R", Third Air Force Personnel Depot, Plant Park, Tampa, Florida, did, at the Third Air Force Personnel Depot, Plant Park, Tampa, Florida, on or about 4 January 1945 present for approval and payment a claim against the United States by presenting a voucher to the Finance Officer at the Third Air Force Personnel Depot, Plant Park, Tampa, Florida, an officer of the United States duly authorized to approve and pay such claims, in the amount of one hundred and sixty-three dollars and fifty cents (\$163.50) for the month of December 1944, which claim was false and fraudulent in that Second Lieutenant Arthur W. McGhee had at the time a Class E Allotment to the Bank of America, Sacramento, California, in the amount of forty-three dollars and thirty-four cents (\$43.34) and such claim was then known by the said Second Lieutenant Arthur W. McGhee to be false and fraudulent in that he was entitled to receive only one hundred and twenty dollars and sixteen cents (\$120.16).

Specification 2: (Disapproved by reviewing authority).

Specification 3: (Disapproved by reviewing authority).

Specification 4: (Disapproved by reviewing authority).

Specification 5: (Disapproved by reviewing authority).

The accused pleaded not guilty to, and was found guilty of, all Charges and Specifications. He was sentenced to be dismissed the service. The reviewing authority disapproved the findings of guilty of Specifications 2, 3, 4, and 5 of Additional Charge II, approved the sentence, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution with respect to the Specifications of which the accused stands convicted shows that, on 14 December 1944, the accused cashed a check for \$25.00 at the Exchange National Bank of Tampa, Florida, and, on the same day, cashed another check in the sum of \$40.00 at the First National Bank of the same city. Two other checks, each for \$25.00, were presented by him on 16 and 17 December, 1944, respectively, to the Floridian Hotel of Tampa, Florida, and were accepted by it at face value. All four of these instruments were made payable to cash, were signed in the name of the accused, and were drawn on The Citizens and Southern National Bank of South Carolina, Columbia, S. C. (R. 11-13; Pros. Exs. A, B, C, D). All of them were dishonored by the drawee bank because of insufficient funds. According to the Assistant Cashier of the Citizens and Southern National Bank, the largest amount maintained by the accused in his account during December, 1944, was \$6.95 (Pros. Ex. G).

The accused on 18 December 1944 cashed a check for \$50.00 at the First National Bank of Tampa, Florida, and another for \$40.00 at the Exchange National Bank of Tampa, Florida. Both were payable to cash, were signed in the name of the accused, were drawn on the Bank of America, 8th and J Streets, Sacramento, California, and were dishonored when presented for payment. An official of the Bank of America testified that the accused's account had been closed on 6 December 1944 and that the accused had no funds to his credit in the bank during December 1944 (R. 14; Pros. Exs. E, F. H).

On 5 January 1945 the accused was restricted by his Commanding Officer, "pending investigation of charges", to the post limits of the Third Air Force Personnel Depot, Plant Park, Tampa, Florida (Pros. Ex. I). Sergeant Brachter H. Huschen testified that the restriction was still in effect on 20 January 1945 when he saw the accused on "Lafayette Street" in Tampa, Florida (R. 21, 22).

The accused authorized a Class E allotment of \$43.34 per month, effective 1 July 1943, to his credit at the Bank of America, Sacramento, California. The allotment remained in effect for a period of nineteen months to and including January, 1945 (Pros. Ex. I). Admitted into evidence as Prosecution's Exhibit K was a copy of a pay and allowance voucher for the month of December 1944. It was stipulated that the original voucher, bearing the signature of the accused, appeared in the records and files of the Finance Officer at MacMill Field, Army Air Base, Tampa, Florida, and that this Finance Officer "handled the records of and made payment to personnel then stationed at the Third Air Force Personnel Depot, Plant Park" (R. 19, 20). The voucher showed total credits of \$245.00, a Class "E" allotment of \$75.00, a Class "N" allotment of \$6.50, and a net balance amounting to \$163.50 (R. 19, 20; Pros. Ex. K).

4. For the defense it was stipulated that the accused had made full restitution of the money which he had received by virtue of the checks described in the five Specifications of Charge I and in Specification 1 of Additional Charge I, and that he had paid to the Finance Officer at Drew Field, Florida, the sum of \$433.40 "for payments collected on a monthly allotment in the sum of \$43.34" (R. 23).

The accused, after his rights relative to testifying or remaining silent had been explained to him, elected to make an unsworn statement through counsel. According to this statement, the accused at the time of his trial was 21 7/12 years of age, was married, and had one child. He enlisted as an aviation cadet on 1 April 1942 and was commissioned a second lieutenant on 20 May 1943. He has made restitution of the sums "alleged in each and every Specification on the Charge sheets to the proper parties" (R. 23).

5. Each of Specifications 1, 2, 3, and 4 of the Charge alleges that the accused did "with intent to deceive, wrongfully and unlawfully make

and utter * * * a certain check * * * and by means thereof, did fraudulently obtain" in cash the amount thereof, "then well knowing that he did not have and not intending that he should have sufficient funds" in the drawee bank for its payment. The four checks, which aggregated \$115.00, are alleged to have been executed and uttered from 14 December 1944 to 17 December 1944, inclusive. These offenses are set forth as violations of Article of War 96.

The evidence shows that the four checks were presented and cashed by the accused and, after passing through normal banking channels to the drawee bank, were dishonored because of insufficient funds. The name of the accused, together with his serial number and station, appeared on the checks, but no testimony was adduced, either by way of proving his handwriting or otherwise, to show that he actually executed the checks. However, the court had before it on Prosecution's Exhibit "L" his admitted signature and, by a comparison with this rather distinctive specimen, was justified in finding that the signature on the checks was in his handwriting.

"Where the genuineness of the handwriting of any person may be involved, any admitted or proved handwriting of such person shall be competent evidence as a basis for comparison by witnesses or by the court to prove or disprove such genuineness * * *". Par. 116b, MCM, 1928.

An official of the drawee bank testified that during the month in which the checks were executed the accused's account never exceeded \$6.95. This knowledge was properly chargeable to the accused. 6 BR 171; CM 202601, Sperti. It follows that bad faith and an intent to deceive were inherent in his conduct. The evidence supports the findings of guilty of Specifications 1, 2, 3, and 4 of the Charge.

6. Specification 5 of the Charge and Specification 1 of Additional Charge I each allege that the accused did "on or about 18 December 1944, with intent to deceive, wrongfully and unlawfully, make and utter * * * a certain check * * * and by means thereof, did fraudulently obtain" in cash the amount thereof, "then well knowing that he did not have and not intending that he should have any account" with the drawee bank for the payment of said check. The total face value of the two alleged checks is \$90.00. These offenses are laid under Article of War 96.

The evidence as to whether or not the accused had an account in the drawee bank is far from clear. The assistant cashier testified that the accused had no funds and no account in the bank during December, 1944, and that the account was closed on the sixth day of that month. In other words, the account was depleted from the beginning of December but no formal action to close it was taken until 6 December. The positive assertion, however, that no account existed in the name of the accused during December, 1944, is difficult to reconcile with other evidence for the prosecution. According to Lieutenant Colonel Howard M. Nelson of the Office of Dependency

Benefits, monthly allotment payments of \$43.34 were made to the Bank of America, the drawee bank, to the accused's credit from 1 July 1943 through 31 January 1945. This circumstance tends to show that the accused, in fact, did have an account in the drawee bank in at least the amount of the allotment payments during both December, 1944, and January, 1945. Furthermore, knowledge of and the intention to maintain the account until January, 1945, are implicit in the fact that on 19 January 1945 the accused executed a formal "notification of Discontinuance of Allotment", which was apparently to be effective as of 31 January 1945. Thus, he may well have expected the allotment funds to be deposited to his credit and intended to maintain an account in the drawee bank at least in the amount of such deposits. In view of the character of the prosecution's evidence it is the opinion of the Board of Review that the accused's guilt of Specification 5 of the Charge and Specification 1 of Additional Charge I has not been established beyond a reasonable doubt. It follows that the findings of guilty of these Specifications should be disapproved.

7. Specification 2 of Additional Charge I alleges that the accused "having been restricted to the limits of Third Air Force Personnel Depot, Plant Park, Florida, did * * * on or about 20 January 1945, break said restriction by going to Tampa, Florida". This offense is laid under Article of War 96.

The evidence showed that the accused, while the order restricting him to the limits of his station was still in effect, was away from his post and in the city of Tampa. The restriction, administrative in character, imposed "pending investigation of Charges", was legal and for its breach the accused was properly charged with a violation of Article of War 96. Sec. 427 (1), Bull. JAG, November 1943. The finding of guilty of this Specification is clearly established by the evidence.

8. Specification 1 of Additional Charge II alleges that the accused did "on or about 4 January 1945 present for approval and payment a claim against the United States by presenting a voucher to the Finance Officer at Third Air Force Personnel Depot, Plant Park, Tampa, Florida, an officer of the United States duly authorized to approve and pay such claims, in the amount of one hundred and sixty-three dollars and fifty cents (\$163.50) for the month of December 1944, which claim was false and fraudulent in that the accused had at the time a Class E Allotment to the Bank of America, Sacramento, California, in the amount of Forty-three dollars and thirty-four cents (\$43.34) and such claim was then known by the said accused to be false and fraudulent in that he was entitled to receive only one hundred and twenty dollars and sixteen cents (\$120.16)". This offense is set forth as a violation of Article of War 94.

The evidence revealed that a pay and allowance voucher for December, 1944, bearing the signature of the accused and calling for a net balance of \$163.50, was found in the Finance Office at MacDill Field. It was also established that the monthly allotment of \$43.34 to the Bank of America

was in effect for the month of December. No proof was adduced, however, in support of the allegation that the accused failed to reflect the allotment deduction on his voucher or that he was entitled to receive only \$120.16. Such a conclusion cannot be drawn from the face of the voucher. While the allotment of \$43.34 is not specifically listed as a debit, there is nothing to refute the legitimate assumption that the item in question was a part of, and included in, the Class "E" allotment of \$75.00 which does appear on the voucher. The record is silent as to what is embraced in the listed Class "E" allotment and there is no proof that the \$43.34 item was not included. The alleged "false and fraudulent" character of the claim was predicated on the accused's failure to list on the voucher the allotment to the Bank of Sacramento. Since this delinquency was not established by the evidence, the record fails to support the findings of guilty of Specification 1 of Additional Charge II and of Additional Charge II and such findings should be disapproved.

9. The accused is about 22 years of age and is married. After graduating from high school, he entered the Army as a private on 1 May 1942, qualified as an Aviation Cadet on 14 August 1942, and was commissioned a second lieutenant, Army of the United States on 20 May 1943. His one efficiency rating as an officer was "Unsatisfactory".

10. The court was legally constituted. In the opinion of the Board of Review the record of trial is legally insufficient to support the findings of guilty of Specification 5 of the Charge, Specification 1 of Additional Charge I, Specification 1 of Additional Charge II and Additional Charge II, but is legally sufficient to support all of the other findings and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 96.

Abner E. Lipscomb, Judge Advocate.

Robert J. Cannon, Judge Advocate.

Samuel C. Morgan, Judge Advocate.

SPJGN-CM 280077
Hq ASF, JAGO, Washington 25, D.C.
TO: The Secretary of War

1st Ind

JUN 15 1945

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Arthur W. McGhee (O-745922), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of fraudulently making and uttering four checks totalling \$115, drawn upon a bank in which his account was insufficient (Specs. 1, 2, 3, 4, of the Chg.); of fraudulently making and uttering two checks for \$50 and \$40 respectively upon a bank in which he had no account (Spec. 5, the Chg.; Spec. 1, Add. Chg. I), all in violation of Article of War 96; of breaking a restriction by leaving the limits of his post and going to Tampa, Florida (Spec. 2, Add. Chg. I), in violation of Article of War 96; of presenting for approval and payment, false and fraudulent claims against the United States, aggregating \$216.70, by presenting monthly pay and allowance vouchers for August, September, October, November, and December, 1944, and failing to list as a debit thereon a Class E allotment, in the sum of \$43.34, to the Bank of America, Sacramento, California (Specs. 1, 2, 3, 4, 5, Add. Chg. II), all in violation of Article of War 94. He was sentenced to be dismissed the service. The reviewing authority disapproved the findings of guilty of Specifications 2, 3, 4, and 5 of Additional Charge II, approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Specification 5 of the Charge, Specification 1 of Additional Charge I, Specification 1 of Additional Charge II and Additional Charge II, legally sufficient to support all the other findings and the sentence and to warrant confirmation thereof.

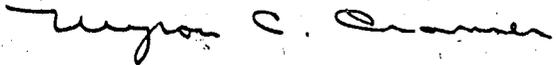
From 14 December to 17 December 1944, inclusive, at Tampa, Florida, the accused executed and cashed a series of four checks, aggregating \$115, at a time when his account in the drawee bank revealed a balance of \$6.95. All of the four checks were dishonored because of insufficient funds. After being restricted to the limits of his post, "pending investigation of charges", and while the restriction was still in effect, the accused, on 20 January 1945, without authority and in violation of the order of restriction, left the post and went to Tampa, Florida.

The accused has received one efficiency rating, "Unsatisfactory", since becoming an officer. In the course of reclassification proceedings

(30)

initiated against the accused, his commanding officer stated that, principally in financial matters, the accused "seems to be unable to take on the responsibilities that are normally required of an officer" and "I would place this officer in the lower portion of the lower third of all officers in my command". According to recent information, the accused, since his release from confinement on 30 April 1945, pending action on this case under Article of War 48, has made and cashed seven checks, totalling \$160, all of which were returned by the drawee bank with the notation "account closed". Since he so obviously lacks that financial integrity and sense of responsibility which are essential qualities for officers in our Army, I am of the opinion that the accused should be separated from the service. I recommend, therefore, that the sentence of dismissal although inadequate be confirmed and ordered executed.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.



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

MYRON C. CRAMER
Major General
The Judge Advocate General

(Findings disapproved in part, Sentence confirmed. GCMO 280, 5 July 1945).

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

SPJGQ-CM 230085

15 JUN 1945

UNITED STATES)

THIRD AIR FORCE

v.)

First Lieutenant WILLIAM J.
MCLEAN, JR. (O-575478), Air
Corps.)

Trial by G.C.M., convened
at Gulfport Army Air Field,
Gulfport, Mississippi, 18
April 1945. Dismissal and
total forfeitures.

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 96th Article of War.

Specification 1: In that 1st Lieutenant William J. McLean, Jr., Squadron B, 3700th AAF Base Unit AAF WPTC, Denver Colorado, attached to Squadron D, 328th AAF Base Unit CCTS (HB), Gulfport Army Air Field, Gulfport, Mississippi, did, at Gulfport Army Air Field, Gulfport, Mississippi, on or about 22 March 1945, wrongfully strike Private First Class John Mize, a Military Policeman who was then in the execution of his office, on the face with his hands and fists.

Specification 2: In that 1st Lieutenant William J. McLean, Jr., ***, did, at Gulfport Army Air Field, Gulfport, Mississippi, on or about 22 March 1945, wrongfully apply to his own use and benefit one (1) Ford sedan, four door, Staff Car, of a value in excess of fifty (\$50.00) dollars, property of the United States furnished and intended for the military service thereof.

Specification 3: In that 1st Lieutenant William J. McLean, Jr., ***, did, while in a public place, to wit, at Gulfport Army Air Field, Gulfport, Mississippi, on or about 22 March 1945, use violent, abusive and profane language toward Private First Class John Mize, a Military Policeman who was then in the execution of his office, to wit: "You little MP son o a bitch, they put the dumbest guys in the Army as MPs for us to have contact with", or words to that effect.

(32)

He pleaded not guilty to and was found guilty of the Charge and 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, at such place as the reviewing authority may direct, for a period of two (2) years. The reviewing authority approved the sentence, but, "because of the past good record of the officer", remitted the confinement imposed 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 latter part of March 1945 the 140th Mobile Training Unit (B-29), operating under orders from headquarters of the Western Technical Training Command, Army Air Forces, Denver, Colorado, was temporarily stationed at Gulfport Army Air Field, Gulfport, Mississippi and engaged in the instruction and training of personnel regarding the armament of B-29 type planes. Among the equipment assigned to the unit were three vehicles -- a Ford staff car and three GMC trucks. The authority to dispatch these vehicles was in the accused, who was the liaison officer of the unit (R. 6, 7, 13).

On the morning of 22 March 1945, the unit dispatcher made out a trip ticket for the use of the staff car by the accused, with Private Stanley A. DuBois named as driver, and New Orleans, Louisiana, indicated as the trip destination (R. 7, 12). It was a "day off" for the personnel of the unit (R. 13) and the accused proposed to take a number of his men, who had been unable to purchase a certain type of shoes at the Post Exchanges at Gulfport Army Air Field and Keesler Field or at stores in Gulfport and Biloxi, Mississippi, to New Orleans in order to obtain them (R. 8, 11, 13). Accordingly, Private DuBois drove the Ford staff car to New Orleans, accompanied by the accused, Staff Sergeant Souther, Sergeant Hahn and Corporal McLain as passengers (R. 8, 13).

The party left Gulfport at about 10 a.m. and arrived in New Orleans at about noon (R. 8); whereupon shoes were purchased by members of the group, after which plans were made to meet at 6 p.m. at an appointed place for the return trip (R. 8, 9, 14).

At about 7 p.m. they left New Orleans, picking up a girl who was hitch-hiking her way to Gulfport. Near Gulfport they stopped at Private DuBois' home and were invited inside to have something to eat and drink. After remaining there about an hour or an hour and a half, the others left and Private DuBois remained at home. Thereafter Sergeant Souther drove the vehicle accompanied by the accused and the girl. What became of Sergeant Hahn and Corporal McLain is not shown. Sergeant Souther drove straight to the airfield and thence to his barracks where he left the car, and the accused then drove away, accompanied by the girl (R. 9, 10, 14, 15, 17).

On the evening of 22 March 1945 Private First Class John E. Mize, attached to the Provost Marshal's Office, Gulfport Army Air Field, was on duty at Gate No. 1 of the field checking passes, AGO cards and authority for the driving of all government vehicles leaving the reservation. It was his duty with regard to the latter to see that those in possession of government vehicles had proper trip tickets for the particular vehicle, that the ticket had the proper date, and that the name of the driver on the ticket corresponded with the name of the one driving the vehicle (R. 19, 29). He was dressed in regulation uniform and wore a Sam Browne belt and an MP brassard (R. 24, 51).

At approximately 11:45 p.m. on said evening he observed the accused, accompanied by a young lady, attempting to leave the base through Gate No. 1 in an army staff car which he took to be "about a 1941 Chevrolet". The car was not a Gulfport Army Air Field vehicle and bore the marking "WATTC" upon it (R. 20, 21).

He had checked the accused on the previous night while he was driving a staff car through the same gate and had a fairly good idea that this was the same officer (R. 30). As the accused pulled up at the gate Mize asked him for his trip ticket and driver's license and upon inspection discovered that the driver's name on the ticket did not correspond with the name on the license and he thereupon told the accused he would have to get permission from the Officer of the Day to allow the accused to leave the reservation. At this point the accused called Mize a "son-of-a-bitch" and said he thought he "was a little bit too eager." Mize then went into the gatehouse to call the Officer of the Day, followed by the accused (R. 21, 23, 31).

According to Mize, when the accused heard him asking over the telephone for the Officer of the Day, he told him to get away from the telephone and allow the accused to talk with him. This, Mize refused to do, telling the accused he could talk all he wished when Mize was through, whereupon the accused struck him on the left cheek with his fist, knocking him away from the telephone (R. 23, 32, 33). He still held on to the receiver, however, and the accused struck at him again whereupon he dropped the telephone, which had been jerked from the shelf. The accused struck Mize again, knocking him against the wall and then picked up the telephone and began using it himself (R. 24).

Mize testified that during this episode the accused called him "a little MP son-of-a-bitch" and said "the fellows that they made MPs out of was the dumbest people they had in the Army for officers to come in contact with" (R. 25).

Private First Class Eddie Artis, a truck driver with Squadron C, 328th Army Air Forces Base Unit, Gulfport Army Air Field was present

(34)

during most of these events. He testified that he and four companions were coming into the field at Gate No. 1 on the night of 22 March 1945 and heard a dispute between Mize, the military policeman, and the accused, who was sitting in his car, regarding the accused's trip ticket. Artis could not understand all that was being said but did hear Mize say to the accused: "You have no right to cuss at me." Mize then went into the gate-house with the accused's trip ticket, followed by the accused (R. 58, 59).

According to Artis, as the accused entered the gate-house Mize was telephoning, and he saw the accused strike him on the left cheek with his fist, causing his nose to bleed (R. 60, 64).

While the accused was telephoning to the Officer of the Day, Mize went outside and took the keys out of the accused's car and put them in his pocket (R. 24, 25, 61). Shortly thereafter the accused told him to come back inside the gate-house and "if (he) didn't talk right to the Officer of the Day and tell him that (they) had it all straightened out there and for him to pass on that (they) would have the same trouble again." (R. 25) Mize thereupon began talking with the Officer of the Day but purposely garbled the conversation by giving wrong and vague answers so that the Officer of the Day would not have any idea what Mize was talking about and would conclude something was wrong and come down to the gate (R. 26).

After Mize finished talking on the telephone, the accused went outside and discovered that the keys of his car were missing, and turned back to enter the gate-house again. Mize, apprehending that he would have more trouble, then told six or eight soldiers who were present by that time to hold the accused "if he got started". Accordingly, when the accused came back into the gate-house Mize directed them to grab him while he made another telephone call to the Officer of the Day and when they did so "he began to scuffle, trying to get away from them and it was pretty rough around there." (R. 26) They tripped one another and all fell on the floor. However, no one struck or kicked the accused (R. 34, 45).

Three sergeants who passed through the gate at about this time heard the scuffling in the gate-house (R. 45, 51, 53), and two of them, upon investigating, saw the accused trying to get away from some men who were holding him while the military policeman stood on the side asking the accused to quiet down (R. 45, 53). After a short while the accused "said he was okay and asked the boys to let him go" whereupon he was released and went outside (R. 27, 45, 54).

When the accused then discovered that the keys to his car were missing he demanded them from Mize, who refused to return them. The accused thereupon made several "swings" at Mize who kept warding off the threatened blows (R. 27, 45, 48, 50, 52, 54, 57). Mize,

however, testified that the accused did not hit him during this period (R. 27). By this time there were about 20 or 25 persons congregated around the gate (R. 55).

Mize claimed that he showed the accused as much respect as he could show any officer (R. 28) and others testified that he was respectful (R. 51) and said "Sir" in addressing the accused at all times (R. 46). None of the enlisted men, except Mize, heard the accused use any profane or abusive language (R. 48, 56).

During all this time Mize had made no attempt to arrest the accused (R. 35), and merely called on the enlisted men to hold the accused because he feared he would harm him (R. 36).

Within a few minutes the Officer of the Day arrived and after an explanation had been made by the accused, and Mize had told his version of the affair, he determined that the accused was capable of taking care of the staff car in a proper manner and Mize was directed to turn over the keys to the accused, who then went on his way (R. 27, 28, 41, 42). The accused told the Officer of the Day that Mize had passed him through the gate after checking him on a previous evening and that he thought the military policeman was "just more or less picking on him or had it in for him" (R. 41) and Mize admitted that he had checked and passed the accused through the gate on a prior occasion (R. 44).

With regard to the use of the staff car, Private First Class DuBois, the dispatcher for the Mobile Training Unit, testified that it was customary to use the car for personal affairs and matters such as purchasing clothes, shoes and things of that nature and that in dispatching the car he would make out one ticket to cover a whole day, and name only one driver thereon although all the personnel were authorized to drive the car and different members might operate the same vehicle during a day under the authorization of the trip ticket. (R. 11, 12)

4. The evidence for the defense, briefly summarized, is as follows:

First Lieutenant John Vance, who had been in charge of a Mobile Training Unit operating under the jurisdiction of the Army Air Forces Western Technical Training Command for over two years (R. 74), Second Lieutenant William J. Frawley, who succeeded the accused as liaison officer of the 140th Mobile Training Unit (R. 69), and Warrant Officer Arthur W. Ainsworth, assigned to the same unit, each testified as to the customs of Mobile Training Units regarding the use by the personnel, for personal and morale purposes, of the motor vehicles assigned to such units. The substance of this testimony shows that because of the migratory nature of the operations of mobile training

units and the inability of the personnel of such units to enjoy the facilities of stationary posts to which they are only temporarily assigned, exceptional rules and regulations applied to the use, by them, of the motor vehicles assigned to the units. Thus, it was considered permissible, within the discretion of the liaison officer in charge of a unit, to put the vehicles to such use as he deemed would be for the best interests of the unit, and, accordingly, it was customary to permit the use, by personnel, of the vehicles for all kinds of transportation on the posts, between the posts and quarters occupied by the men of the unit, wherever they might be located, and such other uses, including trips to football games or other occasional amusements of like character, or to outlying places for the purchase of clothing or equipment, as would contribute to the maintenance of the morale of the unit. Such uses had been specifically approved for the 140th Mobile Training Unit by the Assistant Air Inspector, operating from the Denver, Colorado headquarters of the command, just a short time prior to the trip made by the accused from Gulfport, Mississippi to New Orleans, Louisiana (R. 67, 69, 75-78).

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

He had been connected with Mobile Training Units and the training of combat crews for B-29 type airplanes since July 1944, having been in charge of one of the first of such units sent on the road. From the beginning the units were furnished with motor vehicles for transportation purposes and these were in charge of the liaison officer who was, in fact commanding officer of the mobile unit travelling from base to base staying from three weeks to a month at each base. Under the circumstances it was the duty of the liaison officer to look after the convenience of the men and among other things, the vehicles of the unit were used to promote their welfare in the matter of obtaining clothing, attending to laundry and the like. The men of his unit were obliged to dress in Class A uniforms at all times during classroom instruction, and local post laundries were never able to handle the unit laundry according to the standards required by the headquarters of the Training Command (R. 80, 81). Shortly after the unit arrived at Gulfport, three of the men complained that they were in need of shoes (R. 82). Although they were not required to wear low-cut shoes, the men could not wear G-I shoes all the time and wished to buy some (R. 101). However, there was a regulation of the field quartermaster that after 25 August 1944 no low-cut shoes were to be sold to any officers or enlisted men at the Gulfport Field (R. 100). After the men had tried unsuccessfully to purchase shoes at Keesler Field, and from stores in Biloxi, Mississippi, the accused decided to take them to New Orleans on their day off from duty for the purpose of obtaining shoes (R. 82).

After buying shoes in New Orleans the group stopped to pick up a girl along the highway, who appeared to be in distress and wished to go to Biloxi (R. 82, 83). They stopped for refreshments at Private

DuBois' home and thereafter the accused, accompanied by Sergeant Souther and the girl, proceeded to Gulfport Field where the Sergeant was quartered (R. 83).

The accused lived at the Edgewater Gulf Hotel and after taking the Sergeant to his quarters intended to take the girl to the hotel and leave her there where she could catch a bus for Biloxi, where she wanted to go (R. 83, 92).

After leaving Sergeant Souther's quarters the accused proceeded to leave Gulfport Field by Gate No. 1. On the previous day he had passed through the same gate while driving a Gulfport Field staff car because the accused's staff car was in the motor pool being painted. Private First Class Mize was then on duty as a military policeman and gave the accused a thorough examination during which he looked minutely at his trip ticket, his driver's license, and his AGO card and checked very closely against the names on each (R. 84). Not satisfied with his first examination, Mize told him to wait a minute so that he could look them over again, whereupon Mize said, sarcastically, "I thought officers were not supposed to drive motor vehicles." The accused then explained the nature of his duties with the Mobile Training Unit and told Mize that officers in the Adjutant's office were aware of the situation and had told him to call them if he experienced any difficulty passing through the gates. Mize was not satisfied, however, and demanded further information and then he finally allowed the accused to pass on (R. 84-86).

On the next evening (22 March 1945) Mize was again on duty at the same gate when the accused approached it, this time driving the Mobile Training Unit staff car, which was plainly marked "140th MTU-B 29", and again demanded the accused's credentials which were promptly produced. The trip ticket bore the name of Private DuBois as driver (R. 93) but the accused's name also appeared thereon as the officer to whom the car was assigned (R. 101) and this the accused explained to Mize (R. 93). Nevertheless, Mize told the accused to wait while he went into the gate-house for 5 or 10 minutes (R. 86, 94). It was then 11:00 or 11:15 p.m. and the accused parked his car and went into the gate-house to find out what was detaining him (R. 86, 94, 100).

He found Mize at the telephone, apparently finished calling someone. The accused then asked "May I have the phone to call the Officer of the Day?", which Mize refused, saying: "No, you can't use the phone" (R. 86, 95). The accused thereupon told him if he did not give him the telephone he would take it from him and, as he reached for the telephone, which Mize was holding in his left hand, Mize put up his hands as though he were going to strike the accused. According to the accused: "Naturally, I put up my hands and lightly struck him." He denied, however, using "profanity" at any time or having called Mize "a son-of-a-bitch." (R. 87, 96-98)

The accused then took the telephone and started to talk with the Officer of the Day and at this point Mize called a group of soldiers to his assistance, who surrounded the accused. In the struggle which followed, the accused was thrown to the floor, "dragged and bumped around and . . . manhandled" (R. 87, 97, 98). He was injured and an examination at the hospital on 25 March 1945 disclosed bruises on his back, neck, arms, shoulders and knees, and his tropical uniform was practically ruined by being soiled and torn (R. 87, 88, 96, 99, 101; Def. Ex. B).

After a while the accused stated that he had been "manhandled" enough and the soldiers released him. Mize went out of the gate-house followed by the accused who intended "to retaliate a little for the manhandling (he) had gotten" as he was then very excited and angry (R. 88, 98). He made several swings at Mize but did not recall whether he hit him or not (R. 88, 89, 98, 99). Shortly afterward the Officer of the Day arrived and after talking with them for a few minutes he directed Mize to give the accused the keys to his car and he was allowed to proceed (R. 88, 99).

T. C. Memorandum No. 75-5, Headquarters Army Air Forces Training Command, Fort Worth, Texas, 9 September 1944, with particular reference to par. 5, c, was introduced in evidence. This memorandum, while reiterating the restrictions upon the use of government vehicles for other than official business, provided in the indicated paragraph that

"Personnel at an installation on Temporary Duty, under competent orders, as, for example, inspecting officers, may be furnished transportation to and from their place of arrival, and the place of temporary abode (hotel or other quarters) used during their Temporary Duty. Daily transportation between the installation being visited and the place of temporary abode may be furnished such officers for the period of time required to consummate official business" (R. 79; Def. Ex. A).

A certified copy of the accused's "Motor Vehicle Operations Permit" authorizing him to operate "car, passenger" and "trucks, cargo, 1/4-3/4-ton" was likewise admitted in evidence (R. 101, Def. Ex. C). Lieutenant Colonel Harry W. Sickert, Supervisor of Aircraft Maintenance and Air-Sea Rescue, Gulfport Army Air Field, testified that he was familiar with the work of the Mobile Training Units engaged in instructing B-29 aircraft crews. In his opinion the B-29 Mobile Training Units are the finest and best instructors which the Army Air Forces have had and the liaison officer of such a unit has a very responsible job. Due to the fact that there is a limited number of the type of personnel required for such work, the B-29 Mobile Training Units have a "top priority". The work done by the accused's unit at the Gulfport Field was so important that he had

requested that the unit be held over from 24 April 1945 to 15 May 1945 in order that other crew chiefs, aircraft mechanics and electrical specialists could be trained (R. 102, 103).

5. The evidence shows, and it is specifically admitted, that on the date alleged the accused did strike a military policeman while he was in the execution of his office and there is, therefore, no need to enter upon an extended discussion of the evidence adduced to prove the offense of assault and battery alleged in Specification 1.

However, it is clearly apparent that the event which gave rise to the offenses charged resulted from a tactless and unnecessarily strict exercise of authority by a member of the military police, who, although he was undoubtedly in the exercise of lawful authority, could have avoided the aggravating and annoying method employed by him in performing his duty and so prevented the result.

The accused was the liaison officer (and thus in command) of a mobile training unit engaged in going from base to base for the purpose of training highly skilled specialists in the maintenance of B-29 type airplanes. The personnel of the unit were "top priority" men performing an important mission while temporarily stationed at the bases where they were engaged in their work. For their transportation and other uses a Ford, sedan, staff car and three trucks had been issued to them. The use and dispatching of these vehicles were within the discretion of the accused and under tacit understanding with headquarters of the Western Technical Training Command and the Assistant Air Inspector and because of the peculiar status of the mobile units, they could be used for whatever purpose would reasonably aid in maintaining the morale of the unit.

It so happened that on 21 March 1945 the accused was operating a Gulfport Army Airfield vehicle under proper authority (while his unit staff car was undergoing repairs), and attempted to leave the field by a gate where Private First Class Mize, a military police guard, was stationed. After a thorough examination of the accused's AGO card, his driver's license and his trip ticket, and some extended conversation in which the accused advised him that he had the authority and permission of the adjutant of the post, the guard permitted him to pass.

On the next evening, the accused was on his way to his quarters at the Edgewater Gulf Hotel accompanied by a young woman whom he was taking to the hotel so that she could catch a bus for Biloxi, Mississippi. He was obliged to pass through Gate No. 1 where Mize was again on duty. Notwithstanding the fact that the accused on this occasion was driving his unit staff car, plainly marked with the mobile training unit designation, and the fact that Mize had minutely examined his credentials on the previous evening, the guard again made a thorough check of the accused's AGO card, his driver's license and the trip ticket. Finding that the trip ticket named Private DuBois as the driver, although the accused was shown as the person

for whose use the car was issued, Mize determined to call the Officer of the Day.

There is no corroboration of either the accused's or Mize's version of what happened immediately thereafter. Mize testified that the accused struck him merely because he was telephoning to the Officer of the Day. The accused insisted that he was refused permission to use the telephone and that when he tried to take the telephone from Mize, the guard raised his arms and the accused then struck him in a natural act of self-defense. To this extent the accused was guilty of wrongfully assaulting the guard while in the performance of his duty, but the evidence nowhere discloses any necessity for the guard's actions in calling five or six enlisted men to his assistance and directing them to restrain the accused in such a manner that he was physically injured in a scuffle which followed and in which the accused was so roughly handled that his uniform was ruined.

The evidence in support of Specification 3 which alleges the use, by the accused, of an opprobrious epithet and insulting language toward the guard leaves some doubt as to whether the incident occurred as alleged. The guard testified in detail that the language set forth in the Specification was used by the accused in addressing him while he was then in the execution of his office and this the accused specifically denied. Apparently, if such language was used, it was at the very beginning of the episode and before the more aggravating circumstances occurred; for the witnesses to the later incidents testified that the accused used no such expressions. It seems strange that, upon such slight provocation and in the presence of his female companion, he would have resorted to such language, but did not do so when subjected to the treatment which he later received under circumstances which, according to common experience, were such as would ordinarily arouse anger and induce invective against the guard who, in the accused's mind, was purposely and without cause harrassing and tantalizing him in the presence of a group of enlisted men. Yet the evidence shows no such conduct when it was most likely to occur. There is, however, some degree of corroboration of the guard on this matter in the testimony of a private who was present at the beginning of the altercation between the guard and the accused. He testified that the guard told the accused: "You have no right to cuss at me," but did not understand any other remark from either. Were it not for this, the doubt created by the circumstances would be sufficiently reasonable to justify the accused's acquittal of this offense. As it is, the record is deemed sufficient to support the finding on this Specification.

As to the offense laid in Specification 2 it is sufficient to say that the charge of wrongful application to his own use and benefit of government property was certainly not supported by the evidence of record. It may well be that the accused was guilty of exercising poor judgment in using the staff car to make a lengthy trip in order that some of his men might purchase shoes which they

were unable to obtain otherwise, but such an erroneous decision was nevertheless a command function and, under all of the circumstances portrayed, did not constitute the offense alleged nor warrant trial by general court-martial. The conduct of the accused in using the car for such a purpose rested upon the exercise of a discretion with which he believed he was vested by his superiors with a view to the maintenance of morale in a mobile unit of specially chosen experts entitled to special consideration because of the nature of their transitory work. Any abuse of such discretion could and should have been corrected by his superiors in the chain of command through more appropriate methods.

6. Consideration has been given to a plea for clemency, "in view of the accused's past good record", signed by four of the seven members of the court and defense counsel; and to a letter of commendation from the commanding officer of the 3718th Army Air Forces Base Unit, Mobile Training Unit, Denver, Colorado, stating that the accused has been a liaison officer of said command since June 1944, since when he has, at all times, proved to be an efficient and capable officer, has conducted himself as an officer and a gentleman, and in every respect has been a credit to the service, so that the command desires, if the accused is restored to duty, that he be reassigned to active duty as a liaison officer.

7. Records of the War Department disclose that the accused was born in Virginia, Minnesota, is 34½ years of age and divorced. (However, in a letter to Senator A. H. Vandenberg, dated 1 May 1945, he states that he is married and the father of two sons). He was graduated from high school and attended the University of Minnesota for two years, majoring in business administration, and Penn College for one year during which he majored in radio speech. From July 1929 to August 1933 he was employed as a telegraph and teletype operator; from August 1933 to December 1940 as a salesman; from January to August 1941 as a radio announcer; and from August 1941 to July 1942 as a production manager for a company manufacturing airplane engine parts. He was inducted on 25 August 1942 and on 10 December 1942 was accepted for training as an officer candidate. Upon completing the prescribed course at the school of the Army Air Forces Technical Training Command at Miami Beach, Florida, he was commissioned a second lieutenant on 3 March 1943, and assigned to Maxwell Field, Alabama. Thereafter he was assigned to Army Air Forces Western Technical Training Command, Denver, Colorado, and while on duty there was promoted to first lieutenant 27 October 1944.

8. The court was legally constituted and had jurisdiction of the accused and the offenses charged. For the reasons stated, the

(42)

Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Specification 2 but is legally sufficient to support the findings of guilty of Specifications 1 and 3 and the Charge, and to support the sentence and warrant confirmation thereof. The sentence imposed is authorized upon conviction of a violation of Article of War 96.

Fletcher R. Andrews, Judge Advocate

Herbert B. Friedman, Judge Advocate

W. H. King, Judge Advocate

SPJGQ-CM 280085

1st Ind

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

JUL 2 1945

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant William J. McLean, Jr. (0575478), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of striking a military policeman who was then in the execution of his office (Specification 1), wrongful application of a government staff car to his own use and benefit (Specification 2), and use of abusive and profane language toward a military policeman then in the execution of his office (Specification 3), all 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 may direct, for a period of two (2) years. The reviewing authority approved the sentence but "because of the past good record of the officer", remitted the confinement and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally insufficient to support the finding of guilty of Specification 2 but is legally sufficient to support the finding of guilty of Specifications 1 and 3, and of the Charge and to support the sentence and warrant confirmation thereof. I concur in that opinion.)

Both of the offenses of which this officer is found guilty arose out of an altercation between him and a private of military police who was on duty at one of the gates of the Gulfport Army Air Field, Gulfport, Mississippi. Lieutenant McLean was liaison officer and therefore in command of a small unit of the Army Air Forces Western Technical Training Command known as a Mobile Training Unit (B-29). The function of this unit was to go from one post to another throughout the country and, during temporary assignment of a month or more, train personnel as specialists in the maintenance of B-29 type airplanes. As such a mobile body of instructors, they operated under the jurisdiction of the Western Training Command and because of the migratory nature of the work and the short periods of time during which they remained at any post or station, the unit was supplied with a Ford staff car and three trucks for use in transportation and such other purposes as would contribute to the morale of the unit. These vehicles were under the control of Lieutenant McLean. On 21 March 1945

(u)

Lieutenant McLean's staff car was in the motor pool being painted and with the knowledge of the Gulfport Army Air Field authorities he was operating a vehicle of that Command instead. As he proceeded to leave the field he was stopped by a military policeman who, in the performance of his duties, demanded the officer's credentials. Thereupon he minutely examined Lieutenant McLean's AGO card, driver's license and trip ticket, and Lieutenant McLean informed the guard of his status and duties and of the reasons for his driving the Army Air Field car. After a second and more thorough scrutiny of the documents and the automobile, the military policeman allowed the officer to leave.

On the next evening the officer again sought to leave the field through the same gate and was stopped by the same military policeman for the same purpose. On this occasion Lieutenant McLean was driving the staff car of his unit which was plainly marked "140th MTU". It was then about 11 or 11:15 p.m. and he was accompanied by a young woman whom he was taking to town where she could catch a bus. The military policeman again scrutinized the officer's AGO card, driver's license, trip ticket and automobile and he and the officer became engaged in a dispute regarding Lieutenant McLean's right to drive the car because the trip ticket named "Private DuBois" as the driver. The officer pointed out that the trip ticket disclosed that the car was, nevertheless, assigned to him and that the fact that a private was named as driver did not make it unlawful for the officer to drive his own car. It is evident that the military policeman was becoming overly technical in the performance of his duties and the situation annoyed Lieutenant McLean. This became more aggravating when the guard told him to wait and, without further explanation, went into the gate-house for a period of 5 or 10 minutes. When Lieutenant McLean finally entered the gate-house he found the guard evidently completing a telephone call. When he asked for permission to use the telephone, he says that he was denied the right to do so and when he threatened to take the telephone forcibly from the guard and the guard raised his arms, the Lieutenant struck him on the cheek. While Lieutenant McLean then used the telephone the guard went out and took the keys out of the car. Upon his return to the gate-house 5 or 6 enlisted men had gathered, and the guard, fearing further trouble, directed them to restrain Lieutenant McLean. In the struggle which followed, the officer received injuries which left marks on his body for several days and he claims that his uniform was ruined.

The Officer of the Day appeared shortly thereafter and after hearing an explanation from both the guard and Lieutenant McLean, he ordered the guard to surrender the keys and the lieutenant was allowed to proceed. Although no one heard any opprobrious or insulting remarks made by the lieutenant during the most aggravating period of his experiences, the guard testified that he did use such language at the beginning of their altercation and in the presence of the young woman

who was in the car with him. Because of the slight corroboration furnished by an enlisted man who heard the guard tell Lieutenant McLean "You have no right to cuss at me", the finding as to this Specification was sustained. Although the use of opprobrious language and the striking of the military policeman cannot be condoned, these offenses are somewhat extenuated by the tactless and unnecessarily strict exercise of his authority by the military policeman under circumstances which did not require or justify it. Four of the seven members of the court recommended clemency, and Lieutenant McLean's commanding officer urged his return to active duty and expressed a willingness to restore him to his former duties because of his character and ability. This officer has an excellent record and is capable of further honest and faithful service in a valuable capacity. I recommend that the sentence, as approved by the reviewing authority, be confirmed but that it be commuted to a reprimand and that, as thus modified, it be carried into execution.

4. Consideration has been given to the attached letter from the accused to the Honorable Arthur H. Vandenburg, United States Senate, dated 1 May 1945.

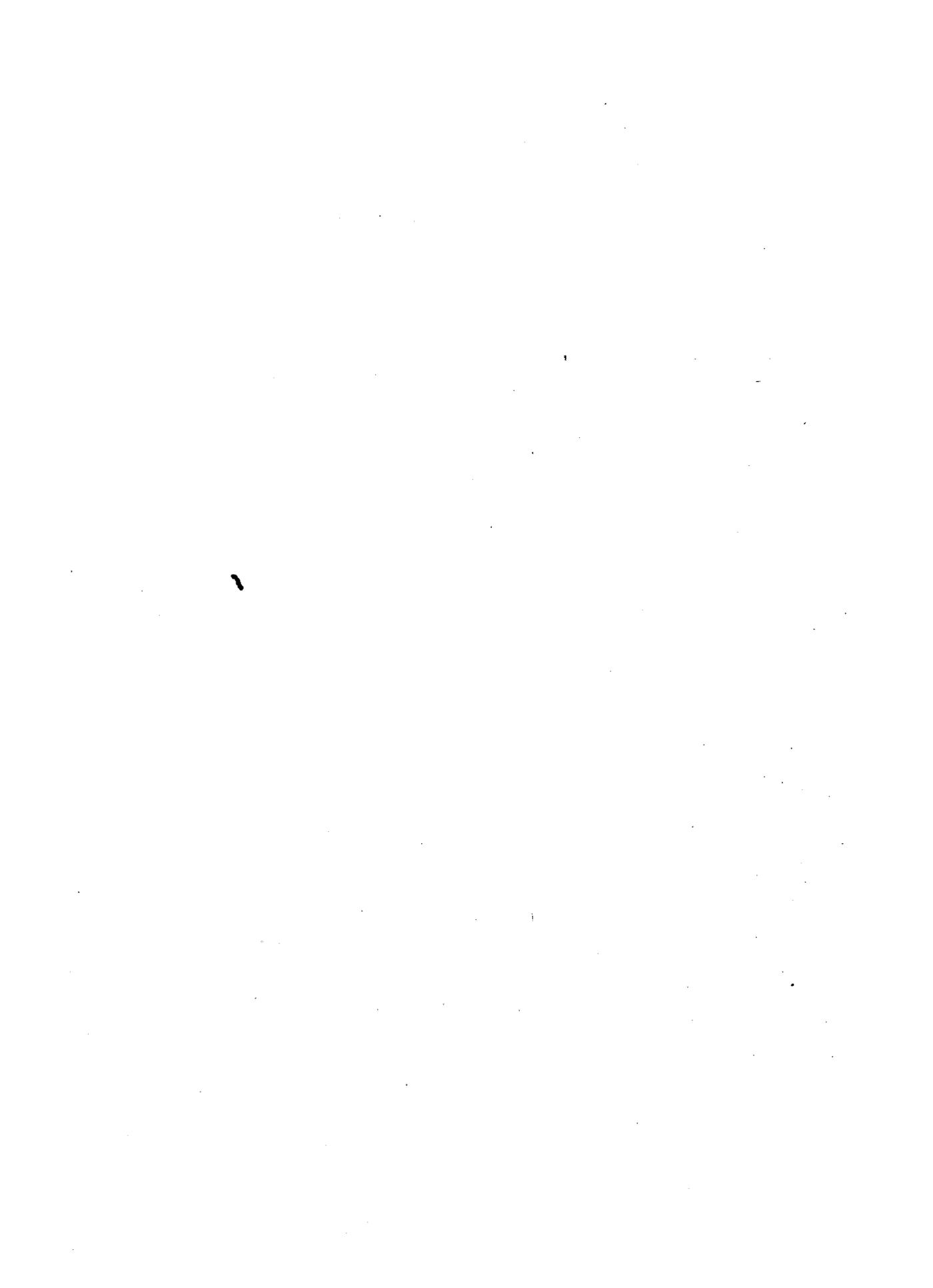
5. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.

Myron C. Cramer

3 Incls
 1 Rec of trial
 2 Form of action
 3 Ltr fr accused to
 Senator Vandenburg
 dated 1 May 1945

MYRON C. CRAMER
 Major General
 The Judge Advocate General

(Findings disapproved in part. Sentence as approved by reviewing authority confirmed but commuted to a reprimand. GCMO 354, 21 July 1945).



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

5 JUN 1945

SPJGV-CM 280093

UNITED STATES)

v.)

Captain WILLIAM C. HUGHES)
(O-443694), Air Corps.)

ARMY AIR FORCES
PERSONNEL DISTRIBUTION COMMAND

Trial by G.C.M., convened at
Atlantic City, New Jersey, 19
and 20 March 1945. Dismissal,
total forfeitures and con-
finement at hard labor for
three (3) years.

OPINION of the BOARD OF REVIEW
SEMAN, MICELI and BEARDSLEY, 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 Captain William C. Hughes, 1010th AAF Base Unit (Redistribution Station No. 1) (R), did, at New York City, New York, on or about 12 August 1944, with intent to defraud, wrongfully and unlawfully make and utter to The Princeton Club of New York, a certain check, in words and figures as follows, to wit:

No. 4 New York August 12 19 44
Name of Bank First National Bank of New Hartford
Address New Hartford, New York
Pay to the order of CASH
Sixty - - - - - 00 Dollars
\$60⁰⁰ /s/ William C. Hughes.

the back of said check endorsed in words and figures as follows, to wit:

(48)

Pay to the Order of
The National City Bank of New York
42nd Street Branch
The Princeton Club of New York
Petty Cash Account

and by means thereof, did, fraudulently obtain from The Princeton Club of New York, \$60.00 in cash, he, the said William C. Hughes, then well knowing that he did not have and not intending that he should have any account with the First National Bank of New Hartford, New Hartford, New York, for the payment of said check.

Specifications 2, 3, 4, 5, 6, 7, 9 and 10 inclusive are in substantially the same language as Specification 1, except for dates, check numbers, amounts, victims and drawees, which are as follows:

Specification No.	Date	Check No.	Amount	Victim	Drawee Bank
2	12 Aug 1944	5	\$40.00	Princeton Club of New York	First Nat'l Bank of New Hartford, N. Y.
3	14 Aug 1944	8	25.00	Princeton Club of New York	First Nat'l Bank of New Hartford, N.Y.
4	15 Aug 1944	—	25.00	Princeton Club of New York	First Nat'l Bank of New Hartford, N.Y.
5	15 Aug 1944	7	25.00	Princeton Club of New York	First Nat'l Bank of New Hartford, N.Y.
6	14 Sept 1944	16	50.00	Lea D. Hitchner	Bridgeton Nat'l Bank, Bridgeton, N.J.
7	18 Sept 1944	218	25.00	The Benjamin Franklin Hotel	The Chase Nat'l Bank of N.Y.
9	23 Sept 1944	16	70.00	The Belleville Military Stores	Rossllyn Nat'l Bank and Trust Co., Rossllyn, L.I.
10	5 Oct 1944	—	25.00	Patterson Field Exchange	Rossllyn Nat'l Bank and Trust Co., Rossllyn, L.I.

Specification 8: In that Captain William C. Hughes, 1010th AAF Base Unit (Redistribution Station No. 1) (R), being indebted to Hotel Lexington, New York City, New York, in the sum of \$71.01, for lodging, which became due and payable on or about 28 August 1944, thereafter did, at New York City, New York, wrongfully and dishonorably fail and neglect to pay said indebtedness.

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

Specification: In that Captain William C. Hughes, 1010th AAF Base Unit (Redistribution Station No. 1) (R), did, without proper leave, absent himself from his command at Atlantic City, New Jersey, from about 28 August 1944 to about 9 November 1944.

ADDITIONAL CHARGE: Violation of the 95th Article of War.
(Finding of not guilty).

Specification: (Finding of not guilty).

He pleaded not guilty to and was found guilty of the Specifications under Charges I and II, and of Charges I and II, and not guilty of the Additional Charge and its Specification. No evidence of previous convictions was offered. He was sentenced to undergo dismissal, total forfeitures and confinement at hard labor for three years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. There is substantially no dispute as to the facts in regard to the acts of accused upon which Charges I and II and the 11 Specifications are based. Accused admitted the conduct charged therein in statements (Pros. Exs. 10, 11) which he signed prior to the trial and in the unsworn statement (R. 118), which he made to the court.

Between 12 August and 15 August 1944, accused cashed five bad checks, in the total amount of \$175 (Pros. Exs. 1, 2, 3, 4, 5) at the Princeton Club of New York (R. 12-14). All five checks were drawn upon the First National Bank of New Hartford, New York, in which bank accused did not have and never had an account. On 14 September 1944, accused induced Lea D. Hitchner to cash a bad check (Pros. Ex. 6) for \$50, which he had drawn on the Bridgeton National Bank, Bridgeton, New Jersey. He did not have an account in that bank (R. 12-13). On 18 September 1944, accused induced the Benjamin Franklin Hotel to cash a bad check (Pros. Ex. 7) for \$25, drawn

on the Chase National Bank, wherein accused had no accounts (R. 12, 49; Pros. Ex. 13). Accused had a checking account in the Rossllyn National Bank and Trust Co., Rossllyn, Long Island. His balance therein on 31 December 1942 was sixteen (16¢) cents, and he made no deposits in the account thereafter (R. 14). On 23 September 1944 induced the Belleville Military Stores of Belleville, Illinois to cash his worthless check for \$70.10 (Pros. Ex. 8) drawn upon the Rossllyn National Bank and Trust Company (R. 12). Twelve days later, accused induced the Post Exchange at Patterson Field, Ohio, to cash his worthless check for \$25 (Pros. Ex. 9), drawn upon the same bank.

A 21-day leave which had been granted to accused (R. 14; Pros. Ex. 10) expired on 28 August 1944. He did not report back to his station in Atlantic City, but remained absent without leave until 9 November 1944, when he was apprehended by the military police in Cincinnati, Ohio (R. 14; Pros. Exs. 10, 12, 14, 15).

On 3 August 1944, accused was a guest at the Hotel Lexington in New York, New York, and was indebted to the hotel in the amount of \$71. He departed surreptitiously, neither checking out nor making arrangement to pay his bill (R. 33-34).

4. The defense was lack of mental capacity, i.e., that by reason of mental disease, defect or derangement, accused was unable to adhere to the right.

It was shown that accused served in the Air Corps, and its predecessors, the Air Service and Aviation Section Signal Corps from 1917 to 1942 (R. 56, 62; Def. Exs. A, B, C, D, E, F, G, H, I, J, K). For 18 years, he was a master sergeant. On 1 April 1942, he was appointed a captain, AUS. While accused was on duty overseas on 29 May 1944, his wife died in Walter Reed Hospital (R. 127).

Stanley Williamson, an attorney in the employ of the Union Carbide and Carbon Co., since 1934, has known accused who frequently visited him (R. 54). Accused was much devoted to his late wife. She was an invalid for some years prior to her death. He spent large sums of money for medical research and surgery in vain efforts to restore her to health. Upon his return from England in August 1944, accused called at Williamson's office. Williamson gave him a card at the Princeton Club (R. 55). After several social contacts, accused forgot an engagement to dine at the Williamson home. A close friend and associate of accused in genealogical and historical research was Raymond Hughes of Cincinnati, Ohio. Accused was arrested in that city, but had not gotten in touch with Raymond Hughes while there, a circumstance which indicated to Williamson that accused had no knowledge of his whereabouts or what he was doing (R. 56).

Mrs. Irene DuBois, accused's sister-in-law, had known him for 29 years. She knew that accused had spent a "great deal of money" during his wife's illness (R. 58), but could not say how much. While overseas from January to May 1944, he sent her \$4.00 a month.

Lieutenant Colonel William F. Orbison, retired, had served with accused and knew him intimately. Accused's reputation was impeccable (R. 61). He always was conservative in his drinking. He spent a "great deal" of money on specialists for his wife, and was "very sacrificial" for his family.

George F. Hughes, accused's son (R. 64) related in detail the history of operations and treatments upon his mother between 1937 and 1944. Accused became much worried and upset.

Major D. B. Stone had served with accused. On 17 August 1944, accused called upon him at Syracuse Army Air Base. He was un-presentable, and appeared as if he had not shaved for two or three days. His uniform was dirty. His memory seemed vague, and his conversation was extremely incoherent. He was not drinking. His mind did not appear to be rational. Major Stone offered accused bathing facilities, and returned to his office. In thirty minutes, accused called him and said that he had to leave immediately to take care of things in Utica. While stationed at Rome and at Syracuse, accused's conduct was above reproach and he was well thought of by his fellow officers (R. 68).

On 8 September 1944, accused visited Sol S. Busloff, Hempstead, Long Island, and was with him for about an hour. He said that he was being married the following day to a girl who lived in Syracuse, New York.

Lieutenant Thomas P. Hughes, USNR, Naval Hospital, St. Albans, New York, saw accused quite frequently in New York in July (R. 69). Accused appeared one night at 10 o'clock for a dinner engagement scheduled for six o'clock (R. 71). He never saw accused drunk. In July, accused stated that he had a great deal of money. One night, he offered to invest \$25,000 to set witness up in the hotel business, after the war, and at witness' suggestion promised five to ten thousand to establish a friend in the paper business. Accused once said that he had a million dollars. One night accused, who had been with witness and the latter's wife on the night before, remarked "you should have stayed around," and stated that, after witness left, a man, who liked the way accused handled a disorderly character in the bar, invited

accused to the Waldorf-Astoria, and there introduced him to Admiral King, Henry J. Kaiser, and another well known person, whose name had been forgotten by witness (R. 74). At the time, witness thought accused's actions and statements at times were peculiar. However, he did not then doubt that he was normal. One night when accused was sober, he got into a cab with witness and the latter's wife. The cab was of the skylight type, and during the ride accused stood up, with his head through the skylight and above the roof of the cab and watched where they were being driven (R. 77).

Dorothy S. Hughes, the wife of accused's first cousin (R. 80), said that he did things in August 1944, which at the time did not seem strange, but later did seem unusual, such as the secretive imparting of word that he was about to be transferred to duty in the Philippines, and statements that his son was overseas, that he was missing in action, and that he had been found. On one occasion, he described a flight which he said that he had made with a radio crew to the Philippines. He stated that he had a substantial private income (R. 82). There were things about accused, which were very strange (R. 83).

Mrs. Ruth W. Hughes married accused in Cincinnati on 7 October 1944 (R. 84), after a courtship of six days. They had been childhood friends. His deceased wife was witness' most intimate friend, from the time when they were in high school together. On 2 October, accused called her. They had dinner, and talked about his late wife. Then accused said, "Before I leave here, you're going to marry me" (R. 85). He told her that life would not be worth living without her (R. 86). One night they were walking on the bridge from Kentucky to Cincinnati. He stepped "to admire the view", and witness heard something drop in the water. She asked him about it, and he answered that now that he knew she would marry him (R. 87), he had thrown into the river some cyanide tablets which he had procured in England. He told her, that while in Cincinnati, he was doing special work for Wright Field, to which he said he went nearly every day. He also went away for a time and was supposed to be in New York, and on another occasion in Belleville, Illinois. He told her that he had just come back from the Philippines, was waiting for General MacArthur to invade the islands, and was collecting radio parts in Hoboken, to be shipped there. At the time, witness believed him. During all this time, accused wore the uniform of a captain (R. 91).

Witness was a widow and housekeeper of the Netherland Plaza Hotel in Cincinnati. During their first four weeks together "everything went normally", then accused began to smoke and read in the bathroom at night. He complained that he could not sleep. He said things which made witness

wonder, such as his statement to a group of her friends that he had won \$12,000 in gambling on the boat en route from England. He said that he had lost half of it, but that the remaining \$6,000 was in a bank in Long Island (R. 92). One night he said, "Tomorrow is pay day, I'll have to go to Dayton to get my pay check." That night, he said he was able only to cash a small check, because there were 8,000 officers waiting to be paid, and he didn't want to be late to meet witness.

Major Lewis I. Sharp, Jr., MC, Chief Neuropsychiatrist, Army Air Forces Redistribution Station No. 1, Atlantic City, New Jersey, had examined accused. He testified that in his opinion, accused was capable of differentiating between right and wrong, and of adhering to the right (R. 94). His attention was called to a report, which he had signed, which was admitted in evidence as Defense Exhibit Q. The following statement appears therein:

"Family history indicates an hereditary tendency, particularly in the maternal line, to emotional instability and alcoholism. Past history indicates that Captain Hughes is capable of a satisfactory adjustment until subjected to emotional stress when he manifests emotional instability and an immature attempt to escape from reality, such as the fugue-like episode in 1934 and the present escape into alcohol. The evidence does not indicate that such escapes are of a psychotic or psycho-neurotic nature, but rather the type of escape commonly seen in emotionally inadequate or immature personalities when subjected to undue stress or strain. As there is no evidence of psychosis, Captain Hughes is able to differentiate right from wrong and while from a psychiatric point of view he is probably not capable of adhering to the right, from an administrative and legal point of view he should be considered responsible for his actions.

"The mild arterio-sclerosis, while not sufficient to play a determining role, may be an added factor in lowering this officer's threshold to emotional stress."

The foregoing language was called to witness' attention. He then stated:

"From a purely psychiatric point of view I have not yet been able to make up my mind whether he's a constitutional psychopathic personality, can adhere to the right or not. Therefore, the answer to that is that I'm inclined to think that he cannot, as I mentioned in that discussion. But from a purely legal and purely administrative point of view he can" (R. 95).

After some controversy between counsel, this witness made the following answer to this question:

"Q With reference to the first statement made, may I ask a qualifying statement to that. You have stated that Captain Hughes is able to adhere to the right, and then that from a legal point of view he is capable of adhering to the right. Now, on your first statement, would you please tell me whether you are speaking from your conception of the law or from a psychiatric standpoint? A. I'm speaking as regards my conception of competence, legal competence. A man is sent to a psychiatrist for the determination of whether he is competent to stand trial. My conclusions here are that he is. Now, he is a constitutional psychopathic personality, in my opinion. I say probably; I don't say that he psychiatrically, unqualifiedly, cannot adhere to the right. I say that psychiatrically speaking, in the discussion, not in the finding, this man may not, or probably cannot, adhere to the right. But that from a point of view of legal responsibility, competency, he must be considered competent."

A lengthy hypothetical question (R. 98-99) was put to witness by a member of the court, in which factors in the conduct of a hypothetical person were substantially in evidence as to accused. In answer to this question, the witness testified:

"Well, I'd have to answer it by an assumption and that is that the man could or could not be insane; and my experience, my examination, indicates that he was not psychotic, without insanity, therefore competent. Now, he could have been insane, anybody could have been insane and do all these things. But my opinion is that he wasn't" (R. 99).

The law member then asked whether one could be sane over a period of time, and during a short period of time, because of stress of one sort or other, he unsound at that point. To this, the witness stated:

"THE WITNESS: I would say that this man definitely would not be considered normal; that he would either be psychotic or psychopathic personality—one or the other. This hypothetical question—certainly that isn't normal behavior. It isn't normal behavior in the sense of what a person does in adjusting to his environment. But people can make a maladjustment, do wrong, without being psychotic. They fall into this loose category called

psychopathic personalities, which has not yet been considered as a relief of responsibility. That is something which the law may take up in time, but not now. So hypothetically I would say that he would either be a psychopath, that is, constitutional psychopathic personality, or suffering from a psychosis. Of course, psychopathic personalities do suffer from psychoses, and they can recover and be seen later. Then it's very difficult to evaluate just what happened. We have to evaluate the man as we see him. I also went into the record, as you'll see in the report, that he has episodes in the past of what I call immature behavior, which are suggestive that he can go along for quite a period until he gets under stress, and then something happens. Now, this is still this hypothetical person.

"Q. Yes. And during this period of check cashing, assuming large obligations, you would define him as a person who was suffering with some kind of a psychosis at that time? A Not necessarily. People can cash checks and be perfectly sane. Usually people who cash checks that are valueless, or without sufficient funds, and what-not, are somewhat psychopathic unless they do it under the particular stress which justifies it for the time being. But this went on over a period of time.

"Now, I had to evaluate in considering this condition, this hypothetical problem, you might say, whether the man was actually psychotic, that is, so depressed, so emotionally disturbed, that he couldn't differentiate right from wrong. I felt, and during my examination I could get a proper understanding of the development of this condition and of what happened, that when people get upset and start doing things that are considered out of order, they get in deeper by trying to carry on. And that doesn't mean that they're psychotic; it just shows poor judgment and a lack of appreciation for consequences. That is what a psychopath ultimately is."

5. In rebuttal, the prosecution called Lieutenant Colonel Henry A. Christian, MC, a member of a board of officers appointed under the provisions of AR 600-500 to examine accused (R. 103). He identified the report of proceedings of the board (Pros.Ex. 17), which concluded that accused was sane, able to distinguish right from wrong, and able to adhere to the right. From the report, which was admitted in evidence (R. 108), the conclusions of the board would appear to be based upon the report of Major Sharp, who stated that accused from a psychiatric point of view probably could not adhere to the right but from a legal and administrative point of view was able so to do.

In support of his objection to the admission of Prosecution's Exhibit 17, defense counsel was sworn and testified that the board of medical

officers refused to permit him to ask questions or offer evidence (R.106). Specific objection to the admission of the report on that ground was overruled (R. 108).

Major Emile G. Stoloff, MC, a defense witness, testified that in his opinion the hypothetical person described in the question, hereinabove quoted, under the circumstances outlined could be of sound mind, know the difference between right and wrong, and still commit the acts in question (R. 112).

6. Arguments were heard, and the court was closed. Apparently, it was troubled by the seemingly inconsistent expert testimony that accused was probably psychiatrically unable to adhere to the right, but nevertheless was legally responsible for his acts, since he was not psychotic, for it reopened after some time (R. 116), whereupon the following occurred:

"LAW MEMBER: Captain Hughes, we would like to ask you three questions. The questions are these: Do you feel that if you were given a period of five days or a week to obtain any additional evidence, substantial evidence, bearing on the question of your mental competency during this period from August the 12th up through November the 9th, that you could produce any substantial additional testimony in your behalf. We would like to have you answer the question, if you would. How do you feel about that, Captain?

"THE ACCUSED: I'm trying to go over what has been shown so far, sir, regarding my—Regarding what, sir?

"LAW MEMBER: Regarding your mental competency during this period of time.

"THE ACCUSED: I don't believe I can, sir.

"LAW MEMBER: All right, sir. Now, our second question is this: Was it fully explained to you that under the Articles of War you have the right to take the witness stand if you elect, and if you do take the witness stand, to make a sworn statement which would be subject to cross-examination, or to make an unsworn statement which would not be subject to cross-examination, or to remain silent, in which case, if you did remain silent—and as you did—no inference of guilt would be drawn against you by members of this court. Was that fully explained to you before this trial?

"THE ACCUSED: Yes, sir.

"LAW MEMBER: And having been so explained, you elected to remain silent?

(60)

Because a person doesn't usually lie without a feeling that he is going to get away with the lie. But a pathological liar is like a pathological drinker: One drink makes him drunk.

Now, any alcoholic is pathological, but technically a pathological drinker is a person who, after one drink, becomes as intoxicated as if he had drunk enough to really give him a state of intoxication. And a pathological liar is a person who lies when it's obvious that he's lying. In other words, there are normal liars and pathological liars." (pp. 147-148) (Underscoring supplied)

The court again closed and found accused guilty of Charges I and II and of the Specifications thereunder, and not guilty of the Additional Charge and its Specification.

7. It appears to us from the testimony of the psychiatrist that there was some confusion in his mind as to his proper function. He reported to the Board of Officers convened under AR 600-500, and testified upon the trial, that from the psychiatric point of view accused probably was unable to adhere to the right, but that "administratively and legally" accused could adhere to the right. The law is usually regarded as an art or a philosophy, but psychiatry is generally regarded as a science. If on the basis of such tests as have been developed in the present state of that science, the probability is that it is impossible for accused to adhere to the right; then it would seem to be the duty of a scientist to report such conclusion and the reasons therefor to the tribunals authorized by law and regulations to determine whether or not the mental condition of the accused, as diagnosed and prognosed by the scientist, is such as to make the subject legally responsible for his acts.

Manual for Courts-Martial, 1928, paragraph 78g provides:

"Where a reasonable doubt exists as to the mental responsibility of an accused for an offense charged, the accused can not legally be convicted of that offense. A person is not mentally responsible for an offense unless he was at the time 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."

The task of the psychiatrist is to determine from a scientific point of view:

(1) Whether an accused suffers a mental defect, disease or derangement; and

(2) Whether such defect, disease or derangement impairs accused's ability:

- (a) To distinguish right from wrong; and/or
- (b) To adhere to the right.

The court, whose duty it is to determine legal questions, then considers the determination of the psychiatrist together with the other evidence in the case, and determines whether all the evidence establishes beyond a reasonable doubt from the standpoint of the law (1) whether accused committed the acts charged (2) whether at the time thereof accused with reference thereto could distinguish right from wrong, and (3) whether he could refrain therefrom and adhere to the right.

8. We have the right to weigh the evidence in an effort to determine whether or not upon all the evidence a reasonable doubt exists concerning accused's mental responsibility. It is difficult for us to perceive how a man could be legally able to adhere to the right in spite of the existence of a mental defect, and yet be unable so to do from a psychiatric point of view. Military law has sought to keep pace with the developments of science. Major Sharp's testimony would seem to indicate that he was out of step with the march of science. Were his testimony the only evidence to establish that the accused was legally responsible for his acts, we would not hesitate to hold this record to be legally insufficient to support the findings of guilty and the sentence. For the reasons stated, we feel that such testimony leaves more than a merely reasonable doubt that accused at the time of the commission of the offenses was so far free from mental defect and derangement as to be able to adhere to the right. Unfortunately for the accused, the testimony of this psychiatrist does not stand alone. The report of the Board of Medical Officers convened under the provisions of AR 600-500 (Pros. Ex. 17) is also in evidence. The members of that board reported that accused was able both to distinguish right from wrong and to adhere to the right (Pros. Ex. 17; p. 6). Lieutenant Colonel Henry A. Christian, M.C., president, and Major Emile A. Slotoff, M.C., a member of that board, both gave testimony in open court. Colonel Christian testified that accused was given a thorough examination (E. 109). Major Slotoff testified that he was able to adhere to the right. In view of all the evidence, we feel that we have no right to substitute our judgment for that of the court, which, after the most careful and thorough inquiry and consideration, reached the conclusion that accused was legally responsible for his acts.

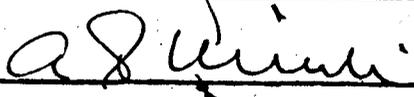
9. Serious error was committed when the psychiatrist was interrogated about his knowledge of pathological liars. The question was not so framed

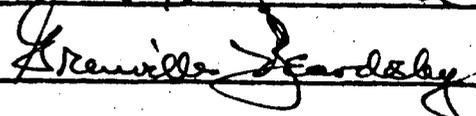
as to call for an opinion from the witness whether accused was a pathological liar. The implication of the answer (R. 147) seems to us to be inescapable. The accused was entitled to have the testimony and other evidence weighed by the court, free from any complication which might tend to arise from expert testimony on the subject of pathological liars. Although no objection was made to the question, and no motion interposed to strike the answer, we have carefully considered the effect of this obvious and plain error. Counsel is in a delicate position in respect to interposing objections to a question put by a member of the court. He may well have feared that to object would be to offend however baseless any such fear might have been. After careful study of the whole record, we are of the opinion that this error was not prejudicial to the substantial rights of the accused, since it is our belief that, despite the difficulty the court apparently was having in making a determination of the mental responsibility of accused, the result would have been the same had not the court heard this expert witness discuss the pathology of prevarication.

10. The accused was born in Bridgeton, New Jersey, on 5 August 1893. He is a high school graduate, and studied engineering for one year at Drexel Institute. He enlisted in the Aviation Section, Signal Corps in November 1917, and has been in the Army ever since. All of his service has been with air units or installations. He was a non-commissioned officer for 22 years, and for 17 years was a master sergeant. On 19 March 1942, he was appointed Captain, Air Corps, AUS. He has been on extended active duty since 1 April 1942.

11. The court was legally constituted and had jurisdiction of the subject matter and of the accused. No errors injuriously affecting the substantial rights of the accused were committed upon 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 to dismissal, total forfeitures, and confinement at hard labor for three years is authorized upon conviction of violations of the 61st and 96th Articles of War.


_____, Judge Advocate


_____, Judge Advocate


_____, Judge Advocate

SPJGV-CM 280093

1st Ind

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

TO: The Secretary of War.

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain William C. Hughes (O-443694), Air Corps.

2. A general court-martial found this officer guilty of fraudulently obtaining \$345 upon nine bad checks (Specifications 1, 2, 3, 4, 5, 6, 7, 9, 10) which he signed and induced five different victims to cash, and of dishonorably failing to pay to a hotel (Specification 8) \$71.01, due for lodging, in violation of Article of War 96, and of absenting himself without leave (1 Specification) from his command from 28 August 1944 to 9 November 1944, in violation of Article of War 61. He was sentenced to dismissal, total forfeitures and confinement at hard labor for three years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence appears in the foregoing opinion of the Board of Review, which Board is of the opinion that the record of trial is legally sufficient to support the findings and sentence, and to warrant confirmation of the sentence. In that opinion I concur.

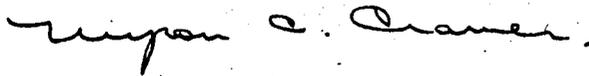
Captain Hughes, upon his return from duty overseas, was granted a 21 day leave by the 1010th Army Air Forces Base Unit, Redistribution Station No. 1, Atlantic City, New Jersey. He failed to return to his station on 28 August 1944, the expiration date of his leave and remained absent without leave until 9 November 1944 when he was apprehended in Cincinnati, Ohio by the military police. He was absent without leave for two months and 13 days. He incurred a bill totalling \$71.01 for lodging at the Hotel Lexington in New York, which he failed to pay. He obtained \$345 by making and uttering nine checks, drawn upon banks in which either his balance was insufficient, or in which he had no account, from Lea S. Hitchner, the Princeton Club in New York, The Benjamin Franklin Hotel in Philadelphia, The Belleville Military Stores in Belleville, Illinois, and the Post Exchange at Patterson Field, Ohio. None of these offenses was denied by accused. He cooperated with the prosecution by stipulations, which eliminated the necessity for presentation of testimony to prove that he committed the acts charged. His defense was that by reason of mental disease, defect or derangement he was unable to adhere to the right with reference to the acts charged. The persons who had known accused for many years testified to conduct and acts on his part about the time in question, which might be regarded as inconsistent with sanity. The prosecution met this evidence by offering

(64)

the report of the proceedings of a Board of Medical Officers, which examined accused, and found that he was so far free from mental disease, defect or derangement as to be able to distinguish right from wrong and to adhere to the right. Two of the members of this board testified as witnesses. An Army doctor and psychiatrist who studied accused's case testified for the defense. He was of the opinion that from a legal standpoint, accused was able to distinguish right from wrong, and to adhere to the right, although from a psychiatric point of view he believed that accused was probably unable to adhere to the right. No such qualification was made in the report of the Board of Medical Officers.

I recommend that the sentence be confirmed, but that the forfeitures be remitted, that as thus modified the sentence be ordered executed, and that the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, be designated as the place of confinement.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.



MYRON C. CRAMER
Major General
The Judge Advocate General

- 3 Incls
- 1 Rec of Trial
- 2 Form of Action
- 3 Ltr fr Capt Rominger (Inactive),
dated 21 June 45

(Sentence confirmed but forfeitures remitted. As modified ordered executed.
GCMO 279, 5 July 1945).

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

23 MAY 1945

SPJGV-CM 280115

UNITED STATES)

XXI BOMBER COMMAND

v.)

Private JOHN J. SEMIOLI
(32883921), 28th Bombard-
ment Squadron, 19th Bomb-
ardment Group.

Trial by G.C.M., convened at
Headquarters, 314th Bombard-
ment Wing, APO 246, Unit 2,
c/o Postmaster, San Francisco,
California, 20 April 1945.
Dishonorable discharge (sus-
pended) and confinement for
five (5) years. The Army Gar-
rison Forces Stockade, APO
246, c/o Postmaster, San
Francisco, California.

OPINION of the BOARD OF REVIEW
SEMAN, MICELI and BEARDSLEY, Judge Advocates.

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

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

CHARGE: Violation of the 64th Article of War.

Specification 1: In that, Private John J. Semioli, 28th Bombardment Squadron, 19th Bombardment Group, having received a lawful command from Major LEE C. FREE, his superior officer, to report to the Officers' Mess for Kitchen Police duty, did, at APO 246, Unit 2, c/o Postmaster, San Francisco, California, on or about 1000 hours 23 March 1945, willfully disobey the same.

Specification 2: In that, Private John J. Semioli, 28th Bombardment Squadron, 19th Bombardment Group, having received a lawful command from Major LEE C. FREE, his superior officer, to report to the Officers' Mess for Kitchen Police duty, did, at APO 246, Unit 2, c/o Postmaster, San Francisco, California, on or about 1030 hours 23 March 1945, willfully disobey the same.

He pleaded not guilty to and was found guilty of the Charge and Specifications. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for ten years. The reviewing authority approved the sentence, reduced the period of confinement to five years, ordered the execution of the sentence as thus modified, but suspended the execution of the dishonorable discharge until accused's release from confinement. He designated the Army Garrison Forces Stockade, APO 246, c/o Postmaster, San Francisco, California, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 21, Headquarters XXI Bomber Command, APO 234, c/o Postmaster, San Francisco, California, 29 April 1945.

3. a. Evidence for the Prosecution.

On 23 March 1945, at about 10 a.m. Major Free, Executive officer of the accused's squadron, was advised that the accused was absent or missing from KP at the officers' mess where he was currently assigned (R. 6-8). The major met the accused coming out of his (the accused's) tent and inquired why he wasn't at the officers' mess on KP where he was supposed to be. The accused replied "I don't want to" (R. 7). A conversation ensued. The major said there was no use arguing and for the accused to go back to work. The accused replied "I won't do it". The order given was "to the kitchen for KP". (R. 11).

A half hour later the major again met the accused and again repeated his former order. Accused again refused to obey (R. 8). While the officer couldn't remember the exact words which he had used, he testified that he did give a direct order (R. 8-9) on both occasions. Major Free further testified that the men are detailed to the work at the officers' mess, and the detailing has the effect of a direct order (R. 10). Some of the work involved waiting on some of the officers "if the KP wanted to wait on them" (R. 10).

b. For the defense.

The accused testified on direct examination that he was on KP prior to 23 March 1945 at the officers' mess of this particular Bombardment Group; that he was detailed on a roster which was for KP duty, and that he was told to and did wait on table (R. 13-14). Upon cross-examination he described his previous work as setting the tables with salt and pepper shakers, sugar and dishes, cleaning up as each officer left. He also refilled pitchers and fruit bowls (R. 15) and put butter, jam, fruit and dessert on the table (R. 16-17). If an officer at a table (the service was cafeteria style) wanted a second helping, he held up his pitcher or bowl and it was the accused's duty to replenish it (R. 18). He did not have to wash dishes or help prepare food (R. 17).

The accused further stated that he refused to obey the order because he did not want to wait on tables (R. 19) and that he did not want to work in the officers' mess. He admitted receiving the order from Major Free as charged, and admitted refusing to obey it, knowing Major Free was his superior, and the executive officer of his squadron (R. 19). Upon redirect examination (R. 20), recross-examination (R. 20) and a full examination by the court (R. 21) he firmly repeated what he had previously said.

Private Costanza, for the defense, corroborated the accused as to the type of work in the officers' mess.

In rebuttal, the prosecution presented the testimony of Lieutenant Vincent J. Pellicone, mess officer, whose description of the work required of KP's at the mess differed little from that of the accused, except to say that the officers' mess had no table waiters as such (R.28). He denied that officers were directed to hold up their plates for refills; but admitted that they did do so to some extent (R. 28-29). He testified that he tried to get native help, but could not (R. 31).

4. It often has been said that he who disobeys an order which he believes to be illegal does so at his peril. The conclusion has been affirmed, however, by most authorities that a command not lawful, may be disobeyed. An order may be disobeyed with impunity, if it is clearly repugnant to some specific statute, to the law or usage of military service, or to the general law of the land (Winthrop Mil. Law & Prec., Reprint, sec. 888).

The chief question presented by this record is whether compulsory KP duty in an officers' mess at all times and under all circumstances violates the statute, which provides that no officer shall use an enlisted man as a servant in any case whatsoever (10 U.S.C. 608; R.S. 1232). For if that is the case, then every order by a superior officer to do KP duty in an officers' mess is illegal and need never be obeyed. Nor does the refusal or failure to obey such an order constitute a violation of the Articles of War by an enlisted man.

The Judge Advocate General of the Army has generally held that R.S. 1232 prohibits requiring enlisted men to perform service for officers' messes as KP's, waiters, clerks or janitors (SPJG 1945/3030—SPJG 1945/3653).

It has been held that waiting on tables in an officers' mess is contrary to the provisions of R.S. 1232, and the failure of an enlisted

man to obey an order of his superior officer to so wait on table at an officers' mess is illegal and cannot be made the basis of a conviction of willful disobedience under Article of War 64 (Sec. 422(6) Dig. Ops. JAG 1912-40). It has also been held that an order by a superior officer to an enlisted man to "continue washing highball glasses" was illegal as violative of R.S. 1232, for the reason that that order was not given by the officer as the accused's "superior officer" but rather in his capacity of the accused's employer (CM 249667-Shields) and for disobedience of that order the soldier was held not to be punishable.

Section IV of Circular 214, War Department 1942, provides as follows:

"IV--Employment of civilians in officers' messes.--* * *

1. Civilians will be used to operate officers' messes or will be employed as attendants thereat except--

a. When enlisted personnel are provided in Tables of Organization.

b. In the operation of school or training center messes where the officer students are on a temporary duty status.

2. Enlisted attendants may be employed in officers' messes at localities where the post, camp, or station commander has determined that it is impracticable to employ qualified civilian personnel.

3. When civilians are employed they will be paid from funds collected from individual mess members."

Reading the section in toto, it appears to us that the entire spirit of it deals not with the kind of work contemplated but rather with the object to be accomplished thereby. It is to be noted that the authorization for employment of enlisted men is not limited to services voluntarily tendered but is broad enough to include compulsory service under the conditions stated. It is obvious that the intention of the War Department was not to abrogate an act of Congress. The regulation must be held to be in furtherance and not in contravention of the object of the statute. KP as such may be a personal service when rendered to an officer or an officers' mess; or it may be a service rendered to the Army as the result of military necessity, under certain circumstances. The statute in question (RS 1232) is one which obviously places a restriction upon officers using enlisted men as servants. It does not restrict or attempt to prevent an enlisted man from rendering a personal

service to an officer if the enlisted man so chooses. Bearing this in mind, the purpose of the above-quoted Circular becomes apparent, since R.S. 1232 was obviously not designed to prevent the use of enlisted men for military purposes. The sole purpose of the statute is to prevent the use of enlisted men as personal servants. If the work in question is to be performed in the capacity of a private servant to an officer (against the enlisted man's will) then, under any circumstances, it is exacted contrary to the statute. If, on the other hand, the service is rendered as a military necessity and not in the capacity of a servant, it is not exacted unlawfully, merely because an officer or a group of officers benefit thereby. The test to be applied in a case where the question of disobedience of an illegal order is involved, is not whether the work which the accused was ordered to do in an officers' mess was menial in nature, such as KP, clerical work or janitor work, but rather whether these services were to be performed in the capacity of a private servant to accomplish a private purpose, or in the capacity of a soldier, i.e., to accomplish a necessary military purpose. Services of this type rendered by enlisted men to officers at their residences upon a military post in the United States, or as a waiter at a voluntary private officers' mess at such a station may accomplish no military purpose, and may be for the mere convenience and personal benefit of the officer or group of officers as individuals, since no military object is accomplished. In such cases the services are rendered in the capacity of a private servant and hence their compulsion would be in violation of R.S. 1232. However, at remote islands in the Pacific it may be as much an essential military need that officers be fed, as that gasoline and oil be placed in tanks and airplanes, or that enlisted men be fed at Government messes. In each of these instances the object to be accomplished is not the personal welfare of the individual soldier, or of the driver of the tank, or of the pilot of the airplane, or of the officer eating at the mess. Hungry soldiers, gasless tanks and airplanes, and unfed officers could not accomplish the military object for which they were stationed in such remote places. An officer stationed at a remote island cannot reasonably be expected to cook his own food, to wash his own dishes or to attend to the disposal of his own garbage any more than a first sergeant or a corporal would be expected to do these things; not in order to gratify the vanity of the officer, but because it might interfere with the far more important functions inherent in his office and mission.

5. Section IV of Circular 214, supra, was issued by the War Department as a regulation to govern the circumstances under which soldiers may be used at officers' messes, etc., and the circumstances under which,

when so used, they would be considered not as servants within the meaning of the statute but rather as persons performing a military duty.

The question therefore arises whether, in this case, the order issued by Major Free to perform KP duty at the officers' mess was issued in the major's capacity as an employer or in his capacity as the superior officer of the accused. He had no authority to issue such an order as a military superior, unless the station commander had made a determination under Section IV of Circular 214 of the military necessity for the utilization of enlisted men for KP duty at the officers' mess. Of course the burden rested upon the accused in this case of showing the invalidity of the order which he defied. He met that burden by calling the attention of the court to R.S. 1232, because such an order is prima facie illegal in the light of such statute.

Enlisted men may be compelled to work in officers' messes, only under the exceptional circumstances outlined in Circular 214, supra. The general rule is that civilians will be employed therein, unless one of the three exceptions made by the Circular is applicable. The prosecution in this case had the burden of establishing either that the table of organization authorized enlisted men for positions in the officers' mess, or that the station commander had made a determination that it was impracticable to employ qualified civilian personnel in the mess, since the third exception mentioned in the circular is clearly inapplicable. Unless one of these exceptions was established by the evidence in the record, the prosecution's case must fail. The burden of proving the exception rested upon the prosecution, since the presumption is that the general rule and not one of the exceptions was applicable.

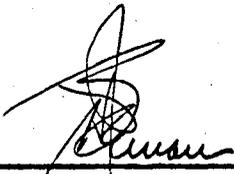
Ordinarily the proper way to prove a determination by the station commander that it was "impracticable to employ civilian personnel" in accordance with the circular above quoted, would be either to put the station commander on the stand to testify that he made such determination, or to produce the original order publishing the action if there was such; or perhaps producing an official copy thereof. While the prosecution did not proceed in the manner outlined, nevertheless we find from the circumstances in evidence, that the court was justified in concluding that the prosecution had met the burden of proving that a determination had been made by the station commander. In a case such as this, the question of the weight of evidence is for the trial court and not for the Board of Review.

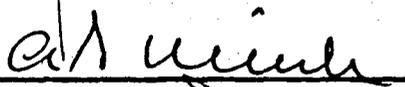
6. The record discloses that the Specifications are multiplicitous, in that the accused is charged with violating two orders. Actually, there

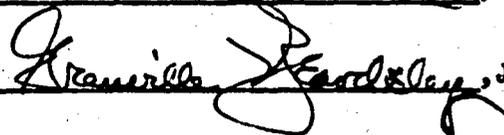
was but one order, which was later repeated. However, the punishment imposed does not exceed that, which might be awarded for one offense. The accused therefore was not prejudiced.

7. The accused is 20-5/12s years of age and was inducted into the service on 6 April 1943. He has had no prior service.

8. For the reasons above set forth, the Board of Review is of the opinion that the record of trial is legally sufficient to support the sentence.


_____, Judge Advocate


_____, Judge Advocate


_____, Judge Advocate



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

PJGH-CM 280124

19 JUN 1945

UNITED STATES)

SEVENTH SERVICE COMMAND
ARMY SERVICE FORCES

v.)

Second Lieutenant JAMES W.
PAYNE (O-1546824), Medical
Administrative Corps.)

Trial by G.C.M., convened at
Jefferson Barracks, Missouri,
24 April 1945. Dismissal,
total forfeitures and confine-
ment for ten (10) 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 Charges and Specifications:

CHARGE I: Violation of the 58th Article of War

Specification: In that Second Lieutenant James W. Payne, MAC, 655th Ambulance Company, Camp Swift, Texas, did, at Camp Swift, Texas, on or about 16 July 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at St. Louis, Missouri, on or about 12 March 1945.

CHARGE II: Violation of the 94th Article of War

Specification 1: In that Second Lieutenant James W. Payne, * * *, did, at Kansas City, Missouri, on or about 30 December 1944, make a claim against the United States by presenting to Lieutenant Colonel Fred G. Tiffany, Finance Officer at Kansas City, Missouri, an officer of the United States, duly authorized to allow and pay such claim, to wit: War Department Pay and Allowance Account, Voucher No. 64394, for the

(74)

sum of Two Hundred and Fifty Dollars (\$250.00), as partial payment for pay and allowances for December 1944, which claim was false and fraudulent in that Second Lieutenant James W. Payne was not lawfully entitled to receive or claim any pay or allowances on said date from the United States, and which claim was then known by the said Second Lieutenant James W. Payne to be false and fraudulent.

Specification 2: In that Second Lieutenant James W. Payne; * * *, for the purpose of obtaining the allowance and payment of a claim against the United States, to wit: War Department Pay and Allowance Account, Voucher No. 64394, for the sum of Two Hundred and Fifty Dollars (\$250.00), as partial payment for pay and allowances for December 1944, did, at Kansas City, Missouri, on or about 30 December 1944, present to Lieutenant Colonel Fred G. Tiffany, Finance Officer at Kansas City, Missouri, an officer of the United States, duly authorized to allow and pay such claim, certain Special Orders in the following words and figures, to wit:

HEADQUARTERS
49th Medical Battalion
Camp Swift, Texas

SPECIAL ORDERS: 12 December 1944

NO.211: E X T R A C T

4. Pursuant to auth contained in Par 6 a (1), AR 605-115, dtd 15 July 1942, leave of absence for fifteen (15) days is granted 2d Lt JAMES W. PAYNE, MAC, 01546824, 655 Ab Co., this Sta eff o/a 15 December 1944.

By order of Major WILLIS:

AUBREY F. CROW
WOJG, USA,
Asst Adjutant

OFFICIAL:

AUBREY F. CROW
WOJG, USA,
Asst Adjutant

A TRUE EXTRACT COPY:

/s/ James W. Payne
JAMES W. PAYNE
2nd Lt., MAC

which said Special Orders were, as he, the said Second Lieutenant James W. Payne then well knew, falsely made and forged.

Specification 3: In that Second Lieutenant James W. Payne, * * *, did, at St. Louis, Missouri, on or about 10 January 1945, make a claim against the United States by presenting to Colonel W. Gritz, Finance Officer at St. Louis, Missouri, an officer of the United States, duly authorized to allow and pay such claim, to wit: War Department Pay and Allowance Account, Voucher No. 101584, for the sum of One Hundred Dollars (\$100.00), as partial payment for pay and allowances from 1 January 1945 to 10 January 1945, which claim was false and fraudulent in that Second Lieutenant James W. Payne was not lawfully entitled to receive or claim any pay or allowances on said date from the United States, and which claim was then known by said Second Lieutenant James W. Payne to be false and fraudulent.

Specification 4: In that Second Lieutenant James W. Payne, * * *, for the purpose of obtaining the allowance and payment of a claim against the United States, to wit: War Department Pay and Allowance Account, Voucher No. 101584, for the sum of One Hundred Dollars (\$100.00), as partial payment for pay and allowances from 1 January 1945 to 10 January 1945, did, at St. Louis, Missouri, on or about 10 January 1945, present to Colonel W. Gritz, Finance Officer at St. Louis, Missouri, an officer of the United States, duly authorized to allow and pay such claim, a certificate, to wit: "SL FO PT - 35 FINANCE OFFICE, U. S. ARMY, St. Louis, Mo. D A T A --- OFFICERS' PAY," which said certificate, as he, the said Second Lieutenant James W. Payne, then knew contained a statement that he, the said Second Lieutenant James W. Payne departed on 5 January 1945 from his prior station at Camp Swift, Texas, and that on 10 January 1945, he was on leave, which statement was false and fraudulent, and was then known by the said Second Lieutenant James W. Payne to be false and fraudulent.

Specification 5: In that Second Lieutenant James W. Payne, * * *, did, at Jefferson Barracks, Missouri, on or about 18 January 1945, make a claim against the United States by presenting to Captain S. Schalman, Agent Finance Officer for Colonel W. Gritz, Finance Officer, St. Louis, Missouri, an officer of the United States, duly authorized to allow and pay such claim, to wit: War Department Pay and Allowance Account, Voucher No. 110615-13, for the sum of One Hundred and Sixty Dollars (\$160.00), as partial payment for pay and allowances for January 1945, which claim was false and fraudulent in that Second Lieutenant James W. Payne was not lawfully entitled to receive or claim any pay or allowances on said date from the United States, and which claim was then known by said Second Lieutenant James W. Payne to be false and fraudulent.

Specification 6: In that Second Lieutenant James W. Payne, * * *, for the purpose of obtaining the allowance and payment of a claim against the United States, to wit: War Department Pay and Allowance Account, Voucher No. 110615-13, for the sum of One Hundred and Sixty Dollars (\$160.00), as partial payment for pay and allowances for January 1945, did, at Jefferson Barracks, Missouri, on or about 18 January 1945, present to Captain S. Schalman, Agent Finance Officer for Colonel W. Gritz, Finance Officer, St. Louis, Missouri, an officer of the United States, duly authorized to allow and pay such claim, certain Special Orders in the following words and figures, to wit:

HEADQUARTERS
49th Medical Battalion
Camp Swift, Texas

SPECIAL ORDERS:

4 January 1945

E X T R A C T

NO.4:

4. Pursuant to auth contained in Par 6 a (1), AR 605-115, dtd 15 July 1942, leave of absence for fifteen (15) days is granted 2nd Lt JAMES W. PAYNE, MAC, 01546824, 655th Medical Ambulance Co., this sta eff o/a 5 January 1945.

By order of Major WILLIS:

AUBREY F. CROW
WOJG, USA,
Asst Adjutant

OFFICIAL:

AUBREY F. CROW
WOJG, USA,
Asst Adjutant

A TRUE EXTRACT COPY:

/s/ James W. Payne
JAMES W. PAYNE
2nd Lt., MAC

which said Special Orders were, as he, the said Second Lieutenant James W. Payne then well knew, falsely made and forged.

Specification 7: In that Second Lieutenant James W. Payne, * * *, did, at Fort Leonard Wood, Missouri, on or about 26 January 1945, make a claim against the United States by presenting to Captain O. N. Reese, Finance Officer at Fort Leonard Wood, Missouri, an officer of the United States, duly authorized to allow and pay such claim, to wit: War Department Pay and

Allowance Account, Voucher No. 9976, for the sum of Two Hundred and Fifty Dollars (\$250.00), as partial payment for pay and allowances for January 1945, which claim was false and fraudulent in that Second Lieutenant James W. Payne was not lawfully entitled to receive or claim any pay or allowances on said date from the United States, and which claim was then known by said Second Lieutenant James W. Payne to be false and fraudulent.

Specification 8: In that Second Lieutenant James W. Payne, * * *, did, at Fort Benjamin Harrison, Indiana, on or about 31 January 1945, make a claim against the United States by presenting to Captain R. Perkins, Agent Finance Officer for Major B. B. Callaway, Finance Officer at Indianapolis, Indiana, an officer of the United States, duly authorized to allow and pay such claim, to wit: War Department Pay and Allowance Account, Voucher No. 35491, for the sum of Two Hundred and Ninety Five Dollars and Three Cents (\$295.03) for pay and allowances from 1 January 1945 to 31 January 1945, which claim was false and fraudulent in that Second Lieutenant James W. Payne was not lawfully entitled to receive or claim any pay or allowances on said date from the United States, and which claim was then known by said Second Lieutenant James W. Payne to be false and fraudulent.

Specification 9: In that Second Lieutenant James W. Payne, * * *, for the purpose of obtaining the allowance and payment of a claim against the United States, to wit: War Department Pay and Allowance Account, Voucher No. 35491, for the sum of Two Hundred Ninety Five Dollars and Three Cents (\$295.03), payment for pay and allowances from 1 January 1945 to 31 January 1945, did, at Fort Benjamin Harrison, Indiana, on or about 31 January 1945, present to Captain R. Perkins, Agent Finance Officer for Major B. B. Callaway, Finance Officer, at Indianapolis, Indiana, an officer of the United States, duly authorized to allow and pay such claim, certain Special Orders in the following words and figures, to wit:

HEADQUARTERS
49th Medical Battalion
Camp Swift, Texas

SPECIAL ORDERS:

17 January 1945

E X T R A C T

NO. 18:

3. Pursuant to auth contained in Par 6 a (1), AR 605-115, dtd 15 July 1942, as amended, leave of absence

(78)

for fifteen (15) days is granted 2d Lt. JAMES W. PAYNE, MAC, 01546824, 655th Ambulance Co., this station eff o/a 20 January 1945.

By order of Major WILLIS:

AUBREY F. CROW
WOJG, USA,
Asst Adjutant

OFFICIAL:

AUBREY F. CROW
WOJG, USA,
Asst Adjutant

A TRUE EXTRACT COPY:

/s/ James W. Payne
JAMES W. PAYNE
2d Lt., MAC,

which said Special Orders were, as he, the said Second Lieutenant James W. Payne then well knew, falsely made and forged.

Specification 10: In that Second Lieutenant James W. Payne, * * *, did, at Indianapolis, Indiana, on or about 2 February 1945, make a claim against the United States by presenting to Major B. B. Callaway, Finance Officer at Indianapolis, Indiana, an officer of the United States, duly authorized to allow and pay such claim, to wit: War Department Pay and Allowance Account, Voucher No. 33191, for the sum of Two Hundred and Ninety Five Dollars and Three Cents, as payment for pay and allowances from 1 January 1945 to 31 January 1945, which claim was false and fraudulent in that Second Lieutenant James W. Payne was not lawfully entitled to receive or claim any pay or allowances on said date from the United States, and which claim was then known by said Second Lieutenant James W. Payne to be false and fraudulent.

Specification 11: In that Second Lieutenant James W. Payne, * * *, for the purpose of obtaining the allowance and payment of a claim against the United States, to wit: War Department Pay and Allowance Account, Voucher No. 33191, for the sum of Two Hundred Ninety Five Dollars and Three Cents (\$295.03), as payment for pay and allowances from 1 January 1945 to 31 January 1945, did, at Indianapolis, Indiana, on or about

(79)

2 February 1945, present to Major B. B. Callaway,
Finance Officer at Indianapolis, Indiana, an officer of
the United States, duly authorized to allow and pay such
claim, certain Special Orders in the following words and
figures, to wit:

HEADQUARTERS
49th Medical Battalion
Camp Swift, Texas

SPECIAL ORDERS:

17 January 1945

E X T R A C T

NO. 18:

3. Pursuant to auth contained in Par 6a (1)
AR 605-115, dtd 15 July 1942, as amended, leave of absence
for fifteen (15) days is granted 2d Lt. JAMES W. PAYNE,
MAC, 01546824, 655th Ambulance Co., this station eff o/a
20 January 1945.

BY order of Major WILLIS:

AUBREY F. CROW
WOJG, USA,
Asst Adjutant

OFFICIAL:

AUBREY F. CROW
WOJG, USA,
Asst Adjutant

A TRUE EXTRACT COPY:

/s/ James W. Payne
JAMES W. PAYNE
2d Lt., MAC,

which said Special Orders were, as he, the said Second Lieu-
tenant James W. Payne then well knew, falsely made and forged.

He pleaded not guilty to Charge I and its Specification, but by excep-
tions and substitutions guilty to absence without leave for the period
alleged in violation of Article of War 61, and guilty to Charge II and
its Specifications. He was found guilty of all Charges and Specifica-
tions. There was introduced at the trial evidence of one previous con-
viction by general court-martial for AWOL from 8 November 1943 to
11 November 1943 in violation of Article of War 61 for which accused
was sentenced to dismissal and total forfeitures. This sentence was on

12 February 1944 suspended during the pleasure of the President. For the offenses here involved accused was sentenced to dismissal, total forfeitures and confinement during his natural life. The reviewing authority approved the sentence, remitted all of the confinement in excess of ten years and forwarded the record of trial for action under Article of War 48.

3. a. Charge I and Specification:

Accused absented himself without leave from his organization and station at Camp Swift, Texas, on 16 July 1944 and remained absent until apprehended by civil police in the lobby of the Lennox Hotel, St. Louis, Missouri, on 12 March 1945, and returned to military control on the same date. At the time of his apprehension accused was dressed in the uniform of an officer of the United States Army and was sober (R. 13-14; Pros. Exs. 1, 2).

b. Charge II, Specifications 2, 4, 6, 9 and 11:

These five Specifications allege respectively that on 30 December 1944, 10 January 1945, 18 January 1945, 31 January 1945 and 2 February 1945, accused presented to various finance officers of the Army false orders, in order to obtain payment of purported claims, stating accused had been granted leave of absence. The prosecution introduced evidence demonstrating that (a) on 30 December 1944, at Kansas City, Missouri, accused presented to Lieutenant Colonel Fred G. Tiffany, a Finance Officer of the United States Army, a purported extract copy of paragraph 4, Special Orders No. 4, Headquarters 49th Medical Battalion, Camp Swift, Texas, dated 12 December 1944, which stated that accused had been granted 15 days leave effective on or about 15 December 1944. At the same time accused presented a pay and allowance account to Lieutenant Colonel Tiffany, using the purported Special Orders to justify his presence in Kansas City. Believing these Special Orders to be authentic and relying thereon, Lieutenant Colonel Tiffany paid accused the sum of \$250 on the pay and allowance account. This extract copy of Special Orders had not in fact been issued by the authority appearing thereon, or by any other proper authority, but had been falsely and fraudulently prepared by accused who was absent without leave at the time he exhibited and presented them (R. 14; Pros. Exs. 3, 3c), (b) on 10 January 1945, at St. Louis, Missouri, accused presented to Colonel W. Gritz, Finance Officer of the United States Army, St. Louis, Missouri, a signed certificate containing a statement that accused departed on 5 January 1945 from his prior station at Camp Swift, Texas, and that on 10 January 1945 he was on leave. At the same time accused presented a pay and allowance account to Colonel W. Gritz, using the signed certificate to justify his presence in St. Louis, and to support his partial pay and allowance claim. Believing the statements contained in this certificate to be true and relying thereon, Colonel Gritz paid accused the sum of \$100 on the pay and allowance account so

presented. This signed certificate, containing the statement that accused was on leave from his station at Camp Swift, Texas, from which he departed 5 January 1945, was as he well knew, false and fraudulent, in that accused was, at the time he presented the certificate and the claim, absent without leave and not entitled to any pay and allowances for the period covered by the pay voucher (R. 15; Pros. Exs. 4, 4a), (c) on 18 January 1945, at Jefferson Barracks, Missouri, accused presented to Captain S. Schalman, Agent Finance Officer for Colonel W. Gritz, Finance Officer of the United States Army, St. Louis, Missouri, a purported extract copy of paragraph 4, Special Orders No. 4, Headquarters 49th Medical Battalion, Camp Swift, Texas, dated 4 January 1945, which stated that accused had been granted 15 days leave effective on or about 5 January 1945. At the same time accused presented a pay and allowance account to Captain Schalman, Agent Finance Officer for Colonel W. Gritz, using the purported Special Orders to justify his presence in St. Louis. Believing these Special Orders to be authentic and relying thereon, Captain Schalman, Agent Finance Officer for Colonel Gritz, paid accused the sum of \$160 on the pay and allowance account. This extract copy of Special Orders had not in fact been issued by the authority appearing thereon, or by any other proper authority, but had been falsely and fraudulently prepared by accused who was absent without leave at the time he exhibited and presented them (R. 15; Pros. Exs. 5, 5c), (d) on 31 January 1945, at Fort Benjamin Harrison, Indiana, accused presented to Captain R. Perkins, Agent Finance Officer for Major B. B. Callaway, Finance Officer of the United States Army, Indianapolis, Indiana, a purported extract copy of paragraph 3, Special Orders No. 18, Headquarters 49th Medical Battalion, Camp Swift, Texas, dated 17 January 1945, which stated that accused had been granted 15 days leave effective on or about 20 January 1945. At the same time accused presented a pay and allowance account to Captain Perkins, Agent Finance Officer for Major Callaway using the purported Special Orders to justify his presence in Indianapolis. Believing these Special Orders to be authentic and relying thereon, Captain Perkins paid accused the sum of \$295.03 on the pay and allowance account. This extract copy of Special Orders had not in fact been issued by the authority appearing thereon, or by any other proper authority, but had been falsely and fraudulently prepared by accused who was absent without leave at the time he exhibited and presented them (R. 16; Pros. Exs. 7, 7c), (e) on 2 February 1945, at Indianapolis, Indiana, accused presented to Major B. B. Callaway, Finance Officer of the United States Army, Indianapolis, Indiana, a purported extract copy of paragraph 3, Special Orders No. 18, Headquarters 49th Medical Battalion, Camp Swift, Texas, dated 17 January 1945, which stated that accused had been granted 15 days leave effective on or about 20 January 1945. At the same time accused presented a pay and allowance account to Major Callaway, using the purported Special Orders to justify his presence in Indianapolis. Believing these Special Orders to be authentic and relying thereon Major Callaway paid accused the sum of \$295.03 on the pay and allowance account. This extract copy of Special Orders had not in fact been issued by the authority appearing thereon, or by any

(82)

other proper authority, but had been falsely and fraudulently prepared by accused who was absent without leave at the time he exhibited and presented them (R. 16; Pros. Exs. 8, 8b).

c. Charge II. Specifications 1, 3, 5, 7, 8 and 10:

These six Specifications charge accused with making a like number of false claims against the United States by presenting them to various finance officers of the United States Army who were duly authorized to allow and pay such claims, accused well knowing that each and all such claims were false and fraudulent. The prosecution introduced evidence proving that false claims for pay and allowances and for partial pay and allowances in the following amounts were made and presented by accused, while in a status of AWOL, to the following Finance Officers of the United States Army on the following dates and were paid by such Finance Officers with the resultant total overpayments being made to accused, viz:

<u>Spec.</u>	<u>Ex. No.</u>	<u>Amount of False Claim</u>	<u>Finance Officer to Whom Presented</u>	<u>Date Presented</u>	<u>Total Overpayment</u>
1	3,3a,3b	\$250	Lt Col Fred G Tiffany Kansas City, Mo	30 Dec 44	\$250
3	4,4a	\$100	Col W Gritz St Louis, Mo	10 Jan 45	\$100
5	5,5a, 5b	\$160	Capt S Schalman Agent Finance Officer for Col W Gritz St Louis, Mo	18 Jan 45	\$160
7	6,6a	\$250	Capt O N Reese Ft Leonard Wood, Mo	26 Jan 45	\$250
8	7,7a, 7b,7d	\$295.03	Capt R Perkins Agent Finance Officer for Maj B B Callaway Indianapolis, Ind	31 Jan 45	\$295.03
10	8,8a, 8c,8d	\$295.03	Maj B B Callaway Indianapolis, Ind	2 Feb 45	\$295.03
Total Overpayment					\$1350.06

During accused's unauthorized absence from 16 July 1944 to 12 March 1945, no pay or allowances accrued to him from the United States (par. 3a,

AR 35-1420, 15 Dec 1939; par. 9a (1), AR 605-300, 14 Sept 1944). Nevertheless, during this period of unauthorized absence accused made and presented all of the above claims for pay and allowances, each and all of which were paid (R. 13-32; Pros. Exs. 3, 3a, 3b; 4, 4a; 5, 5a, 5b; 6, 6a, 7, 7a, 7b, 7d; 8, 8a, 8c, 8d; 9, 10, 11).

4. After having his rights fully explained, accused elected to testify under oath in his own behalf. He testified that he and his wife were having domestic difficulties and he was granted fifteen days leave of absence in July 1944 for the purpose of proceeding to Walla Walla, Washington, where his wife and two children were residing. One of the children was his own and the other was his wife's by a former marriage. His wife wanted a divorce in order to marry another man, who was unwilling to marry her with his the second child. Accordingly, his wife proposed to "let the child out for adoption by any person that would have it." He was unable to come to any understanding with his wife during his fifteen days leave, so he departed in sufficient time to arrive at Camp Swift, Texas, before it expired. He got as far as Denver, Colorado, and had a layover there of about four hours where "I started drinking and sort of went hay-wire, I guess, and missed several trains." He then sobered up and sent a wire to his commanding officer advising him that he had been delayed, but was proceeding to his station for duty. Upon arrival at Amarillo, Texas, he was "in such a frame of mind that nothing mattered much to me, so I don't know what made me do it. I started drinking there and I was already four or five days late, so I just said 'what's the use.' So I kept on drinking then, and I guess just went from bad to worse. That's about all I have to say" (R. 38-40). "Well, at all times during my absence, I kept thinking 'Well, tomorrow I will go to turn myself in', and during this time of drinking I kept saying that I would turn myself in to the nearest station when I sobered up. But I kept putting it off, because in my mind, I was gone so long that I just could hardly bring myself to going into some strange post and a camp not my own and going up to a strange officer and telling him that I was absent without leave and wanted to give myself up. And I kept trying to make myself do it, and I intended to do it all along, but just didn't do it." He was in uniform and used his own name at all times during his absence (R. 40-41).

On cross-examination and examination by the court accused testified that at the time he started to return to his station, his child was in the custody of his wife, who intended to have the child adopted (R. 43). After his apprehension, the accused learned that his mother had acquired custody of the child about the middle of December, and he stated that his mother is a proper custodian for the child (R. 41-42). While absent in desertion, the accused had no contact with his wife or mother, and he made no inquiries about the child (R. 42). He was drunk most of the time during his absence, particularly at night, since he slept more or less all day (R. 43, 46-48). However, he was "more or less on an even keel" and "never did get staggering drunk at

(84)

any time" (R. 48). Prior to his unauthorized absence, the accused was not a heavy drinker (R. 45). In spite of his drinking, he remained in uniform and maintained a neat appearance at all times (R. 43). The accused received a partial payment for the first fifteen days of July when he went on leave, he did some gambling during his absence, and his living expenses during several months in Amarillo were low because he made acquaintances there and was able to do his drinking at social affairs (R. 48-49). He intended to return to his proper station sometime but, although he did not fear the consequences of his unauthorized absence, his conscience bothered him and he did not have the courage to turn himself in (R. 44). At the time he went on leave, his unit had just started a training period which was to be finished in November, and it was rumored that the organization was going overseas after completing its training (R. 44-45). The accused did not communicate with any person at his home station during the period of his unauthorized absence. He received his commission upon graduation from Officer Candidate School at Camp Berkeley, Texas, with Class 15 on 12 May 1943 (R. 45).

On redirect examination the accused testified that at the time he went on leave he was ambulance officer and platoon leader with a separate ambulance company, which in combat would be attached to an Army corps. He requested leave in order to straighten up family difficulties at home, and he left intending to return to his proper station. At that time his organization had not been alerted for overseas movement. The organization had just started a training period, to be completed in November, at which time the accused understood that the organization would go overseas (R. 46).

5. The record evidence fully sustains all findings of guilty and demonstrates conclusively that accused's pleas of guilty were not improvidently entered.

a. With respect to Charge I and its Specification it is clear that accused absented himself without leave from his organization and station at Camp Swift, Texas, on 16 July 1944 and remained absent until apprehended by civil police at St. Louis, Missouri, on 12 March 1945. From the long period of his absence, the distance traveled by accused and the manner by which his absence was terminated, the court was warranted in drawing the inference that he intended to remain away permanently.

b. During this period of absence and between 30 December 1944 and 2 February 1945, accused presented false leave orders on four separate occasions and on one occasion presented a false certificate (in conformity with Section IX, Cir. 337, dated 28 Dec. 1943) in order to enable him to obtain payment of six false pay and allowance claims against the United States (Ch. II, Specs. 2, 4, 6, 9, 11). Although no pay or allowances accrued to him while he was absent without leave (par. 3a, AR 35-1420,

15 Dec. 1939; par. 9a (1), AR 605-300, 14 Sept. 1944) nevertheless during this period of absence and between 30 December 1944 and 2 February 1945, accused presented six false pay and allowance accounts to various finance officers of the United States Army and thereby fraudulently obtained from the United States a total of \$1350.06 on these six vouchers to which he was not entitled. There is nothing in the record or allied papers to indicate that restitution has been made of any part of the money fraudulently obtained by accused.

6. Accused is 26 years of age, is married and has one child. He attended high school $3\frac{1}{2}$ years and in civil life worked as a meat and dairy inspector at a salary of \$80 per month. He enlisted in the Army 21 January 1938, serving continuously in an enlisted capacity until 12 May 1943, when he was commissioned a second lieutenant, Army of the United States, and ordered to 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, 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 58 or Article of War 94.

Thomas N. Dappy, Judge Advocate

William H. Sambrell, Judge Advocate

Robert C. Trevethan, Judge Advocate

SPJGH-CM 280124

1st Ind

Hq ASF, JAGO, Washington 25, D. C. JUL 5 1945

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant James W. Payne (O-1546824), Medical Administrative Corps.

2. Upon trial by general court-martial this officer pleaded not guilty to desertion in violation of Article of War 58 (Charge I, Specification) but guilty to absence without leave for about eight months, in violation of Article of War 61; guilty to presenting false leave orders on four different occasions and a false certificate on another, in order to obtain payment on six false pay and allowance claims against the United States (Charge II, Specs. 2, 4, 6, 9, 11) and guilty to presenting six false pay and allowance claims to various Finance Officers of the United States Army, between 30 December 1944 and 2 February 1945, whereby he fraudulently obtained from the United States a total of \$1350.06, to which he was not entitled (Charge II, Specs. 1, 3, 5, 7, 8, 10). He was found guilty of all Charges and Specifications. There was introduced at the trial evidence of one previous conviction by general court-martial for absence without leave from 8 November 1943 to 11 November 1943 in violation of Article of War 61 for which accused was sentenced to dismissal and total forfeitures. On 12 February 1944 this sentence was suspended during the pleasure of the President. For the offenses here involved accused was sentenced to dismissal, total forfeitures and confinement during his natural life. The reviewing authority approved the sentence, remitted all of the confinement in excess of ten years and forwarded the record of trial for action under Article of War 48.

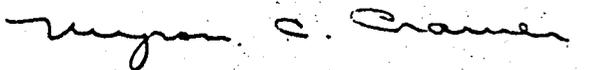
3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, as approved by the reviewing authority, and to warrant confirmation of the sentence. I concur in that opinion. Accused absented himself without leave from his organization and station at Camp Swift, Texas, on 16 July 1944 and remained absent until apprehended by civil authorities in St. Louis, Missouri, on 12 March 1945. During this period of unauthorized absence and between 30 December 1944 and 2 February 1945 accused presented false leave orders on four different occasions and a false certificate on another in order to obtain payment of six false pay and allowance claims against the United States. Simultaneous with the presenting of these false leave orders and the false certificate he presented six false pay and allowance accounts to various Finance Officers

(87)

of the United States Army whereby he fraudulently obtained from the United States the sum of \$1350.06 to which he was not entitled. There is nothing in the record or allied papers to indicate that restitution has been made of any part of the money fraudulently obtained by accused.

I recommend that the sentence as approved by the reviewing authority be confirmed and carried into execution and that the U. S. Penitentiary, Leavenworth, Kansas, be designated as the place of confinement. Section 80, Title 18, U.S. Code, 1940 Edition, authorizes penitentiary confinement for presenting false claims against the United States.

4. Inclosed is a form of action designed to carry into effect the foregoing recommendation, should such recommendation meet with your approval.



2 Incls

1. Record of trial
2. Form of action

MYRON C. CRALER
Major General
The Judge Advocate General

(Sentence as approved by reviewing authority confirmed. GCMO 356, 21 July 1945).



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

(89)

SPJGK - CM 280144

18 MAY 1945

UNITED STATES)

v.)

First Lieutenant BENJAMIN)
F. BAER (O-806604), Air)
Corps.)

ARMY AIR FORCES
CENTRAL FLYING TRAINING COMMAND

Trial by G.C.M., convened at
Fort Worth Army Air Field, Fort
Worth, Texas, 30 April 1945.
Dismissal and total forfeitures.

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 Specification:

CHARGE: Violation of the 61st Article of War.

Specifications: In that First Lieutenant Benjamin F. Baer, Squadron B, 2519th Army Air Forces Base Unit, did, without proper leave, absent himself from his command at Fort Worth Army Air Field, Fort Worth, Texas, from about 6 April 1945 to about 16 April 1945.

He pleaded guilty to and was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by a general court-martial for embezzlement of \$1,000, property of the United States, in violation of Article of War 94, and for absence without leave for five days in violation of Article of War 61. The approved sentence involved forfeiture of pay of \$100 per month for six months and suspension of promotion for one year. In the case now under consideration 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. Supplementing the plea of guilty, the prosecution offered in evidence a properly identified and authenticated extract copy of the morning report of Squadron B, 2519th Army Air Forces Base Unit, containing entries pertaining to the accused, showing that accused was absent without leave from that organization from 6 April 1945 to 16 April 1945 (R. 5). There was also introduced in evidence a stipulation, duly signed by the trial judge advocate, defense counsel, and the accused, showing that by paragraph 9, Special Orders No. 89, Headquarters Smyrna Army Air Field, Smyrna,

Tennessee, dated 30 March 1945, the accused was relieved from "attachment unassigned" that station and "assigned to AFTRC 2519th AAF Unit, Ft. Worth AA Fld, Ft. Worth Texas: * * * and ordered to report at his new station not later than 5 Apr. 1945 if travel is performed by rail and not later than 6 April 1945 if travel is performed by privately owned conveyance" (R. 6, Pros. Ex. 2). The commanding officer of the organization to which accused had been assigned testified that he only knew the accused as an officer who had been assigned to his squadron. When asked what day in April the accused reported for duty, the witness replied: "I know that he signed in, which is the official way of reporting to the station, on the 16th" (R. 5,6).

4. No evidence was introduced by the defense. However, the accused, through his counsel, made an unsworn statement as follows:

"* * * The accused, Benjamin F. Baer, 1st Lieutenant, Air Corps, 0806604, has served a tour of duty in the European Theater of Operations beginning 4 November 1943 and ending 20 October 1944. An examination of the accused's Form 66-2, and this is agreed to by the Trial Judge Advocate that this is an extract of that 66-2, discloses that he flew 29 combat missions totaling 182 combat hours as a B-24 co-pilot, and 4 combat missions totaling 28 combat hours as a B-24 pilot. All missions were flown as a member of the 448th Group, 715th Squadron, of the 8th Air Force in England. The 66-2 of the accused shows that he holds the following awards and decorations: Distinguished Flying Cross awarded 2 August 1944; Air Medal awarded 9 March 1944; 4th Oak Leaf Cluster; European and Mediterranean Theater Ribbon with 3 battle stars, and 2 overseas bars for twelve months' service from 3 November 1943 to 17 November 1944." (R. 6-7)

5. The undisputed evidence confirms accused's plea of guilty of absence without leave from his new station from 6 April 1945 to 16 April 1945, as alleged in the Charge and Specification and as found by the court.

6. War Department records show that accused is 25 years old and unmarried. He attended the University of Virginia, but did not graduate. He also attended the Spartan School of Aeronautics for 5-1/2 months. He enlisted in the military service on 8 January 1942 for training as an aviation mechanic. He became an aviation cadet 15 September 1942, was commissioned a second lieutenant, Air Corps, AUS, 30 June 1943, and was promoted to the grade of a first lieutenant 15 June 1944. As a member of the 448th Bombardment Group, Eighth Air Force, he received four citations for meritorious achievement in accomplishing with distinction several aerial operational missions over enemy occupied Continental Europe, for which he was awarded the Air Medal with four Oak Leaf Clusters. On 8 August 1944 he was found guilty by a general court-martial of embezzlement of \$1,000, property of the United States, in violation of Article of War 94, and of absence without leave for five days in violation of Article of War 61.

The approved sentence involved forfeiture of pay of \$100 per month for six months and suspension of promotion for one year. Subsequent to his previous trial and conviction by general court-martial he was awarded the Distinguished Flying Cross "for extraordinary achievement, courage, coolness, and exceptional skill while serving as a pilot of a B-24 airplane on many bombardment missions over enemy occupied Continental Europe."

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

Langston, Judge Advocate.
Charles Thomas, Judge Advocate.
William W. Wynn, Judge Advocate.

(92)

SPJGK - CM 280144

1st Ind.

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

104

TO: The Secretary of War

1. Pursuant to Executive Order No. 9566, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Benjamin F. Baer (O-806604), Air Corps.

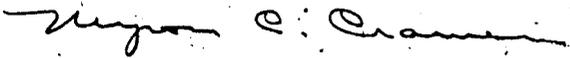
2. Upon trial by general court-martial this officer pleaded guilty to, and was found guilty of, absence without leave (10 days) in violation of Article of War 61. Evidence was introduced of one previous conviction by general court-martial for embezzlement of \$1,000, property of the United States, in violation of Article of War 94, and for absence without leave (5 days) in violation of Article of War 61. The approved sentence in that case involved forfeiture of pay of \$100 per month for six months and suspension of promotion for one year. In the case now under consideration, 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. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof.

The accused by proper order was relieved from duty at Smyrna Army Air Field, Smyrna, Tennessee, and transferred assigned to Squadron B, 2519th Army Air Forces Base Unit, Fort Worth Army Air Field, Fort Worth, Texas. He was ten days late in reporting to his new station. War Department records show that while a member of the 448th Bombardment Group, Eighth Air Force, the accused received four citations for meritorious achievement in several aerial operational missions over enemy occupied Continental Europe, for which he was awarded the Air Medal with four Oak Leaf Clusters. Subsequent to his previous trial and conviction by general court-martial he was awarded the Distinguished Flying Cross "for extraordinary achievement, courage, coolness, and exceptional skill while serving as a pilot of a B-24 airplane on many bombardment missions over enemy occupied Continental Europe." In view of the outstanding combat record of accused, I recommend that the sentence be approved but commuted to a reprimand and forfeiture of \$25.00 a month for six months, and that the sentence as thus modified be carried into execution.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.

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


MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed but committed to a reprimand and forfeiture of \$25. per month for six months. GCMO 289, 7 July 1945).

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

(93)

30 MAY 1945

SPJGV-CM 280159

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

v.)

Captain GILLESPIE B. MURRAY)
(O-907126), Air Corps.)

ARMY AIR FORCES
WESTERN TECHNICAL TRAINING COMMAND

Trial by G.C.M., convened
at Lowry Field, Denver,
Colorado, 4 and 26 April
1945. Dismissal.

OPINION of the BOARD OF REVIEW
SEMAN, MICELI and BEARDSLEY, Judge Advocates.

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

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

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

Specification: In that Captain Gillespie B. Murray, Army Air Forces, Assigned Squadron A, 3702d Army Air Forces Base Unit, Buckley Field, Colorado, did, at Headquarters, Army Air Forces Western Technical Training Command, Denver, Colorado, on or about 5 January 1945, with the intent to deceive the Reclassification Board appointed pursuant to Paragraph 17, Special Order 212, dated 2 September 1944, Headquarters, Army Air Forces Western Technical Training Command, Denver, Colorado, and Paragraph 1, Special Order 258, dated 27 October 1944, Headquarters, Army Air Forces Western Technical Training Command, Denver, Colorado, state that as of 5 January 1945 his total indebtedness was Eight Hundred Twenty-Three (\$823.00) Dollars, which statement was well known by the said Captain Gillespie B. Murray to be untrue.

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

Specification 1: In that Captain Gillespie B. Murray, Army Air Forces, Assigned Squadron A, 3702d Army Air Forces Base Unit, Buckley Field, Colorado, did, at Keesler Field, Mississippi, on or about 15 August 1944, wrongfully borrow money in the amount of Twenty (\$20.00) Dollars from Private First Class James E. Hadden, an enlisted man under his command, to the prejudice of good order and military discipline.

Specification 2: In that Captain Gillespie B. Murray, Army Air Forces, Assigned Squadron A, 3702d Army Air Forces Base Unit, Buckley Field, Colorado, did, at Keesler Field, Mississippi, on or about 8 November 1944, wrongfully borrow money in the amount of Twenty (\$20.00) Dollars from Private First Class James E. Hadden, an enlisted man under his command, to the prejudice of good order and military discipline.

Specification 3: In that Captain Gillespie B. Murray, Army Air Forces, Assigned Squadron A, 3702d Army Air Forces Base Unit, Buckley Field, Colorado, did, at Keesler Field, Mississippi, on or about 1 November 1944, wrongfully borrow money in the amount of Five (\$5.00) Dollars from Sergeant Oliver Gregory, an enlisted man under his command, to the prejudice of good order and military discipline.

Specification 4: In that Captain Gillespie B. Murray, Army Air Forces, Assigned Squadron A, 3702d Army Air Forces Base Unit, Buckley Field, Colorado, did, at Sheppard Field, Texas, on or about 1 September 1943, wrongfully borrow money in the amount of Fifty (\$50.00) Dollars from Master Sergeant Benjamin Fredericks, an enlisted man under his command, to the prejudice of good order and military discipline.

Specification 5: (Nolle Prosequi).

Specification 6: (Finding of not guilty).

Specification 7: In that Captain Gillespie B. Murray, Army Air Forces, Assigned Squadron A, 3702d Army Air Forces Base Unit, Buckley Field, Colorado, did, at Keesler Field, Mississippi, on or about 31 August 1944, wrongfully borrow money in the amount of Forty (\$40.00) Dollars from Corporal George H. Morrison, an enlisted man under his command, to the prejudice of good order and military discipline.

Specification 8: In that Captain Gillespie B. Murray, Army Air Forces, Assigned Squadron A, 3702d Army Air Forces Base Unit, Buckley Field, Colorado, did at Keesler Field, Mississippi, on or about 1 July 1944, wrongfully borrow money in the amount of Five Dollars (\$5.00) from Private First Class Harry J. Bournique, an enlisted man under his command, to the prejudice of good order and military discipline.

Specification 9: In that Captain Gillespie B. Murray, Army Air Forces, Assigned Squadron A, 3702d Army Air Forces Base Unit,

Buckley Field, Colorado, did, at Keesler Field, Mississippi, on or about 1 July 1944, wrongfully borrow money in the amount of Sixty Dollars (\$60.00) from Private First Class Malcolm M. McKenzie, an enlisted man under his command, to the prejudice of good order and military discipline.

Specification 10: In that Captain Gillespie B. Murray, Army Air Forces, Assigned Squadron A, 3702d Army Air Forces Base Unit, Buckley Field, Colorado, did, at Keesler Field, Mississippi, on or about 1 February 1944, wrongfully borrow money in the amount of Five Hundred Dollars (\$500.00) from Private First Class Edward W. Kramer, an enlisted man under his command, to the prejudice of good order and military discipline.

Specification 11: In that Captain Gillespie B. Murray, Army Air Forces, Assigned Squadron A, 3702d Army Air Forces Base Unit, Buckley Field, Colorado, did, at Keesler Field, Mississippi, on or about 1 October 1944, wrongfully borrow money in the amount of Twenty-five Dollars (\$25.00) from Private First Class George L. Mundwiler, an enlisted man under his command, to the prejudice of good order and military discipline.

Specification 12: In that Captain Gillespie B. Murray, Army Air Forces, Assigned Squadron A, 3702d Army Air Forces Base Unit, Buckley Field, Colorado, did, at Keesler Field, Mississippi, on or about 1 February 1944, wrongfully borrow money in the amount of Five Hundred Dollars (\$500.00) from Private First Class Thomas J. O'Brien, an enlisted man under his command, to the prejudice of good order and military discipline.

Specification 13: (Nolle Prosequi).

Specification 14: (Nolle Prosequi).

He pleaded guilty to Specifications 2, 3, 4, 7, 8, 9 and 11 of Charge II and to Charge II, but not guilty to all other Specifications of Charge II and to the Specification and Charge I. By direction of the appointing authority, the prosecution withdrew Specifications 5, 13 and 14. He was found guilty of all the remaining Specifications and the Charges except Specification 6 of Charge II. No evidence of previous convictions was introduced. Accused 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 118.

3. The evidence for the prosecution shows that accused on the 4th and 5th of January 1945 appeared before a Reclassification Board appointed by Headquarters, Army Air Forces, Western Technical Training Command, Denver, Colorado, presided over by Brigadier General Carl W. Connell (R. 9). During the course of his examination by the board he was asked "How much money do you owe right now" and he answered "Roughly, about \$800, sir" (R. 9). Accused submitted to the board a sworn statement showing a "total" indebtedness of \$823 and listing the names of his creditors (Ex. "A"). The board completed accused's case and forwarded the record to higher authority on 12 January 1945 (R.10). It recommended that accused be given a 10-day leave to make adequate arrangements for a loan to pay his various debts, such single obligation to be repaid before 1 July 1945 (R. 20).

On 17 February 1945 Major Johnston, Recorder of the Reclassification Board, received from accused a statement entitled "Amendment of Affidavit dated 5 January 1945" in which he listed four additional debts totaling \$2,200, which were classified in the statement as "non-current debts" (Ex. B). When the amended affidavit was received, the proceedings in connection with accused's case had been completed (R. 14).

It was agreed between the accused, his counsel and the prosecution that at the time that the affidavit of 17 February was filed and at the time of the trial he owed the following additional debts not listed:

Sergeant Oliver Gregory	\$5.00
Corporal George H. Morrison	\$40.00
Private First Class Harry J. Bournique	\$5.00
Private First Class Malcolm M. McKenzie	\$60.00
Private First Class George L. Mundwiler	\$25.00
Mrs. Lavita P. Brown (wife of Corp. Lloyd Brown)	\$10.00 (R. 13)

Private First Class James E. Hadden testified that he was a member of accused's organization and that on two occasions he loaned accused twenty dollars. The first \$20 was loaned in the middle of August 1944 and the second loan was made in the month of November. The first request for a loan came through Lieutenant Wojnarowski and the second by a note (Fros. Ex. "C", R. 14, 16). Accused had acknowledged owing him \$40 (R. 14). After the witness had been transferred to another air field, he wrote accused about the repayment of the loan, but received no reply. (R. 15).

It was stipulated between accused, his counsel and the prosecution that if First Lieutenant Wallace J. Wojnarowski were in court he

would testify that accused had asked him to borrow \$20 from Private First Class Hadden; that reluctantly he had done so and had given the money to the accused (R. 16).

It was also stipulated that if Private First Class Edward W. Kramer were present in court he would testify that he was a member of accused's unit, had known accused since October 1942 and was very friendly with him; that accused borrowed \$500 in cash from him in February 1944; that the loan was to carry 6 percent interest and was payable at no specified time (R. 17).

It was further stipulated that if Private First Class Thomas J. O'Brien were present in court he would testify that he was a member of accused's unit and had known accused for about a year and seven months; that accused had borrowed \$500 from him about February 1944. The loan was made with the understanding that it would not be paid until after the war with compounded interest at 6 percent. There was no evidence of the loan nor did anyone else know about the loan (R. 19).

4. Accused after being duly warned of his rights took the stand under oath in his own behalf. He stated that about a year and a half before the trial he was sent to Reno, Nevada on detached service to take some films. It was during the Christmas holiday 1943 and there was nothing to do for the unit. They were staying at the El Cortez Hotel. He had never seen anything like it and began gambling and drinking. He lost more money than he could afford to lose (R. 20). He was on friendly terms with the owner of the place and cash credits were made available to him for gambling. When it was time to leave accused had lost \$3,000. He secured all the money he could and reduced the indebtedness to about \$2,500. The management of the hotel gave him 30 days to liquidate the debt, but required him to issue a check on his bank for each of the amounts that he had drawn. When he returned to Wichita Falls he borrowed \$1,000 from the National Bank of Fort Sam Houston, \$500 from the First National Bank of Wichita Falls, \$300 from the City National Bank, and \$50 or \$100 from anyone that he could. He was offered \$500 each by two enlisted men with whom he had been closely associated, Privates Kramer and O'Brien. They knew the difficulty that he was in and desired to help him. He kept a list of the creditors and every month he would go over the list and send \$25 or \$50 to the creditors who were about to take action against him. He considered the loans of Kramer, O'Brien, Duncan and McCusker listed in Exhibit "B" as loans to be paid after the war or whenever he was in a position to pay them (R. 22). Accused completed the payment of the loan to the National Bank of Fort Sam Houston on 1 December 1944. In the meantime he was living from hand to mouth. He was under a terrific strain physically and otherwise. He still owed the

El Cortez Hotel \$300. It would not wait any longer and turned over this matter to his commanding officer. An investigation of his financial situation was held by the legal officer, who recommended that accused be given an administrative reprimand for the Reno incident. In the meantime Mr. McCusker had written to his commanding officer. When accused was asked by the Reclassification Board about his debts, he understood that they were talking about creditors that he could not pay and not about the others with whom he had made arrangements, as it was understood that these other debts would be paid after the war or whenever he had completely cleared up the other loans (R. 23). To save money he had his wife go and live with relatives and he subleased the apartment (R. 24). Some time later he reread the affidavit (Ex. A) and realized that it might be misunderstood. He prepared an amended statement (Ex. B), which he mailed to the president of the board (R. 24). There are other debts which were not included in either his original affidavit or in the subsequent statement.

Accused further testified that he was in command of a special unit composed of about fifteen enlisted men. They traveled together all over the United States and lived in the same hotels. He ran this unit more as a civilian group than a military unit. The unit was composed mostly of writers, artists and photographers, and was a brilliant group. Some of the enlisted men in civil life had earned from \$20,000 to \$30,000 per year. The unit dealt exclusively with civilian firms such as Bendix, Douglas Aircraft and North American Aircraft. On only a few occasions did they go to military posts to make films. Time and time again he borrowed from the men and paid them back. They in turn borrowed from him when they were in need of cash. It was a very friendly - hard working organization. When he was in Biloxi, Mississippi, he saw the opportunity of making five or six hundred dollars in about three months. A friend of his had about 1500 live turkeys, which he thought could be retailed at \$1.25 and \$1.30 a turkey. Accused borrowed \$150 from friends, soldiers, and set up a retail business downtown. Mrs. Phyllis Johnson agreed to run it. In the evening he gave her any suggestions she wanted to run the business. Mrs. Johnson operated the business for accused, and Sergeant E. E. Johnson, her husband, would go down at night to help her out. The business was a failure. Then accused was relieved from the command of the unit and called before the Reclassification Board. He turned the unit over to Lieutenant Fetz, and asked him to sell the equipment of the business which had been closed (scales, cash registers and the slot machines) and with the proceeds, which he estimated would be around \$200, to pay the small loans due the enlisted men. Accused owed money also to the Biloxi Paper Company and to the Ice Company. Lieutenant Fetz said he would see that it was done. Accused immediately dismissed the matter from his mind. He did not know that the debts at Biloxi were not paid until

charges were preferred (R. 25, 26, 27). He did not intentionally withhold the knowledge of any indebtedness from the Reclassification Board (R. 25). He had paid the first indebtedness contracted on 15 August 1944, from Sergeant Hadden. He had also paid the second loan to the same soldier (R. 29). Accused had also paid the loan to Master Sergeant Fredericks (R. 29).

On cross-examination accused admitted that the loan of McCusker, Halloran and Larsen was obtained on a note due 1 January 1945, but that he had an understanding that it would be paid after the war (R. 34, 35). O'Brien, Kramer and Duncan were not listed with their proper military titles in the supplemental statement (R. 38). He also admitted that at the time he made the supplemental statement on 17 February 1945 he was indebted to Sergeant Gregory for \$5, to Corporal Morrison for \$40, to Private Bournique for \$5, to Private McKenzie for \$60, to Private Mundwiler for \$25 and to Mrs. Lavita P. Brown for \$10. However, he thought that these debts had been paid out of the proceeds of the liquidation of the business in Biloxi (R. 38).

Accused admitted having paid only the sum of \$239 on his debts since 5 January, although he had previously stated in evidence that he had paid \$486 (R. 40). All of his indebtedness did not represent his losses at Reno. He was traveling around the country and arranging for crews to go in factories and plants. It was very expensive and the per diem that he received never covered the cost of his traveling expenses (R. 44). Accused admitted that his indebtedness was over \$3,000 (R. 45).

In rebuttal the deposition of First Lieutenant John E. Fetz was introduced in evidence (Pros. Ex. "D", R. 46). Lieutenant Fetz knew accused had a retail produce business at 611 West Beach, Biloxi, and that it was run by Staff Sergeant Edward E. Johnson and his wife; that accused had asked him to see that Staff Sergeant Johnson disposed of the cash register scales, check the slot machines and also sell the remaining stock and to forward any balance left over to him. The money left over from the slot machines was to be used to pay any rent due from the time accused left to the time accused's business closed. He did not receive any papers from accused nor did he have a list of creditors. He had no idea that accused intended for him to pay debts to enlisted men. The instructions of accused were to send to him any balance which Sergeant Johnson gave to him (Pros. Ex. "D").

5. The evidence is clear and it is admitted by accused that he furnished an untrue sworn statement to the Reclassification Board on 5 January. He not only failed to give a complete and "total" account of debts on that date, but he persisted in the making of false statements by submitting an incomplete list of liabilities on 17 February, when he forwarded the amendment to the original affidavit. In that statement

he left out the names of five creditors, four of whom were enlisted men of the unit of which he was in command. Accused claimed that his failure to disclose all of his debts when questioned by the board was due to misunderstanding of the question, in that he believed that the board was only interested in the debts which he could not handle. In other words, according to accused, the question of the board "How much money do you owe right now?" did not mean that, but meant "How much of what you owe can you not now pay?". In the affidavit his answer "my total indebtedness is * * *" did not mean to him what the words plainly stated. There was no reason or basis for the accused to believe that these questions meant other than that which their plain words implied. It is apparent that accused elected to disclose only so much of his financial condition as would lead the board to a lenient view of his case, thereby willfully deceiving the board.

Accused's explanation that the names of five creditors were omitted from the statements due to his belief that they already had been paid was rebutted by Lieutenant Seltz' deposition that he had not been given any list of creditors by accused, and had no idea that accused intended him to pay any debts. We agree with the court that the statement made by accused before the board was a false official statement and that it was made with intent to deceive.

6. Accused pleaded guilty to all the Specifications alleging the borrowing of money from enlisted men, except those charging loans of \$20 procured from Private First Class Hadden, of \$500 procured from Private First Class Kramer and of \$500 procured from Private First Class O'Brien. However, on the witness stand accused admitted borrowing these amounts of money from these other three enlisted men. It is immaterial to the charges that the creditors have been satisfied or how or when the debts were to be repaid.

The mere borrowing of money by an officer from an enlisted man is an offense under Article of War 96 (CM 122920 (1918); 130989 (1919); Dig. Ops. JAG 1912-1940, sec. 543(5); CM 221833 (1942) 1 Bull. JAG 106; CM 230736 (1943); 2 Bull. JAG 144).

7. The records of the War Department show that the accused is 33 years old. He was born in Griffin, Georgia, and graduated from high school at Black Mountain, North Carolina, in 1928. He attended Davidson College, North Carolina, for 2½ years. He was commissioned a second lieutenant in the Army of the United States (AC) on 26 May 1942; promoted first lieutenant on 20 July 1943 and captain on 25 April 1944. In civilian life he was a public relations, sales, promotion and administrative manager for a radio station.

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 mandatory upon conviction of a violation of the 95th Article of War and is authorized upon conviction of a violation of the 96th Article of War.

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_____, Judge Advocate

A. S. Smith

_____, Judge Advocate

Granville Fawcett

_____, Judge Advocate

(102)

SPJGV-CM 280159

1st Ind

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

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain Gillespie B. Murray (O-907126), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of making a false official statement before a Reclassification Board (Specification, Charge I), in violation of Article of War 95 and of borrowing money from enlisted men, in violation of Article of War 96 (Charge II, 10 Specifications). He pleaded guilty to seven Specifications of Charge II. 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. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the finding and sentence and to warrant confirmation thereof.

Accused appeared before a Reclassification Board and, in answer to a question as to how much money was owed by him, he stated "Roughly about \$800" and furnished a detailed sworn affidavit showing an indebtedness of \$823. Accused admitted on the witness stand that at that time his indebtedness amounted to over \$3,000. The explanation at the trial that he misunderstood the question and believed that it meant only those debts which "he could not handle" is not supported by the evidence.

Accused admitted on the witness stand that he borrowed a total of \$1,225 from nine enlisted men, members of the unit under his command.

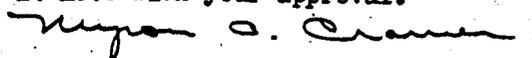
I recommend that the sentence be confirmed and ordered executed.

4. Consideration has been given to a letter from Honorable Edwin C. Johnson, United States Senator, dated 16 May 1945, recommending clemency.

5. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.

3 Incls

- 1 Rec of Trial
- 2 Form of Action
- 3 Ltr fr Hon E. C. Johnson,
16 May 45, w/incl


MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed, GCMO 282, 5 July 1945).

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

(103)

SPJGH - CM 280174

31 MAY 1945

UNITED STATES)

INFANTRY REPLACEMENT TRAINING CENTER

v.)

Trial by G.C.M., convened
at Camp Fannin, Texas, 27
April 1945. Dismissal.

Second Lieutenant FRANCIS
J. FRIEL (O-1329698),
Infantry.)

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 95th Article of War.

Specification: In that Second Lieutenant Francis J. Friel, Company "C", Fifty-second Training Battalion, Eleventh Training Regiment, was, at Tyler, Texas, on or about 16 April 1945, in a public place, to wit, the police station, Tyler Texas, drunk and disorderly while in uniform.

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

Specification 1: In that Second Lieutenant Francis J. Friel, * * *, did, at Tyler, Texas, on or about 16 April 1945, drink whiskey with Technician fifth grade William C Jones, an enlisted man, in a public place, to wit, The Trailways Cafe.

Specification 2: In that Second Lieutenant Francis J. Friel, * * *, was, on or about 16 April 1945, drunk and disorderly in Tyler, Texas, while in uniform.

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 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:

At about midnight on the night of 15 April 1945 accused met Corporal William C. Jones in the entrance of the Tyler Hotel, Tyler, Texas, and invited him to have a drink. The two of them walked to the Blackstone Hotel in the same city, where accused bought a quart of Bourbon de Luxe whiskey. Each of them took two drinks from the bottle in the men's room of the Blackstone Hotel, remaining there about 15 minutes. They then walked to the Trailways Cafe, which adjoins the bus station in Tyler. There, the accused invited another enlisted man - a sergeant - accompanied by two girls to have a drink and poured a round of drinks. An older man walked up and accused likewise poured him a drink. After they had been in the restaurant about an hour accused fell asleep with his head on his arm, which in turn rested on the counter. During the interval approximately two inches of the quart had been consumed, Corporal Jones taking two drinks of whiskey (R. 6-8) and accused taking one drink which looked like Red Rock Cola (R. 12) but smelled like whiskey (R. 20, 21). The night manager of the restaurant called the city police regarding accused who was "drunk" and in a "kind of stupor" (R. 16, 17). Two Tyler policemen responded to the call and found the accused "drunk", with a bottle of whiskey in his pocket (R. 20, 23). One of the policemen, W. N. Threlkeld, joined Corporal Jones in "a little round" of drinks, the other policeman, Westley O. Butler, standing by. The policemen woke accused up and asked him if he had a room in town, to which he replied in the affirmative. They then called a taxi and requested accused to leave in it. He protested and inquired "if there was a curfew on officers". One of the policemen said "I aint going to fool with you" and pushed accused out of the door. Accused and Jones then returned to the Tyler Hotel in the taxi (R. 9, 19).

They went up to accused's room and each of them had "a few drinks". They then decided to walk to the bus station but before reaching there they were stopped by Patrolman Butler who said to accused "I thought I told you to get the hell out of town". Butler thereupon put accused in the police car and took him to the police station where the desk sergeant instructed him to lock accused up in the Smith County Jail. This occurred about 2 a.m. (R. 9, 10, 23, 24).

At approximately 5 a.m. Corporal Jones went to the jail and obtained accused's release upon depositing \$10 as bail (R. 10). Accused and Jones walked back to the bus station. Accused "wanted to go back and ask what the charges were against him." They went to the MP station in Tyler to seek advice. The MP at the desk advised that the police station was the best place at which to inquire as to the nature of the charges and he agreed to accompany accused to the police station (R. 11, 27).

When accused, Jones and the MP arrived at the police station accused "asked the city desk sergeant what the charges were against him and why he was put in jail." The desk sergeant snapped "We are tired with

fooling around with you." Accused said "Who's that dirty bastard who threw me in jail? Where is he at?" The desk sergeant radioed for Butler and when the latter came in the desk sergeant told accused "he could call him a dirty bastard to his face now." Butler inquired of accused if he had referred to him as a dirty bastard and accused replied that he had. Thereupon Butler slapped accused's face and put him back in jail (R. 11, 27, 28). This incident at the police station occurred at about 6:30 a.m. Accused was in uniform (R. 29). The MP testified that accused was "drunk" at this time and was "loud * * * using curse words" (R. 28, 29). Patrolman Butler, however, when asked on the witness stand whether accused was "loud" or "boisterous" in the police station replied that he was not. Butler further testified that while accused "was still drunk" at the time of the incident in the police station he was "not as drunk as when we first put him in jail" (R. 24). Accused's bottle of whiskey was taken away from him when he was first put in jail and was not returned to him. (R. 20).

4. Evidence for the defense:

No witnesses were called for the defense.

After being advised as to his rights as a witness accused elected to remain silent (R. 33).

5. The Specification of Charge I alleges that at a specified time accused was drunk and disorderly in "the police station, Tyler, Texas", while in uniform. The Specification is laid under the 95th Article of War. It is not disputed that accused was present at the place and time alleged or that he was in uniform. The only question raised is whether, while there, he was drunk and disorderly to such an extent or degree as to amount to a violation of Article of War 95. The prosecution's principal witness, Patrolman Butler, testified that accused was not "loud" or "boisterous" at the police station. He also testified that while accused was "drunk", he was not as drunk as when he was first placed in jail. One other witness for the prosecution, however, testified that accused was "drunk" at the time in question and was "loud * * * using curse words." In considering this conflicting testimony it must be borne in mind that the evidence otherwise shows (a) that more than four hours elapsed between the time that accused was first locked up and his bottle of whiskey was taken away from him and the time of the episode at the police station and (b) that accused's conversation and actions immediately prior to his arrival at the police station with the MP reflect considerable steadiness on his part rather than a high degree of intoxication. On all of the evidence, the Board of Review is of the opinion that, at the time and place alleged in the Specification, the accused was neither "grossly drunk" nor "conspicuously disorderly" within the meaning of those terms as used in paragraph 151 of the Manual for Courts-Martial, 1928, describing conduct violative of Article of War 95. The Board holds that

the evidence establishes accused's guilt of the Specification, but only in violation of Article of War 96 (CM 249726, Hanson, 32 B.R. 169; CM 254054, Bunch, 35 B.R. 161).

6. Specification 1 of Charge II, laid under Article of War 96, alleges that, at a specified time and place, accused drank whiskey in public with Corporal Jones. The evidence of record fully sustains the court's finding of guilty of this Specification (CM 252075, McPheron, 33 B.R. 325).

7. Specification 2 of Charge II, likewise laid under Article of War 96, alleges that on or about 16 April 1945 accused was drunk and disorderly in Tyler, Texas, while in uniform. It is to be noted that this Specification is not limited to accused's conduct at any one particular place in the city of Tyler, but is broad enough to cover accused's conduct anywhere in the city throughout the night of 15-16 April 1945. The undisputed evidence fully establishes every element of the offense alleged and accordingly sustains the court's finding of guilty.

8. The records of the War Department show that accused is 30 years of age and single. He is a high school graduate and in civilian life was employed as a private chauffeur for one year, as a delivery route salesman for a bakery for one year and as a production dispatcher for an aircraft manufacturing company for two years. He was inducted into the Army on 26 April 1943 and was commissioned a second lieutenant, AUS, Infantry, upon graduation from The Infantry School 28 December 1944.

9. The court was legally constituted and had jurisdiction of the accused and the subject matter. 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 only so much of the findings of guilty of Charge I and its Specification as involves findings of guilty of a violation of Article of War 96 and legally sufficient to support all other findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 96.

Thomas N. Jaffey Judge Advocate

William H. Hambrick Judge Advocate

Robert E. Nevetan Judge Advocate

SPJGH-CM 280174

1st Ind

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

JUN 27 1945

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Francis J. Friel (O-1329698), Infantry.

2. Upon trial by general court-martial this officer was found guilty of being drunk and disorderly in uniform, in violation of the 95th and 96th Articles of War (Specification of Charge I and Specification 2 of Charge II); and guilty of drinking with an enlisted man, in violation of the 96th Article of War (Specification 1 of Charge II). 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.

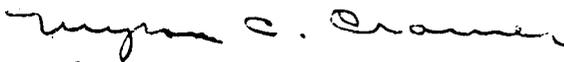
3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of Charge I and its Specification as involves findings of guilty of a violation of Article of War 96, and is legally sufficient to support all other findings of guilty and the sentence and to warrant confirmation of the sentence. I concur in that opinion. The evidence shows that on the night of 15-16 April 1945 in Tyler, Texas, accused and an enlisted man, Corporal William C. Jones, went on a drinking spree together. Accused purchased a quart of bourbon whiskey. The two of them drank together privately in two different hotels and in public in a local cafe. In the cafe accused also poured drinks for another enlisted man - a sergeant - and the latter's two female companions, as well as for a civilian who joined their group. Accused was drunk in the cafe and fell asleep, resting his head upon his arm which in turn rested on the counter. The night manager telephoned the Tyler police to come and take charge of him. Two city policemen responded to the call, woke accused up, placed him in a taxicab and requested him to go to his hotel room. A few minutes later one of the police officers observed accused and Corporal Jones again approaching the cafe. An altercation between accused and the police officer took place and the policeman locked accused up in the Smith County Jail in Tyler. This occurred at about 2 a.m. Accused was released on \$10 bail at about 5 a.m. An hour and a half later, at 6:30 a.m. accused went to the police station in Tyler and inquired of the desk sergeant "Who's that dirty bastard who threw me in jail? Where is he at?" The desk sergeant radioed for the police officer who arrested accused and when he arrived the accused admitted that he had referred to him as a dirty bastard. The policeman thereupon slapped accused and placed him in jail again. I recommend that the sentence be confirmed and carried into execution.

4. In the Staff Judge Advocate's Review, attached to the record of trial, it is stated that in February 1945 accused was given punishment under Article of War 104 for drunkenness, failure to repair to his post for duty at the proper time and failure to obey an order to report to his commanding officer.

5. After the Board of Review had rendered its opinion in this case, my office received from the Commanding General of the Eighth Service Command a report of investigation of additional offenses committed by Lieutenant Friel on 10 June 1945. That report, which is attached hereto, shows that on the night of 10-11 June 1945 Lieutenant Friel was intoxicated in uniform on the streets of Lufkin, Texas, and while in that condition became involved, through his own fault, in an altercation with a sailor which created such a disturbance as to require the intervention of city police officers. Action on the additional offenses is being held in abeyance pending disposition of the present case.

6. Consideration has been given to the inclosed letter dated 4 May 1945 from the Most Reverend Charles Buddy, Bishop of San Diego, California.

7. Inclosed is a form of action designed to carry the above recommendation into effect, should such recommendation meet with your approval.



4 Incls

1. Record of trial

2. Report of investigation
dated 12 June 1945

3. Ltr fr Bishop of
San Diego, 4 May 45

4. Form of action

MYRON C. CRAMER

Major General

The Judge Advocate General

(Findings disapproved in part. (Sentence confirmed. GCMO 276, 5 July 1945))

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

(109)

SPJGK - CM 280221

25 MAY 1945

UNITED STATES

v.

Second Lieutenant KARLE E.
KLINE (O-582814), Air Corps.

ARMY AIR FORCES
EASTERN FLYING TRAINING COMMAND

Trial by G.O.M., convened at
Spence Field, Moultrie, Georgia,
1 May 1945. Dismissal.

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 I: Violation of the 96th Article of War.

Specification: In that Second Lieutenant Karle E. Kline, Squadron A, 2133d AAF Base Unit, did, at County of Lee, City of Leesburg, in the State of Georgia, on or about 11 January 1944, unlawfully and wrongfully contract marriage with one Agnes Alfa Graves, he, the said Second Lieutenant Karle E. Kline, having a legal wife, namely, Lillian C. Kline, then living.

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

Specification: In that Second Lieutenant Karle E. Kline, * * *, did, without proper leave, while enroute from Harlingen Army Air Field, Texas, to Spence Field, Moultrie, Georgia, absent himself from his station at Spence Field, Moultrie, Georgia, from about 7 March 1945, to about 14 March 1945.

He pleaded not guilty to Charge I and its Specification but guilty to Charge II and its Specification. He was found guilty of both Charges and their Specifications. No evidence was introduced of any previous conviction. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence, remitted the forfeitures, and forwarded the record of trial for action under Article of War 48.

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

Charge I - Bigamy. Agnes Alfa Graves of Moultrie, Georgia, testified that she first met the accused at the Officers' Club at Spence Field about 25 December 1943 while she was working there "behind the bar." She saw him two or three times a week until 11 January 1944 when they "got married" at Leesburg, Georgia. They lived together as husband and wife thereafter until sometime in August when he told her he was married to a "Lillian Kline." Accused had proposed marriage to her about 5 or 6 January 1944, but she had refused because "he was too old" and she was too young. She changed her mind on 11 January because she "must have liked him." They had both been drinking on the night of the 11th prior to the marriage, but neither of them was drunk (R. 7-13).

Lillian C. Kline testified by deposition that she married the accused on 4 February 1943 in Detroit, Michigan, and that they lived together thereafter as husband and wife. So far as she knew she was still married to the accused on 2 April 1945 when the deposition was taken (Ex. 3).

There was introduced in evidence with the consent of the accused an application for a marriage license in Lee County, Georgia, signed by "K. E. Kline" and "Agnes Graves" (Ex. 4) and a certified copy of a marriage license issued 11 January 1944, to "Carl A. Kline" and "Agnes Graves" and certificate showing the marriage of "Carl A. Kline" to "Miss Agnes Graves" on that date solemnized by "R. C. Harris, Ordinary," Lee County, Georgia (Ex. 5).

Charge II - Absence without leave. The prosecution introduced in evidence with the consent of the accused: (1) An Extract Copy of Special Orders No. 53, Headquarters, AAF Flexible Gunnery School, Harlingen, Texas, dated 27 February 1945, assigning the accused from that station to 2133 AAFBU, Spence Field, Moultrie, Georgia, to take effect 4 March 1945 (Ex. 1), and (2) an Extract Copy of the Morning Report of Squadron "A", 2133d AAFBU showing accused AWOL since 0001 7 March 1945 from "enroute to jn fr AAF Flexible Gunnery Sch, Harlingen AAFld, Tex" and on 14 March 1945 showing the accused "Fr AWOL to ar in qrs this Sta 1415 being held for trial" (Ex. 2).

4. The evidence for the defense may be summarized as follows:

Mrs. Lona M. Cavanaugh testified that she accompanied accused and Miss Graves on a trip to Albany, Georgia, by automobile on 11 January 1944. Accused was drinking very heavily. Miss Graves was also drinking. The party of four wound up that evening in the Paramount Club, Albany, where the drinking continued. Accused was drunk. He removed his shoes and danced barefooted on the floor and then fell down. About 11 o'clock accused and Miss Graves went out of the club together. She thought that they went out for some fresh air. They returned about 2 o'clock and Miss Graves told her that they had been married (R. 15-16, 20).

Mr. R. C. Harris, Ordinary, Lee County, Georgia, testified by deposition that on 11 January 1944 he married the accused and Agnes Graves. At the time he performed the ceremony he did not believe that the accused was intoxicated, but after he had an interview with the accused and some local attorney three or four days later concerning the possibilities of annulling the marriage he was of the opinion that accused was intoxicated at the time of the marriage (Ex. A).

The accused having been advised concerning his rights as a witness elected to testify under oath (R. 21). In January 1945 he attended the gunnery school at Harlingen and was told just before graduation that he ranked second from the top of his class. On graduation day he was not permitted to graduate and was ordered to return to Spence Field because Agnes Graves had complained to the War Department. As a result he was nervous and upset and could not sleep. So he drove in three days from Texas to Pensacola, Florida, to confer with an attorney concerning Agnes Graves' case. He then started for Chicago for the purpose of obtaining outside help and money. There he started to drink. He was nervous and could not sleep. His friends and members of his family advised him to return to Spence Field which he did on 14 March 1945. He was hospitalized for 15 days at Spence Field and for 33 more days at other hospitals because of his nervous condition.

With reference to the marriage he stated that he first met Miss Graves on 11 January 1944 when she was procured by another officer as a date for him to drive to Albany. They were all drinking before leaving for Albany, on their way, and at various places after their arrival. He remembered being in the Paramount Club but remembered nothing thereafter until he woke up the next morning in the New Albany Hotel with "this girl beside me." She explained that they had gotten married the night before and showed him the license. Two or three days later he called on the Ordinary who had married them with Agnes and a lawyer seeking an annulment or a divorce. They were informed that proceedings of that nature would have to be instituted in Moultrie, Georgia. He wanted to keep the matter secret so he sent Agnes to Pensacola, Florida, with funds to get a divorce. She went to Florida but did not obtain a divorce.

Accused had no recollection of going to Leesburg. The signature on the application for a marriage license was not his usual signature. If he signed it it shows he was drunk. He was convinced by the marriage license that he married Agnes. At that time he was already married to Lillian Kline. He did not tell Agnes that he was married until July or August, but he suspected that she knew it all of the time. They sought the annulment several days after the ceremony on the grounds of intoxication. He admitted that he spent nights with Agnes at her home between January and July 1944. He did not live with her because of any desire on his part but because of her threats of exposure. "Only when I was intoxicated did I ever spend any time with her" (R. 28-30).

Accused stated he had been in the Army five years in August 1944. As an enlisted man his highest grade was technical sergeant. He graduated from Officers' Candidate School in October 1943 and was classified as a Link Trainer Officer, but because of his civilian experience as a night club operator he was appointed Club Officer instead (R. 21-27).

5. Agnes Alfa Graves testified in rebuttal that accused drove his car from the Paramount Club to a minister's house in Albany. From there they proceeded by cab to Leesburg. Accused signed the application for the marriage license and answered all of the questions asked of him by the Ordinary in Leesburg. They returned to accused's car by cab and then accused drove to the Paramount Club. The marriage was consummated later in the New Albany Hotel. Thereafter until July or August 1944 accused spent "pretty nearly every night" with her "unless he was busy or something" (R. 37-38).

6. The evidence for the prosecution clearly establishes that the accused did, at the time and place alleged in the Specification of Charge I contract a marriage with Agnes Alfa Graves when he, the accused, had a legal wife living. This was conclusively shown by the testimony of the first wife, the official who performed the bigamous marriage, the application for the marriage license, the license itself and the testimony of Agnes Alfa Graves with whom he entered into the bigamous marriage. The accused's defense that he was so intoxicated at the time that he did not know what he was doing and therefore was not capable of any criminal or matrimonial intent was rejected by the court. We can find no good reason for disturbing its findings. The weight of the evidence favored such a conclusion. It was shown that he was able to drive his car on part of the journey to and from Leesburg when the ceremony took place. He answered all of the questions necessary to procure the license and did not appear intoxicated to the Ordinary. His conduct after the marriage of living with Agnes and continuing to cohabit with her as husband and wife was not consistent with his defense. His contention that he was forced to live with her because she threatened to expose him was unbelievable, because, during that period of time, Agnes did not know that he had been previously married and had a wife living and therefore had nothing to expose. We find no difficulty in sustaining the findings of guilty of Charge I and its Specification.

The plea of guilty coupled with the entries made in the morning report of the accused's organization and his admission on the witness stand conclusively show that the accused was absent without proper leave from his organization from 7 March until 14 March 1945 as alleged in the Specification of Charge II. His contention that he was nervous and upset and that he drank heavily during that period of time constituted no defense to the Charge.

7. War Department records show the accused to be 35 years of age

and married. He completed high school and attended Detroit Institute of Technology for 2-1/2 years. He was employed as a sales representative for about eleven years by an automobile manufacturing concern and for one year by a brewery. He established and operated a night club for about six months. He enlisted in the service on 9 August 1940. As an enlisted man he reached the grade of Technical Sergeant. During most of his enlisted service he served as a Link Trainer Instructor. He attended and graduated from Officers' Candidate School at Miami Beach, Florida, where, on 16 October 1943, he was commissioned second lieutenant, Air Corps, AUS. On 3 January 1945 Agnes Kline notified the Department that she married the accused on 11 January 1944 and seven months later he told her that "he had a wife back home."

8. 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 a conviction of a violation of Article of War 61 or 96.

Lucas, Judge Advocate.

Frank, Judge Advocate.

Herman, Judge Advocate.

(111)

SPJGK - CM 280221

1st Ind.

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

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Karle E. Kline (O-582814), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of bigamy in violation of Article of War 96 (Charge I) and of being absent without leave for eight days in violation of Article of War 61 (Charge II). He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence, remitted the forfeitures, and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence.

The accused was lawfully married to Lillian C. Kline on 4 February 1943 in Detroit, Michigan. On 11 January 1944 while his wife was still living he contracted a bigamous marriage with a girl whom he had recently met at his military station and lived with her as husband and wife for about six months when she discovered, and he admitted, his marital status (Charge I). They separated. He was transferred to a different station. Six months later she reported his bigamous conduct to the military authorities. He was ordered to return to his previous station, but while en route he absented himself without proper leave for a period of eight days (Charge II). The conduct of accused discloses that he is morally unworthy of his commission. Dismissal is justified. I recommend that the sentence although inadequate be confirmed and carried into execution.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.

Myron C. Cramer

2 Incls

1. Record of trial
2. Form of action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence as approved by reviewing authority confirmed, GCMO 301, 7 July 1945).

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

(115)

18 MAY 1945

SPJGV-CM 280227

UNITED STATES)

v.)

First Lieutenant WILLIAM)
T. STIREWALT, JR.)
(O-580475), Air Corps.)

ARMY AIR FORCES
WESTERN FLYING TRAINING COMMAND

Trial by G.C.M., convened
at Merced Army Air Field,
Merced, California, 25
April 1945. Dismissal and
total forfeitures.

OPINION of the BOARD OF REVIEW
SEMAN, MICELI and BEARDSLEY, Judge Advocates.

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

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

CHARGE: Violation of the 94th Article of War.

Specification 1: In that William Taylor Stirewalt, Jr., 1st Lt., Air Corps (then Technical Sergeant), 3026th AAF Base Unit, Merced Army Air Field, Merced, California, did, at Belem, Brazil, on or about 1 August 1942, make a claim against the United States, by presenting same to H. Walker, Major, Finance Department, United States Army, Finance Officer, South Atlantic Wing, Air Transport Command, Belem, Brazil, an officer of the United States duly authorized to pay such claims, in the amount of Thirty-Eight Dollars and Seventy-Five Cents (\$38.75), for monetary allowance in lieu of quarters from 1 August 1942 to 31 August 1942, inclusive, for Myrtle Ester Stirewalt, Oclopee, Florida, dependent wife, which claim was false and fraudulent in that the said Myrtle Ester Stirewalt was not his wife, and was then known by the said William Taylor Stirewalt, Jr., 1st Lt., Air Corps (then Technical Sergeant) to be false and fraudulent.

Specification 2: In that William Taylor Stirewalt, Jr., 1st Lt., Air Corps (then Technical Sergeant), 3026th AAF Base Unit, Merced Army Air Field, Merced, California, did, at Belem, Brazil, on or about 1 October 1942, make a claim against the United States, by presenting same to H. Walker, Major, Finance Department, United States Army, Finance Officer 37th Ferrying Squadron, Belem, Brazil, an officer of the United

States Army duly authorized to pay such claims, in the amount of Thirty-Eight Dollars and Seventy-Five Cents (\$38.75), for monetary allowance in lieu of quarters from 1 October 1942 to 31 October 1942, inclusive, for Myrtle Ester Stirewalt, Oclopee, Florida, dependent wife, which claim was false and fraudulent in that the said Myrtle Ester Stirewalt was not his wife, and was then known by the said William Taylor Stirewalt, Jr., 1st Lt., Air Corps (then Technical Sergeant) to be false and fraudulent.

Specification 3: In that William Taylor Stirewalt, Jr., 1st Lt., Air Corps (then Master Sergeant), 3026th AAF Base Unit, Merced Army Air Field, Merced, California, did, at Belem, Brazil, on or about 1 November 1942, make a claim against the United States, by presenting same to E. C. Rogers, 1st Lt., Finance Department, United States Army, Finance Officer, 37th Ferrying Squadron, Belem, Brazil, an officer of the United States duly authorized to pay such claims, in the amount of Thirty-Seven Dollars and Fifty Cents (\$37.50), for monetary allowance in lieu of quarters from 1 November 1942 to 30 November 1942, inclusive, for Myrtle Ester Stirewalt, Oclopee, Florida, dependent wife, which claim was false and fraudulent in that the said Myrtle Ester Stirewalt was not his wife, and was then known by the said William Taylor Stirewalt, Jr., 1st Lt., Air Corps (then Master Sergeant) to be false and fraudulent.

Specification 4: In that William Taylor Stirewalt, Jr., 1st Lt., Air Corps (then Master Sergeant), 3026th AAF Base Unit, Merced Army Air Field, Merced, California, did, at Belem, Brazil, on or about 1 December 1942, make a claim against the United States, by presenting same to E. C. Rogers, 1st Lt., Finance Department, United States Army, Finance Officer, 37th Ferrying Squadron, Belem, Brazil, an officer of the United States duly authorized to pay such claims, in the amount of Thirty-Eight Dollars and Seventy-Five Cents (\$38.75), for monetary allowance in lieu of quarters from 1 December 1942 to 31 December 1942, inclusive, for Myrtle Ester Stirewalt, Oclopee, Florida, dependent wife, which claim was false and fraudulent in that the said Myrtle Ester Stirewalt was not his wife, and was then known by the said William Taylor Stirewalt, Jr., 1st Lt., Air Corps (then Master Sergeant) to be false and fraudulent.

Specification 5: In that William Taylor Stirewalt, Jr., 1st Lt., Air Corps (then Master Sergeant), 3026th AAF Base Unit, Merced Army Air Field, Merced, California, did, at Belem, Brazil, on or about 1 January 1943, make a claim against the United States, by presenting same to E. C. Rogers, 1st Lt., Finance Department, United States Army, Finance Officer, 37th Ferrying Squadron, Belem, Brazil, an officer of the United States duly authorized to pay such claims, in the amount of Thirty-Eight Dollars and Seventy-Five Cents (\$38.75), for monetary allowance in lieu of quarters from 1 January 1943 to 31 January 1943, inclusive, for Myrtle Ester Stirewalt, Oclopee, Florida, dependent wife, which claim was false and fraudulent in that the said Myrtle Ester Stirewalt was not his wife, and was then known by the said William Taylor Stirewalt, Jr., 1st Lt., Air Corps (then Master Sergeant) to be false and fraudulent.

He pleaded guilty to and was found guilty of the Charge and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Since the accused pleaded guilty to the Specifications and Charge there was little evidence offered on behalf of the prosecution. Photostatic copies of a check in the sum of \$373.78 made payable to the accused and drawn on the Treasurer of the United States, and photostatic copies of payrolls in support of the Specifications were offered without objection (Pros. Ex. 1). It was also stipulated that William T. Stirewalt, Jr., Technical Sergeant, Air Corps, is the same person as the accused "now on trial in this case" (R. 9). With that the prosecution rested.

4. For the defense there was offered into evidence (and accepted) a Receipt for Miscellaneous Collections (Def. Ex. A) which shows that on the 18th of May 1943, there was paid back to the United States by the accused the sum of \$376.40 which covers the amounts involved in the five Specifications herein. A clear history of the entire circumstances surrounding this case is given by the accused who took the stand in his own defense. His story was substantially as follows:

The accused, after being advised of his rights and privileges as a witness, elected to testify under oath in his own behalf. He admitted his identity as the accused in the case and stated that he enlisted at Memphis, Tennessee on 21 September 1940 and received recruit training at Maxwell Field, Alabama. Thereafter he was transferred to Orlando, Florida,

where he met a girl whom he had known while in college and to whom he was subsequently engaged. However, being an enlisted man, he could not get permission to marry. He was then sent to Administrative and Technical Schools and after serving as First Sergeant at T.W.A. Conditioning School in Kansas City, Missouri, he was transferred back to Florida where he was to obtain his orders to go overseas. At that time he was a Technical Sergeant and again associated with the girl he had previously known in college. Later, after he had been transferred to Belem, Brazil, he received a letter from the girl saying that she was pregnant. He endeavored to make a decision in the matter himself but "made the wrong decision". He went to see the Sergeant Major of his organization and told him his story. The Sergeant Major made entries in his service record to the effect that the girl was his wife. At the conclusion of his tour of duty in South America he returned to the United States to attend Officers' Candidate School and it was there that he was questioned concerning entries on his service record. He talked to the finance officer and "it was decided that it would be better for my part that I should pay the money back; so he made the arrangements for me to pay the money back." After the money had been repaid, he was told that it would be necessary for him to go before the faculty board which would determine whether or not he would be permitted to continue in the officers' candidate school. He and other witnesses who had been in Belem, Brazil, were questioned by the faculty board and the investigating officer talked to the girl involved. It was the decision of the faculty board that he should continue in officers' candidate school. Approximately one week later, after appearing before the faculty board, he was called before the Commanding Officer of the Officers' Candidate School and Officers' Training School who advised him that he would probably be tried by special court-martial. Later he was informed that he would be punished under the 104th Article of War, which was accordingly done and he was restricted to his barracks for one week and given special details to perform.

He completed officers' candidate training and was commissioned and sent to San Antonio, Texas, as an engineering officer. He was then transferred to Barksdale Field and the matter was brought up again and re-investigated. The matter was sent back to Washington and he "thought that would be all". He was then transferred to the 307th Service Group and while there he requested pilot training as a student officer. He was sent to Santa Ana, California, and after his arrival there, the file in his case was returned from Washington and he was advised that he could not continue with his pilot training. Finally charges were preferred against him and then withdrawn. He remained at Santa Ana Army Air Base until November, 1944, when he was transferred to Merced Army Air Field where he remained until present charges were again preferred against him (R. 9, 13).

On cross-examination the accused stated that he was called into the Personnel Office at Miami Beach and that he talked with the finance officer

concerning the name of the person appearing on his pay voucher. At that time he told the finance officer that he did not know the person whose name appeared thereon, saying that it must have been included therein by mistake as he had intended to make an allotment to his mother (R. 13).

Two letters were introduced into evidence by the defense without objection. One letter dated 3 June 1944 and signed by Captain Thomas M. Mixon, Headquarters of Air Service Command Training Center, Fresno, California, states that from 24 November 1943 until February 1944, the accused exhibited superior ability and excelled in his duties due to his previous experience as a crew chief; that in the opinion of said officer the accused had displayed unparalleled initiative; and that his integrity as an officer could not be questioned during his assignment to the 353rd Service Squadron (Def. Ex. B). In the other letter, dated 5 June 1944, signed by Captain James R. Blake at the same station, it is stated that the accused while assigned as assistant engineering officer of the 307th Service Group from 1 July 1943 to 20 November 1943 displayed more than ordinary initiative in the discharge of his duties; that he also displayed steadiness of character and integrity and had the complete confidence of all of the enlisted men in the engineering section (Def. Ex. C).

5. There is nothing in the record or the evidence which would indicate that the story of the accused is less than the absolute truth. The accused was punished under Article of War 104. This is a bar to trial for minor offenses only. Whether or not an offense may be considered as "minor" depends upon its nature, the time and place of its commission, and the person committing it. The term includes derelictions not involving moral turpitude or any greater degree of criminality or seriousness than is involved in the average offense tried by summary court-martial. An offense for which the Articles of War prescribe a mandatory punishment or authorize the death penalty or penitentiary confinement is not a minor offense (MCM, 1928, par. 105). Since a penitentiary offense is authorized for the offenses of which the accused was found guilty, we are obliged to hold that these were not minor offenses, and therefore the punishment meted out under Article of War 104 was not a bar to trial in this case.

6. However, there is another matter that merits serious consideration, and that is the question of condonation. Generally speaking, the mere fact that charges have once been preferred and dropped by a commander does not mean that the offense has been condoned. Nor does a mere restoration to duty operate as a pardon. The theory of condonation, widely accepted under English law, has but limited application in this country. In military law it is not unknown but it is applied with caution.

It is most commonly used where a deserter is unconditionally restored to duty without trial by an authority competent to order trial. In such a case constructive condonation as a plea is provided for by the Manual for Courts-Martial. The Manual does not provide that this is the only case in which the theory of constructive condonation applies. Whether or not it should apply in any given instance would appear to depend on all the facts and circumstances, since the question is a mixed one of law and fact.

However, a promotion or appointment to a new office of an officer of the Army, while under arrest and charges for the commission of an offense, will operate as a constructive pardon of such offense and constitute a valid bar to a trial therefor (Winthrop's Mil. Law & Prec., Rev. Ed., pp. 270-71).

In the instant case, all of the material facts were known to the proper authorities at the time the accused was attending Officer Candidate School. Despite this knowledge, the matter was disposed of by punishment under Article of War 104 and the accused was permitted to continue his studies, was graduated and commissioned a second lieutenant on 26 June 1943, nearly six months after the commission of the latest offense for which he was tried. On 11 February 1944, nearly 14 months after the commission of the offenses for which he was tried, he was promoted to first lieutenant.

The instant trial took place more than a year after his promotion to his present grade and more than two years from the date of his last alleged offense.

It appears to us that this case is on all fours with the principle enunciated by Winthrop as above quoted. This is not a case where the offenses were not discovered until after the promotions were made; nor a case in which the facts did not come to light until afterward; nor yet one in which the accused concealed the facts so that they were undiscoverable or undiscovered until after his commission and subsequent promotion. The offenses for which he was tried were fully known to the very authorities who had him commissioned. The accused made restitution, obtaining a receipt from the Army Finance officer. This, plus the fact that punishment under Article of War 104 was administered is ample proof that Lieutenant Stirewalt's graduation from Officer Candidate School and his appointment to second lieutenant occurred with full knowledge of all the circumstances.

This case is easily distinguishable from the case quoted under paragraph 369(3) of the Digest of the Opinions of The Judge Advocate General, 1912-40 (CM 145848) since in that case the promotion was a routine matter and the facts surrounding the commission of the offenses by the accused, or even the fact that charges were pending, were unknown to the Adjutant General's Office.

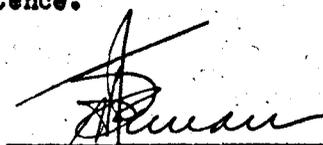
Here there is no question of a promotion while charges were pending, but an actual acknowledgment that the offenses were committed, a disposition of them by an officer who had the right to dispose of them, and a commission and promotion subsequent thereto. To us this is a clear case of constructive condonation of the offenses.

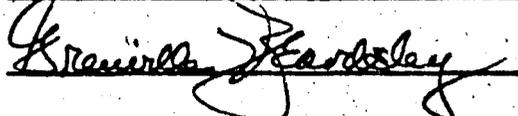
By this we do not intend to mean that this case is to be taken as authority for the proposition that whenever an officer or enlisted man is promoted, such promotion is a constructive condonation of all or any offenses previously committed by him. That a mere change in status Dig. Ops. JAG 1912, p. 97) or a promotion (sec. 369(3), Dig. Ops. JAG 1912-40) does not so operate has already been decided. We do hold, however, that in this particular case, and under these particular circumstances, the action of allowing this accused to continue and complete his course at Officer Candidate School and to have him commissioned thereafter is a condonation of his former known offenses.

While it is true that the accused pleaded guilty to the offenses charged, from the evidence he offered it is clear that he merely intended to make a clean breast of all the facts in the case, as he had done fully two years before.

A plea of guilty admits nothing as to the merits of the case (MCM, 1928, par. 64a, p. 51). After hearing the accused, the court in this case should have proceeded as if the accused had pleaded not guilty under the authority of Article of War 21. Actually, it would have been proper to plead as a special plea, condonation in bar of trial. On such a plea the court should have granted the plea and thus disposed of the entire matter.

7. For the reasons above set forth the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings and the sentence.


_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

(122)

SPJGV-CM 280227

1st Ind

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

JUL 6 1945

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant William T. Stirewalt, Jr. (O-580475), Air Corps.

2. Upon trial by general court-martial this officer pleaded guilty to and was found guilty of making false claims against the Government in the amounts of \$48.75, \$38.75, \$37.50, \$37.75 and \$38.75 (Specifications 1-5, Charge), in violation of Article of War 94. 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. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I do not concur in the opinion of the Board of Review in this case for the following reasons:

a. The doctrine of "constructive condonation" is inapplicable herein.

The Board of Review is of the opinion that the findings of guilty and the sentence should be disapproved because "to us this is a clear case of constructive condonation of the offenses" (p. 7).

What is the source of this "constructive condonation" upon which the Board thus relies?

(1) The only "constructive condonation" set forth in the Manual for Courts-Martial is that relating to desertion (par. 69b). The Board of Review admits this but says that the Manual "does not provide that this is the only case in which the theory of constructive condonation applies" (p. 6).

But there is good reason for believing that when the Manual named this single offense (desertion) that it intended the doctrine to apply only to it. The reason for this is clear. By the very nature of the offense, desertion is expressly, directly and unequivocally condoned when a deserter is unconditionally restored to duty by one who has authority to order him to be tried. That is part and parcel of the act of

restoration. The act of condonation addresses itself directly to the offense committed.

Moreover, the familiar legal principle that the naming of a single specific act or crime necessarily excludes all others is applicable here. If it had been intended that fraud against the Government (involved in this case), or murder, or rape, or absence without leave, should be condoned by some act of the proper authorities and that a special plea based thereon might be raised upon trial, then it must be presumed that the Manual would have so stated.

This view finds specific support in CM 232968 McCormick, 19 BR 263, 279, in which it was expressly stated:

"Constructive condonation relates solely to a charge of desertion." (Underscoring supplied) (This case also involved an officer. He was charged under AW 95 with being drunk and disorderly upon several occasions).

(2) But has the doctrine been accorded wider applicability by the custom of the service? In CM 217589, Kane, 11 BR 265, 270, it is said:

"The War Department for many years has held the view that promotion operates as a constructive pardon only when the officer promoted is under a sentence, and his promotion is inconsistent with the sentence (Dig. Ops JAG 1912, p. 838)"

Clearly, this case does not come within such definition of the applicability of the doctrine. Accused was not "under a sentence," to begin with and, therefore, his being commissioned or his subsequent promotion could not have been "inconsistent with the sentence."

An examination of the cases in which this particular application of the doctrine has been made reveals that condonation was implied when, and only when, the execution of the sentence was inconsistent with the promotion. In C 14389, 13 Aug 1903, Dig Ops JAG 1912, p. 838, it was held that the promotion of an officer who is suffering punishment under a duly approved sentence is a constructive pardon if the promotion was inconsistent with the further operation of the sentence; otherwise not.

(3) The Board of Review appears to assume that there is some well recognized legal concept of constructive condonation or implied pardon which may be resorted to when the facts of a particular case warrant. In 46 C.J. 1190, it is said:

(124)

"Implied pardons are of rare occurrence and apparently arise when a person convicted of crime is appointed to office by the pardoning power; a pardon of this kind has been held inoperative in the case of conviction for treason," citing Raleigh's Case, 2 Rolle 50, 81 Reprint 652.

In 31 Ops Atty Gen 419, Attorney General A. Mitchell Palmer considered this precise question, traced the development of the laws relating to pardon and condonation of offenses and concluded and held that:

". . . . a pardon by implication or construction is a thing not known to or recognized by the law"

Further consideration of this opinion will be given below.

b. There was in fact no condonation of these offenses.

Assuming for the moment, however, that such doctrine were applicable in a case of this character, in my opinion, the facts of this case fail to show any condonation.

"Condonation" has been defined as the pardon of an offense; the voluntary overlooking or forgiveness of an offense by treating the offender as if it has not been committed, usually upon condition that the offense will not be repeated, 15 C.J.S. 814. "Constructive" means derivative, inferential, inferred, implied, made out by legal interpretation, 16 C.J.S. 1515.

To condone or to pardon an offense there must be an express act upon the part of the authority having power to condone or pardon and such authority must have his mind directed to that certain offense and be consciously willing for exemption from the consequences of it. (See United States v. Wilson, 7 Pet. 150, 160-161; Burdick v. United States, 236 U.S. 79, 89, 90).

Apply such principles to the instant case. Here there was no "voluntary over-looking" of the offense or "forgiveness" of the accused. The offenses were not overlooked because they had been specifically punished, albeit the punishment had in fact no legal effect. But the point is that the offenses were recognized and purported disciplinary action taken thereon. Clearly nothing was "forgiven" for the officials believed that punishment had been inflicted and that accused had, in effect, "paid his debt." There was no conscious willingness to exempt accused from the

consequences of his wrongful acts for it was believed that punishment therefor was at an end, it was a closed chapter, at least insofar as the authorities whose conduct is supposed to have condoned these offenses were concerned.

c. The rule announced by Winthrop and relied upon by the Board of Review in this case to the effect that a promotion or appointment to a new office, of an officer of the Army, while under arrest and charges, will operate as a constructive pardon of such offense, is distinguishable on the facts from this case, is of very doubtful soundness and ought not be followed herein.

(1) The Board of Review expressly states that this statement from Winthrop is on "all fours" with the present case. This cannot be for Winthrop was expressly speaking of promotion or appointment to a new office, "while under arrest and charges for the commission of a military offense."

In the present case, no charges were pending nor was accused under arrest either when he was commissioned or when he was promoted. Moreover, there were no outstanding offenses for which he had not in fact been punished, although it is true that the punishment in legal effect, so far as being a bar to trial by court-martial, was a nullity. But clearly these facts distinguish the case from that mentioned by Winthrop.

(2) But even if the Winthrop statement can be said to apply as fully and as completely as the Board believes it does, then it is submitted that the principle enunciated by Winthrop is of such doubtful soundness that it ought not be followed. Winthrop cites as authority for this proposition three comparatively early opinions of the Attorney General, handed down in 1842, 1853, and 1856, respectively. The soundness of each of these three opinions has been seriously and expressly questioned and the conclusions reached therein have been repudiated in an opinion of the Attorney General dated 4 April 1919 and appearing in 31 Ops Atty Gen 419. This was an opinion rendered the Secretary of the Navy upon the question of constructive pardon of a Naval officer by reason of promotion and because it is believed to be very helpful in the consideration of the present subject, substantial portions of the opinion are set out. The questions of law arising were set out as follows:

"(a) Does the promotion of an officer of the Navy while under charges awaiting trial by general court-martial operate as a constructive pardon of the offenses charged against him?

"(b) If so, is it necessary for such officer, when later brought to trial by general court-martial for such offenses,

to bring the fact of such promotion to the attention of the court-martial, by special plea or otherwise, in order to have the proceedings of the court-martial set aside by the reviewing authority, or is it sufficient if the fact of such promotion is placed in the records of the case, after trial but before final action is taken by the reviewing authority,!"

* * * * *

"After a careful investigation, no authority has been found for the possibility or validity of an implied pardon except the opinions of Attorney General Cushing in 6 Op. 123, and 8 Op. 237, and the opinion of Attorney General Legare in 4 Op. 8. (Note that these are the same three opinions upon which Winthrop relies and which, in turn, the Board of Review relies in this case). The former rest entirely on the authority of the latter, without reasoning. The latter with a like lack of reasoning relies entirely on Sir Walter Raleigh's Case, 2 Rolle's Repts. 50. In that report of the case it is said that the Chief Justice while holding that there could be no implied pardon of treason (the case before him), remarked that perhaps it might be different in felony. In the report of the same case in 2 Howells State Trials, 1, 34, no such remark is given, the Chief Justice merely stating:

' . . . for by words of a special nature, in case of treason, you must be pardoned and not implicitly. There was no word tending to pardon in all your commission; and therefore you must say something else to the purpose.'

"A pardon by implication is not noticed in such authoritative English treatises as Hawkins (Pleas of the Crown, vol. 2, p. 542 et seq.), Blackstone (vol. 4, pp. 400, 401), Chitty (Criminal Law, vol. 1, p. 770 et seq.), Halsbury (Laws of England, vol. 6, p. 404). These writers are in accord in mentioning only absolute or full, and conditional pardons. The American writers add partial pardons-- in the nature of commutation of sentence--but none mentions an implied pardon except American and English Encyclopedia. (See e.g. Bishop, Criminal Law, vol. 1, sec. 914; Wharton, Criminal Procedure 10th Edition, vol. 2, secs. 1458-1474; Cyc., vol. 29, p. 1560.) In American and English Encyclopedia (vol. 24, p. 552), where implied pardons are mentioned, no authorities are cited but the opinions of Attorney General Cushing, supra, and of implied pardons it is said:

' . . . these, however, have been of very rare occurrence and are somewhat anomalous in their character.'

"No decision has been found either in the Federal or the State courts recognizing or even mentioning an implied pardon. On the other hand, the uniform tenor of the decisions is inconsistent with their legal possibility."

* * * * *

" In Ex parte Wells (18 How. 307, 310), the court said:

'Such a thing as a pardon without a designation of its kind is not known in the law. Time out of mind, in the earliest books of the English law, every pardon has its particular denomination. They are general, special, or particular, conditional or absolute, statutory, not necessary in some cases, and in some grantable of course.'

* * * * *

"That a pardon is an express act based upon an intent directed to the particular offense and the reasons excusing it with a will to wipe out the punishment therefor, is also shown by the decisions that a pardon granted through fraud or misapprehension, the executive not being apprised of the true situation, is void; that a pardon not clearly directed to the specific offense which it is claimed to cover is not effective as to that offense; It is safe to say that these cases would all have been differently treated both by counsel and by the court had anyone suspected that a right to a pardon could accrue from mere implication out of general circumstances beyond the record.

"If a pardon by implication were held to be within the pardoning power as known to the common law and adopted in the several constitutions, the result would be that, in every case where it was pleaded or set up, an issue of fact would be necessary and a consequent inquiry into the actions of the Executive or the legislature, the inferences of fact to be drawn therefrom, whether the subject acted

(128)

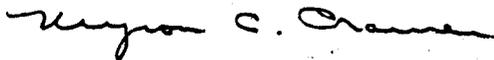
in reliance on them and to what extent, with many other matters of a similar nature, all unfitting, even dangerous considerations in the determination of the important question of public law, viz, whether an amnesty has been duly granted for an offense against the laws of the State. Nor would the offender have anything definite to show as his title to his freedom from punishment, open to all the world—a matter of considerable though lesser importance.

"I have therefore reached the conclusion that a pardon by implication or construction is a thing not known to or recognized by the law, and I answer your first question in the negative. This makes an answer to your second question unnecessary."

4. Believing as I do that this opinion by the Board of Review constitutes an extension of the doctrine of constructive condonation not warranted by the authorities and that the doctrine, in any event, is inapplicable to the facts of this case, I submit that this opinion ought not be adopted by me. Condonation of crime which becomes a legal bar to punishment therefor should be sanctioned only upon the clearest authority. I am unable to find such authority in this case.

I desire to add, however, that I believe injustice has been done this accused. The record of trial and all allied and attached papers reveal that he has an excellent record, that he got into this difficulty through following some bad advice, that he has made restitution and has otherwise conducted himself honorably and honestly upon being advised of the character of the wrong he committed. The equities in his behalf appeal most strongly to anyone considering this record. But clemency should be shown to him through commutation of the sentence. That the equities are so strong in his favor does not justify or warrant the announcement of a rule of law which, in his case, might work substantial justice, but when applied later on might very well enable persons far less worthy to escape just punishment. Accordingly, I recommend that the sentence be confirmed but commuted to a reprimand, and that as thus modified it be carried into execution.

5. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.



2 Incls
1 Rec of Trial
2 Form of Action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence is confirmed but commuted to a reprimand. GCMO 357, 21 July 1945).

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

SPJGN - CM 280244

UNITED STATES

v.

Second Lieutenant THOMAS B.
 WILSON (O-1306923), Infantry.

) ARMY GROUND FORCES REPLACEMENT DEPOT NO.1

) Trial by g.c.m., convened
 at Fort George G. Meade,
 Maryland, 1 May 1945.
) Dismissal

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

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

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

CHARGE: Violation of the 61st Article of War.

Specification: In that Second Lieutenant Thomas B. Wilson, then of Company D, Casual Battalion, now of Company D, 13th Replacement Battalion, 4th Replacement Regiment (Inf), did, without proper leave, absent himself from his organization at Fort George G. Meade, Maryland from about 0001, 31 March 1945 to about 1715, 10 April 1945.

He pleaded not guilty to, and was found guilty of, both the Charge and the Specification and was sentenced to be dismissed the service and to be confined at hard labor, at such place as the reviewing authority might direct, for one year. The reviewing authority approved only so much of the sentence as provided for dismissal and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that by paragraph 18 of Special Orders Number 62 issued on 12 March 1945 by Fourteenth Headquarters & Headquarters Detachment, Special Troops, Second Army, Camp Shelby, Mississippi, the accused was assigned to Army Ground Forces Replacement Depot Number 1 at Fort George G. Meade, Maryland, and was instructed to report to the "CG thereat" at 1200 on 30 March 1945 for "Shipment Number GP-449 (d)-A" (R. 6; Pros. Exs. A, C). A fifteen day delay enroute was granted by an amending order promulgated on 13 March 1945 by the same

headquarters. Three days later, on 16 March 1945, the accused departed from Camp Shelby with a copy of this latter document in his possession (R. 6; Pros. Exs. A, B).

Subsequently, by verbal order of the Commanding General at Fort Meade, the accused was assigned unattached to "Co D 13th Repl Bn 4th Repl Regt (Inf) eff 31 Mar 45" (R. 7; Pros. Ex. G). The accused did not report to his new organization on the date specified but remained absent without leave until 10 April 1945 (R. 6-7; Pros. Exs. A, E, F). At 1715 o'clock on that date he signed the officers' incoming register at the Replacement Depot (R. 6-7; Pros. Exs. A, D).

4. Having been apprised of his rights as a witness, he elected to remain silent. No evidence was adduced on his behalf by the defense.

5. The Specification of the Charge alleges that the accused "did, without proper leave, absent himself from his organization . . . from about 0001, 31 March 1945 to about 1715, 10 April 1945". This offense was laid under Article of War 61.

The accused's unauthorized absence from his new station and organization for a period of ten days has been neither controverted nor explained. Although no evidence was adduced to show that the accused was informed of the contents of the original order dated 12 March 1945, his knowledge of his new assignment may be inferred from his possession of the amending order dated 13 March 1945 and his departure on a fifteen day delay enroute. The Specification has been sustained beyond a reasonable doubt.

6. The accused, who is single and 23 years of age, attended high school for three and a half years but was not graduated. From 1937 to 1940 he was employed as a part time manager of a farm. After voluntarily entering the Army as a private on 12 November 1940 and serving in an enlisted capacity for more than two years, he was commissioned a second lieutenant on 5 January 1943. He has been on active duty as an officer since this last date.

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 61.

Abner E. Lipscomb Judge Advocate

Robert J. Plummer Judge Advocate

Samuel Morgan Judge Advocate

SPJGN-CM 280244 1st Ind
Hq ASF, JAGO, Washington, 25, D. C.

TO: The Secretary of War.

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Thomas B. Wilson (O-1306923), Infantry.

2. Upon trial by general court-martial this officer was found guilty of absenting himself without leave for a period of ten days from his organization, in violation of Article of War 61. He was sentenced to be dismissed the service and to be confined at hard labor, at such place as the reviewing authority might direct, for one year. The reviewing authority approved only so much of the sentence as provided for dismissal and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as approved by the reviewing authority and to warrant confirmation thereof.

Upon termination of a fifteen day delay en route the accused was under orders to report to Army Ground Forces Replacement Depot Number 1 at Fort George G. Meade, Maryland, at 1200 on 30 March 1945. Disregarding his instructions, he absented himself without leave and did not report to his new station until 10 April 1945. Since this was a serious dereliction of duty and since he offered no explanation for his conduct, he does not appear to be worthy of clemency and, his further retention in the service would not be warranted. I accordingly recommend that the sentence as approved by the reviewing authority be confirmed and ordered executed.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.

Myron C. Cramer

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

MYRON C. CRAMER
Major General
The Judge Advocate General

Ⓢ Sentence as approved by reviewing authority confirmed. GCMO 256, 19 July 1945)



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

SPJGQ-CM 280245

14 JUN 1945

UNITED STATES	)	ARMY GROUND FORCES REPLACEMENT DEPOT NO. 1
v.)	
Second Lieutenant WALTER	)	Trial by G.C.M., convened
B. BRANCHE (O-584820),	)	at Fort George G. Meade,
Infantry.	)	Maryland, 1 May 1945.
	)	Dismissal and confinement
	)	for one (1) year.

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 Specification:

CHARGE: Violation of the 94th Article of War.

Specification: In that Second Lieutenant Walter B. Branche, Company C, 4th Replacement Battalion, 1st Replacement Regiment (Inf), did, at the Finance Office, 2 Lafayette Street, New York City, New York, on or about 19 March 1945, present for payment a claim against the United States by presenting to the Finance Officer, Finance Department, 2 Lafayette Street, New York City, New York, an officer of the United States duly authorized to pay such a voucher, War Department Form Number 336, in the amount of one hundred and forty dollars, (\$140.00) for partial payment for services alleged to have been rendered to the United States by the said Second Lieutenant Walter B. Branche, which said claim was false and fraudulent, in that there was then due him less than \$47.00 for services rendered and was then known by the said Second Lieutenant Walter B. Branche to be false and fraudulent.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dismissal and confinement at hard labor for three years. The reviewing authority approved the sentence but reduced the period of

(134)

confinement to one year, designated the Midwestern Branch, United States Disciplinary Barracks, Fort Benjamin Harrison, Indiana, as the place of confinement, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that accused is a second lieutenant, Company C, 4th Battalion, 1st Replacement Regiment, Army Ground Forces Replacement Depot No. 1, Fort George G. Meade, Maryland (R. 6).

It was duly stipulated in writing between the prosecution, defense and accused that at Camp Croft, South Carolina, on or before 12 February 1945, the accused made application for a Class E Allotment in the amount of \$200.00, payable at the end of each month to the Commercial National Bank, Spartanburg, South Carolina, effective 1 March 1945. Prior to his departure from Camp Croft on 16 March 1945 the accused had a Class N Allotment of \$6.50 in effect (R. 7; Pros. Ex. B). It was further stipulated in writing that on 28 February 1945 the accused was paid \$242.70, which constituted payment in full for all services rendered to that date, and that the total pay and allowances earned by the accused for the month of March 1945 was \$253.40 (R. 7; Pros. Ex. C). It was also stipulated in writing that on 19 March 1945, at the Finance Department, 2 Lafayette Street, New York City, New York, the accused presented for payment by the United States a voucher (War Department Form 336) executed by the accused, in the amount of \$140. The voucher was for a partial payment for March 1945. Accused presented it to the Finance Officer, who was duly authorized to make payment and who did so, paying \$140 in cash to the accused (R. 7; Pros. Ex. A).

Considering the accused's base pay, allowances and allotments, the maximum amount which could be due to him during the month of March 1945 or as a partial payment on 19 March 1945 was \$46.90 (R. 8).

The evidence showed that "Army Regulations 35-1360" permit a partial payment not to exceed the amount accrued on the day partial payment is made, leaving a sufficient amount in the account to settle all allotments and indebtedness at the end of the month (R. 8, 9). Neither deductions nor collections are shown on partial payment vouchers (R. 9, 11). The officer certifying his own pay voucher is responsible for making the appropriate deductions on the voucher (R. 9). An allotment effective in the month of March is presumed to be paid unless notification is received by the officer that his allotment will not be processed (R. 11). In paying transient officers the Finance Officer at Fort George G. Meade requires his orders, his A.G.O. identification card, and his pay data card, and the officer is questioned about allotments (R. 12).

Upon arrival at Fort George G. Meade, on or about 2 April 1945, accused and other officers were given an orientation lecture on allotments and their effective dates and were given information questionnaires to fill out (R. 10, 13). It was stipulated in writing that \$200 was sent to the Commercial National Bank, Spartanburg, South Carolina, in payment of the accused's allotment, by check of the Office of Dependency Benefits, and credited to the account of the accused (R. 7; Pros. Ex. B). The date of this transaction does not appear in the stipulation.

First Lieutenant Burton A. Francis, 1322d Service Unit, Fort George G. Meade, Maryland, in charge of the Post Finance Office, AGF Branch (R. 7) testified that on 3 April 1945, the accused came to the Finance Office to be paid. Lieutenant Francis asked the accused if he had received a partial payment, and the accused said he had not (R. 24). When asked if he had been in the Finance Office at 2 Lafayette Street, New York, and had received a partial payment, the accused admitted that he had and "had tried to pull a fast one" in not reporting it (R. 24, 25, 26). The statement that he had not received partial pay was retracted by the accused before he knew that Lieutenant Francis had correspondence on the subject (R. 25). The statement or questionnaire filled out by the accused on 1 April 1945 showed "partial payment, none" (R. 26), and an allotment of \$200.00 effective 1 March 1945. Accused told Lieutenant Francis that he thought it was effective 1 April (R. 7, 27). The statements by the accused to Lieutenant Francis were purely voluntary and he was not under any duress or compulsion (R. 27).

4. The accused testified in his own behalf. When he started the allotment about 12 February, he asked a clerk in the Finance Office whether it would be on the March "payroll" and understood the clerk to say that accused would be notified when it became "effective" (R. 18, 20, 21). He never received a notification that the allotment was or was not accepted and had not been so notified at the time when he drew the partial payment in New York City (R. 18). After arriving at Fort George G. Meade he learned that allotments would be paid on the date requested, in the absence of notification to the contrary and he showed the \$200 allotment on the form he filled out (R. 18). Accused went to Lieutenant Francis, who told him that he (Lieutenant Francis) had been notified of the partial payment (R. 18). At the suggestion of Lieutenant Francis, accused wired the bank in Spartanburg to send the money, but the allotment was not there (R. 19). Accused received the money from the bank on the 17th of April and then paid Lieutenant Francis the amount of the overpayment (R. 19).

On cross-examination the accused testified that on the 19th of March, when he filed the partial pay voucher, he knew that he had a Class E allotment of \$200 but did not know that it was in effect, although he had requested that it be effective the first of March (R. 19).

(136)

He did not know that the \$200 was actually at the bank until the bank sent it to him (R. 19). When accused filled out the Data for Officers' Pay and Allowance Vouchers at Fort George G. Meade, he did not show that he had previously received \$140 (R. 19, 20).

On examination by the court the accused testified that he did not sign a voucher for March pay because no voucher was made up for him by reason of the overpayment in New York (R. 20). The partial payment voucher in New York was made up when accused showed his pay data card at the Finance Office (R. 20, 22). He had not placed the allotment on his pay data card because he had not been notified that it was in effect (R. 20, 21, 22). After making the allotment in February the accused received orders effective about 15 or 16 March transferring him to Fort George G. Meade (R. 21). He stayed in Spartanburg until about 19 March to arrange for a divorce, then went to New York and the next day went to his home in Albany, where he stayed until he reported at Fort Meade on 1 April (R. 21). During this time he received no mail from Camp Croft and admitted that if a notice concerning the allotment had been mailed it would not have reached him (R. 21). The allotment was payable to a joint bank account (apparently with the wife of accused) but because of the impending divorce he subsequently cancelled the allotment (R. 22). Accused made no comment to the "paymaster" in New York about the allotment even though he did not know whether the allotment was effective (R. 22). The pay data card had the accused's insurance allotment entered (R. 22) in the amount of \$6.50 (R. 29). The accused attended an Adjutant General's School and was engaged in adjutant's work from February to September 1944 (R. 27). He had schooling in allotments (R. 28) but did not make up allotments (R. 29). He was familiar with partial pay procedure and had previously drawn partial payments (R. 28). Accused admitted that he told Lieutenant Francis that he did not get a partial payment. He said this because he was scared, but admitted the truth when Lieutenant Francis asked if he had received a partial payment in New York (R. 28). He further admitted saying "I tried to pull a fast one here" (R. 28). He needed the money to buy his uniform and pay a loan but knew that he would eventually have to pay it back (R. 28, 29). After stating that he did not know how long after the end of a month an allotment arrived at the bank, the accused admitted that previous allotments had arrived three days after the end of the month (R. 30).

5. For the most part the evidence is undisputed. On or before 12 February 1945 accused applied for a Class E allotment in the amount of \$200, effective 1 March 1945, payable at the end of each month to the Commercial National Bank, Spartanburg, South Carolina. Under Army Regulations an allotment is paid for the month in which it is to become effective unless the officer making it is notified that it will not be processed. According to accused, a clerk in the Finance Office told accused that he would be notified when the allotment became effective and accused received no notification of its acceptance. On 19 March 1945,

accused presented a partial payment voucher for \$140 to a Finance Officer in New York and received that amount, although only \$46.90 was due him. Accused testified that he did not know that the allotment was in effect at the time but in his subsequent testimony admitted that he said nothing about it to the Finance Officer in New York although he did not know whether it was effective or not. He admitted that he had made previous allotments and that the amount thereof had arrived at the allottee bank three days after the end of the month. He had studied allotments at The Adjutant General's School.

On 3 April accused told the Finance Officer at Fort Meade that he had not received a partial payment for March, but when confronted by the Finance Officer with further details, confessed to having received it and said he had "tried to pull a fast one". Despite the fact that he had applied for an allotment effective 1 March, he told the Finance Officer at Fort Meade that he thought it would not become effective until 1 April. The allotment actually became effective in March and the bank received a check for it during the first part of April.

Evidently the court did not believe accused's story that he thought the allotment ineffective until he had been notified of its acceptance. The court was entirely justified in this conclusion. Indeed, a contrary conclusion could not reasonably have been reached. Admittedly accused lied about the partial payment and although he claimed to have thought the allotment ineffective until notification of its acceptance, he told the Finance Officer at Fort Meade that he thought it was effective on 1 April. If he really believed that notification was necessary, why should he have thought that the allotment would become effective on 1 April? Furthermore, since he had made allotments before, he must have known that they became effective without notification of their acceptance, and since he had specified 1 March as the effective date, he could not have supposed that the allotment would not go into effect until 1 April. His story that the finance clerk told him that he would be notified of the acceptance of his allotment is unworthy of belief, for there is no reason to think that the clerk would misinform him concerning the regulations which provided that the allotment would go into effect as specified, in the absence of notification to the contrary. In addition, it is reasonable to suppose that the fundamentals of the allotment procedure had been given to the accused at The Adjutant General's School. Finally, by his own admission he failed to inform the Finance Officer in New York of the allotment although he did not know whether it was in effect or not.

Considering all the evidence, the court was fully justified in concluding that the accused knew of the false and fraudulent nature of the claim for \$140 which he presented to the Finance Officer in New York. In our opinion the record clearly supports the findings of guilty.

(138)

6. War Department records show that accused is 22 years old. He is married but has no children. He graduated from high school, and between June 1940 and August 1942 did clerical work for the Western Union Telegraph Company and the Times Union, a newspaper, in Albany, New York. He served as an enlisted man from 31 August 1942, was graduated from the Army Air Forces Officer Candidate School, Miami Beach, Florida, and commissioned a second lieutenant, Army of the United States, 5 February 1944. On 19 August 1944 he was "detailed in Infantry".

7. The court was legally constituted and had jurisdiction of the person and the subject matter. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence. Dismissal and confinement at hard labor are authorized for violation of Article of War 94.

Fletcher R. Andrews, Judge Advocate.

Herbert R. Fredericks, Judge Advocate.

W. A. Jones, Judge Advocate.

SPJGQ-CM 280245

1st Ind

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

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Walter B. Branche (O-584820), Infantry.

2. Upon trial by general court-martial this officer was found guilty of presenting for payment a false and fraudulent claim against the United States in the amount of \$140, knowing the claim to be false and fraudulent, there being "less than \$47" due him at the time, in violation of Article of War 94. He was sentenced to dismissal and confinement at hard labor for three years. The reviewing authority approved the sentence but reduced the period of confinement to one year, designated the Midwestern Branch, United States Disciplinary Barracks, Fort Benjamin Harrison, Indiana, as the place of confinement, and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings and sentence as approved by the reviewing authority and to warrant confirmation thereof. I concur in that opinion.

On or before 12 February 1945, at Camp Croft, South Carolina, the accused applied for a Class E allotment in the amount of \$200 per month, effective 1 March 1945, payable at the end of each month to a bank in Spartanburg, South Carolina, for credit to the joint account of the accused and his wife. Allotments become effective at the time designated in the application, without notification to the allotter of their acceptance, and the present allotment actually went into effect as of 1 March 1945. On 19 March 1945, while accused was in New York, apparently on leave, he presented to a finance officer his partial payment voucher for March, in the amount of \$140. The "maximum amount" due him at the time, and for the month of March, considering the allotment and other deductions, was \$46.90. An officer is not required to include deductions on a partial payment voucher, but is required to disclose them orally when presenting the voucher for payment. Accused said nothing to the finance officer about the allotment. The finance officer paid him \$140.

On 1 April 1945, after his arrival at Fort George G. Meade, Maryland, accused executed a pay data questionnaire, evidently relating to his pay for the month of March. On the questionnaire he showed an allotment of \$200, effective 1 March 1945, and also "partial payment, none." On 3 April 1945 he went to the finance office at Fort Meade

(140)

to obtain his March pay, although as already noted, he had been overpaid for that month. Asked whether he had previously received a partial payment for March, he said that he had not. However, when the finance officer, who had received notice from New York of the partial payment, asked the accused whether he had received a partial payment in New York, the accused admitted that he had and stated that he had "tried to pull a fast one" in not reporting it. He also told the finance officer that he had believed that the allotment would not be in effect until 1 April.

The allotment check was sent to the allottee bank early in April. Accused wired the bank, received a check for the \$200, and reimbursed the Government for the overpayment.

According to the testimony of accused, a clerk in the finance office in New York gave him to understand that the accused would be notified of the effective date of the allotment. Evidently the court did not give credence to this testimony, and it is patently unreasonable, in view of the uncontradicted evidence that no such notification is customarily given, which a clerk in the finance office presumably would know. Although accused testified that he did not know that the allotment was in effect, he admitted in his subsequent testimony that he said nothing to the finance officer in New York about the allotment, although he did not know whether it was effective or not. Admittedly, accused had received some instruction about allotments at an Adjutant General's school and had previously made other allotments.

The court was fully justified in concluding that the accused was aware of the false and fraudulent nature of his claim at the time he presented the partial payment voucher in New York.

The accused is only 22 years of age. During his commissioned service he has received four performance ratings of excellent and one of very satisfactory. There is nothing to indicate any previous conviction or disciplinary action. He made restitution. Although his conduct is not to be condoned, in view of his youth and prior good record and in order that he may be made available for future service as an enlisted man, I recommend that the sentence as approved by the reviewing authority be confirmed but that the confinement be remitted and that the sentence as thus modified be ordered executed.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.



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

MYRON C. CRAMER
Major General.
The Judge Advocate General

(Sentence as approved by reviewing authority confirmed but confinement remitted. GCMO 291, 7 July 1945).

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

(141)

23 MAY 1945

SPJGW - CM 280300

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

v.

First Lieutenant SAMUEL B.
WALLACE (O-1824399),
Quartermaster Corps.

) 14th HEADQUARTERS & HEADQUARTERS DETACH-
) MENT SPECIAL TROOPS, FOURTH ARMY

) Trial by G.C.M., Convened
) at Camp Polk, Louisiana,
) 17 April 1945. Dismissal.

OPINION of the BOARD OF REVIEW

SEMAN, MICELI and BEARDSLEY, 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 arraigned and tried upon the following Charges and Specifications:

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

Specification 1: In that First Lieutenant Samuel B. Wallace, 4121st Quartermaster Truck Company, having received a lawful order from Captain John M. Johnston to be in his slit trench between 2100 and 2400 23 March 1945, the said Captain John M. Johnston being in the execution of his office, did, at or near the bivouac area of the 4121st Quartermaster Truck Company in the vicinity of Camp Polk, Louisiana, on or about 23 March 1945, fail to obey the same.

Specification 2: In that First Lieutenant Samuel B. Wallace, * * * having received a lawful order from Captain John M. Johnston that all personnel of said 4121st Quartermaster Truck Company would be in their slit trenches between 2100 and 2400 23 March 1945, the said Captain John M. Johnston being in the execution of his office, did at or near the bivouac area of the 4121st Quartermaster Truck Company in the vicinity of Camp Polk, Louisiana, on or about 23 March 1945, fail and neglect to cause the enlisted personnel under his supervision and control, and for whose compliance with said order he was responsible, to be in their slit trenches during said hours.

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

Specification 1: In that First Lieutenant Samuel B. Wallace, * * * did, without proper leave, absent himself from his organization at or near the bivouac area of the 4121st Quartermaster Truck Company in the vicinity of Camp Polk, Louisiana, from about 2130 to about 2400 23 March 1945:

Specification 2: In that First Lieutenant Samuel B. Wallace, * * * did, at or near the bivouac area of the 4121st Quartermaster Truck Company in the vicinity of Camp Polk, Louisiana, on or about 23 March 1945, fail to repair at the fixed time to the properly appointed place for conduct of a field problem involving the occupation of slit trenches.

Accused pleaded not guilty to and was found guilty of all the Charges and Specifications. No evidence of previous convictions was offered. 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 may be briefly stated:

a. For the Prosecution.

The 296th Quartermaster Battalion on 23 March 1945 was engaged in tactical training. Its bivouac area was about 11 miles from Camp Polk, Louisiana (R. 29, 30, 95, 96). It comprised six companies, three of which were colored, the 4120th, 4121st, 4122nd Quartermaster Truck Companies. The other three companies, the 270th, 271st and 417th Quartermaster Companies, were made up of white personnel.

Accused was motor officer of the 4121st Quartermaster Truck Company (R. 107), which was commanded by Captain John M. Johnson, QMC (R.30).

According to Captain Johnston, pursuant to an announcement made at Adjutant's call early in the forenoon, he called all the officers of his company together and told them that all the personnel of the company would occupy the slit trenches that night from hours 2100 to 2400 (R. 38, 39, 45-47), as a part of the field exercise (R. 95, 103).

About hours 2000 on that day at a meeting of the officers, Lieutenant Colonel Arthur J. Spring, the commanding officer of the battalion, announced that the three colored companies would occupy their slit trenches from hours 2100 to 2400, and that the three white companies would occupy their slit trenches from 2100 until dawn. Accused was present at the meeting (R. 39, 41, 58, 59, 71, 99, 101, 102, 103).

Following the battalion officers meeting, all present engaged in a map problem, which began near the entrance to the battalion bivouac area and ended not far from the bivouac area of the 4121st Quartermaster

Truck Company (R. 41, 54-56). Jeeps were used as transportation. Accused and Lieutenant Ammons went in one jeep and Captain Johnson was in another jeep with Lieutenant Jackson. Captain Johnston's jeep stalled in a hole, and it was about hours 2200 when he got back to his company's bivouac area (R. 42). The members of the company were not in the slit trench. First Sergeant Devoux and Staff Sergeant Maize knew of the order. However, all the enlisted personnel were asleep in their tents. The other officers of the company could not be found in the bivouac area (R. 42-43). Runners were sent out to locate them, but to no avail (R. 43, 70, 74-75). Captain Johnston went to the battalion command post, and reported these facts to Colonel Spring (P. 61-62). About 2350, Colonel Spring started to the company area. He saw two jeeps, and followed one into the company area, and stopped his car next to it. The occupants of said jeep were accused and Lieutenant Ammons. Colonel Spring escorted them to Captain Johnston, who asked accused where he had been. Accused stated that they had gone to Camp Polk for food after completing the map problem (R. 44, 62-64).

Standing operating procedure in the battalion prohibited officers from leaving the bivouac area of a company, without the permission of the company commander (R. 52). Camp Polk is 12 miles from the bivouac area of the 4121st Quartermaster Company (R. 29). Accused did not ask and Captain Johnston did not grant permission to accused to go to Camp Polk after completing the map problem on the night in question.

b. For the defense.

Accused was warned of his rights as a witness, and chose to be sworn and testify in his own behalf. He testified that he was present at the meeting of the officers of the company on the morning of 23 March, but that no orders were given by Captain Johnston concerning occupation of the slit trenches by the personnel of the company that night. Nothing was said about it (R. 78, 82). At hours 2000, a roll call of the battalion officers was taken by Colonel Spring, after the band concert, but accused did not know that an officers' meeting was being held. He did not hear anything said about occupation of slit trenches (R. 83, 84). Following this, he went with Lieutenants Ammons and Washington to work out the map problem, which the three officers together completed about 2130 (R. 81, 84, 90). Accused, as motor officer, then did "not have anything to do." He did not have permission from Captain Johnston to go to Camp Polk to eat, but such permission to leave the bivouac area when off duty had not theretofore been required, and he knew of no standard operating procedure to that effect.

Lieutenant Anderson testified that he was at the meeting of the company officers in the forenoon. He testified definitely and positively that Captain Johnston said nothing about occupying the slit trenches (R.76).

c. Rebuttal.

Colonel Spring was recalled and testified that the battalion was in a tactical situation, during which officers could not leave field problems without permission of the company commander (R. 98). Accused was present at the meeting at 2000, but could have left without witness' knowledge (R. 101). Captain Johnston repeated his previous testimony that accused was present at such meeting (R. 105, 107, 109).

4. Prior to the hearing on the merits, the court heard evidence in support of and in opposition to accused's special plea in bar, which asserted that trial was precluded by reason of the fact punishment had been imposed upon him by Captain Johnston for the offenses involved in the charges, under Article of War 104 (R. 10-15). Accused testified that he was restricted to camp for six days by Captain Johnston as punishment under Article of War 104. Other witnesses corroborated his testimony. Captain Johnston testified that he made no mention of Article of War 104, but merely told accused that charges would be preferred against him and the other officers. Accused was not restricted (R. 18-20).

5. Upon the trial, it was strenuously urged by counsel for accused: (1) that trial of the offenses charged was barred by the previous imposition of punishment therefor under the provisions of Article of War 104; (2) that the testimony of Lieutenant Colonel Spring was inadmissible, since accused was charged, not with violating his order, but with failing to obey the orders of Captain Johnston issued pursuant to the battalion commander's direction; and (3) that the testimony of the accused and Lieutenant Anderson that Captain Johnston gave no order to them in relation to the occupation of the slit trenches and that there was no requirement in effect that officers not on duty obtain permission of the company before leaving the bivouac area outweighs that of Captain Johnston to the contrary, and that hence guilt was not proven beyond a reasonable doubt. We shall consider these matters in the order stated.

6. As to the plea in bar, it may be observed that, in the first place, punishment may be imposed under Article of War 104 only for derelictions not involving moral turpitude or any greater degree of criminality or seriousness than is involved in the average offense tried by summary court-martial (MCM, 1928, par. 105). The offenses charged seem to us to be more serious than those usually made the subject of trial by a summary court. In the second place, the company commander denied that he imposed any punishment under Article of War 104. The first of these matters raises a question of law, while the second involves a question of fact. Both questions were resolved by the court against accused, and we believe correctly, since the offenses charged were not minor or trivial; and because the testimony of Captain Johnston, if true, warranted the conclusion that he had not employed the disciplinary powers invested in him by the Article of War 104. The conclusion of the court as to the

credibility of the witnesses should not arbitrarily be disturbed. There is nothing in the record to indicate any reason for Captain Johnston to bear false witness against accused. In the absence of anything tending to lessen Captain Johnston's credibility, a determination of where the truth lay could best be made by those who saw and heard the conflicting testimony.

7. The testimony of Colonel Spring was relevant and admissible to establish intent. An officer who had previously heard the battalion commander issue instructions concerning night exercises in slit trenches, would be on notice that the orders of his company commander on the same subject were issued in pursuance of orders from higher authority. If no such orders were or had been given by the company commander, it would be not unnatural for him to anticipate them and to keep himself readily available to receive such orders when given and to promptly comply therewith.

8. The accused and another lieutenant of the same company categorically deny that the company commander issued orders to occupy the slit trenches at the time in question. From the facts and circumstances in evidence, it appears to be possible that the company commander overlooked the giving of orders to carry out and insure compliance with the instructions of the battalion commander, and that, in order to embarrass him, the officers of the company said nothing and when instructions from him were not forthcoming in advance of the exercise, made themselves scarce, so that the captain would not have any opportunity belatedly to issue the proper orders. However, the company commander testified categorically that he did give the orders. Accused and Lieutenant Anderson are equally positive in their testimony to the contrary. A like issue of fact is presented by the diametrically opposite testimony of the prosecution and defense witnesses that permission from the company commander was or was not required for officers to leave the bivouac area, even when actually without duties to perform. The question is one of truth and veracity. It is evident that somebody lied. Under circumstances such as those presented by this record, a determination as to who told the truth can not possibly be made except by observation of the manner, conduct and demeanor of the witnesses. The court had the opportunity for such observation. We have not. The conclusion reached by the court does not appear to us to be arbitrary or unreasonable. We have the power to weigh evidence in a case such as this, but such power imposes upon us the exercise of sound discretion. We cannot arbitrarily substitute our judgement for that of the court, in the absence of any fact or circumstances tending to lessen the apparent credibility of the prosecution's witnesses or to bolster that of the defense witnesses. It was suggested in the trial court that Captain Johnston was the only witness who testified that he gave the order in question, while two witnesses testified that he did not. Although numerical preponderance is a factor in determining on which side is the greater weight of the evidence, it is only one of several factors, and is not necessarily controlling. Courts weigh evidence. They do not count witnesses, as sheperds count sheep.

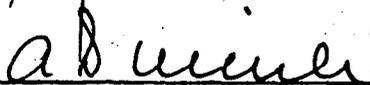
(146)

9. Accused was 38 years old on 6 November 1944. He was born in St. Louis, Missouri. He graduated from Paine College, with the degree of BS. He was inducted 8 June 1942 at Fort Custer, Michigan, and served as an enlisted man until 10 March 1943, on which date he was honorably discharged to accept a commission as second lieutenant, AUS, upon successful completion of the prescribed course at the Tank Destroyer OCS, Camp Hood, Texas. On 25 January 1945 he was promoted to first lieutenant. His efficiency rating has been excellent during 9 months and satisfactory during six months of his commissioned service.

10. The court was legally constituted and had jurisdiction of the subject matter and of accused's person. No errors injuriously affecting accused's substantial rights were committed. 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 to dismissal is authorized upon conviction of violations of the 61st and 96th Articles of War.



Judge Advocate.



Judge Advocate.



Judge Advocate.

SPJGV-CM 280300

1st Ind

Hq ASF, JAGO, Washington 25, D.C. 13 JUL 1945

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Samuel R. Wallace (O-1824399), Quartermaster Corps.

2. This officer was found guilty by a general court-martial of having failed to obey the lawful order of his superior officer to be in a slit trench during certain hours (Charge I, Specification 1), and of having failed and neglected to obey the lawful order of his superior officer to cause enlisted men under his command to be in the slit trench during those hours (Charge I, Specification 2), in violation of the 96th Article of War, and absenting himself without leave for 2½ hours from the bivouac area of his organization near Camp Polk, Louisiana (Charge II, Specification 1) and of failing to repair at the fixed time to the properly appointed place of duty (Charge II, Specification 2), in violation of the 61st Article of War. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. A summary of the evidence is contained in the foregoing opinion of the Board of Review, which Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. I concur in that opinion.

On 23 March 1945, the 4121st Quartermaster Truck Company was engaged in field exercises near Camp Polk, Louisiana. The company commander told the accused and the other lieutenants of the company that between hours 2100 and 2400 the company would occupy the slit trenches. The order was not complied with. Accused during that time with another officer went to Camp Polk to eat, and did not return until about 2350. The lieutenants denied knowledge of the order in question or of standard operating procedure which required permission of the company commander before an officer could leave the bivouac area. The company commander testified that he gave the order in question to accused and the officers, and that the fact that permission to leave the bivouac area was generally known.

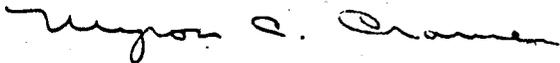
(148)

4. In view of the previous record of this officer, I recommend that the sentence be confirmed but commuted to a reprimand and forfeiture of \$50 pay per month for three months and that the sentence as thus modified be ordered executed.

This is one of the four cases arising out of the same transaction. In the three cases which have reached this office, and been reviewed, similar recommendations have been made.

5. Consideration has been given to a letter from the accused, dated 10 May 1945, with inclosures.

6. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.



MYRON C. CRAMER
Major General
The Judge Advocate General

- 3 Incls
1 Rec of Trial
2 Form of Action
3 Ltr fr accused dated
10 May 1945 w/incls.

(Sentence confirmed but commuted to a reprimand and forfeiture of \$50. per month for three months. GCMO 374, 25 July 1945).

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

SPJGH-CM 280302

30 MAY 1945

UNITED STATES)

ARMORED CENTER

v.)

Second Lieutenant JAMES
Z. NELSON (O-1014916),
Infantry.)

Trial by G.C.M., convened at
Fort Knox, Kentucky, 23 April
1945. Dismissal, total for-
feitures and confinement for
five (5) years.

OPINION of the BOARD OF REVIEW
TAPPY, GAMRELL 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 61st Article of War.

Specification: In that James Z. Nelson, Second Lieutenant, Infantry, Armored Command Officers Replacement Pool, did, without proper leave absent himself from his command at Fort Knox, Kentucky, from about 6 November 1944, to about 16 November 1944.

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

Specification 1: (Withdrawn by appointing authority).

Specification 2: In that James Z. Nelson, Second Lieutenant, * * *, did, at Louisville, Kentucky, on or about 28 September 1944, with intent to defraud, wrongfully and unlawfully make and utter to Koby Drug Company, a certain check, in words and figures as follows: to-wit: "Sept. 28, 1944, Pay to the order of Koby Drug Co. fifteen dollars (\$15.00), Citizens National Bank, Abilene, Texas, James Z. Nelson, O-1014916, Nichols

Gen Hosp.", and by means thereof, did fraudulently obtain from Koby Drug Company United States Currency in the amount of fifteen dollars (\$15.00) the said Second Lieutenant James Z. Nelson then well knowing that he did not have, and not intending that he should have sufficient funds in the Citizens National Bank, Abilene, Texas, for payment of said check.

Specification 3: Same allegations as Charge II, Specification 2, except check uttered on or about 20 October 1944, to Officers' Club, Bowman Field, Louisville, Kentucky.

Specification 4: Same allegations as Charge II, Specification 2, except check uttered on or about 21 October 1944, in the amount of \$20.

Specification 5: Same allegations as Charge II, Specification 2, except check drawn in the amount of \$10 on California Bank, Los Angeles, California, and uttered on or about 8 November 1944, to California Bank, Van Nuys, California.

Specification 6: Same allegations as Charge II, Specification 2, except check drawn in the amount of \$50 on Burns National Bank, Durango, Colorado, and uttered on or about 13 November 1944, to California Bank, Van Nuys, California.

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

Specification 1, Same allegations as Charge II, Specification 2, except check drawn on Security-First National Bank of Los Angeles, California, and uttered on or about 8 December 1944, to Hospital Subsistence Account, Santa Ana, California.

Specification 2: Same allegations as Charge II, Specification 2, except check drawn on Security-First National Bank of Los Angeles, California, and uttered on or about 18 December 1944, to Hospital Subsistence Account, Santa Ana, California.

Specification 3: Same allegations as Charge II, Specification 2, except check uttered on or about 17 September 1944, to J. C. Conniff, Louisville, Kentucky.

Specification 4: Same allegations as Charge II, Specification 2, except check drawn in the amount of \$25 on First National Bank, Louisville, Kentucky, and uttered on or about 22 September 1944, to J. C. Conniff, Louisville, Kentucky.

Specification 5: Same allegations as Charge II, Specification 2, except check drawn in the amount of \$25 on First National

Bank, Albuquerque, New Mexico, and uttered on or about 28 November 1944, to Desmond's, Los Angeles, California.

Specification 6: Same allegations as Charge II, Specification 2, except check drawn in the amount of \$20 on Security-First National Bank of Los Angeles and uttered on or about 14 December 1944, to drawee bank.

Specification 7: Same allegations as Charge II, Specification 2, except check drawn in the amount of \$20 on Security-First National Bank of Los Angeles and uttered on or about 19 December 1944, to drawee bank.

Specification 8: Same allegations as Charge II, Specification 2, except check drawn in the amount of \$20 on Security-First National Bank of Los Angeles and uttered on or about 9 December 1944 to Sears, Roebuck & Co., Santa Ana, California.

Accused pleaded not guilty to Charge I and its Specification, and guilty to Charge II and the Additional Charge and guilty to all Specifications of Charge II and of the Additional Charge except the words "with intent to defraud" and "fraudulently." He was found guilty of all Charges and Specifications. Evidence of one previous conviction for making and uttering certain worthless checks aggregating \$307.75 in amount was introduced. Accused was sentenced to dismissal, total forfeitures and confinement for five years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence introduced by the prosecution is hereinafter summarized under appropriate headings indicating the particular Charges and Specifications to which it is pertinent.

a. Charge I, Specification:

It was stipulated by the prosecution, defense and the accused that if Brigadier General T. J. Camp were present he would testify that accused made written request for fourteen days sick leave effective on or about 22 October 1944, that Lieutenant Colonel Joseph P. Franklin, Medical Corps, commented by 1st Indorsement, that accused was awaiting orders to appear before an Army Retiring Board and recommended that accused be discharged from hospital to duty and given regular leave rather than sick leave, and that on or about 21 October 1944, General Camp approved a regular leave of fourteen days for accused effective on or about 22 October 1944 (R. 15). Pursuant thereto accused was granted fourteen days leave effective on or about 22 October 1944 and signed out on that date on the officers' register, indicating that his leave was to be spent in Los Angeles, California (R. 12-14; Pros. Exs. 2, 3). He failed to return to his station at Fort Knox, Kentucky, by 6 November 1944, after conclusion of his authorized leave of absence (R. 12; Pros. Ex. 1). The officers' register on which accused was required to sign in upon his

(152)

return from leave contains no entry for the period from 23 October 1944 to 16 November 1944 indicating accused's return to his station during that time (R. 13, 14; Pros. Ex. 4).

b. Charge II, Specifications 2 to 6 inclusive, and Additional Charge, Specifications 1 to 8 inclusive:

It was stipulated by the prosecution, defense and the accused that accused made the following checks and uttered them for the following consideration on the following dates at the following places and that on the dates accused made and uttered each of the checks he had insufficient funds on deposit in the particular drawee bank to pay the check drawn thereon and that, after presentation for payment at such bank, each of the checks was returned unpaid because of insufficient funds then on deposit to accused's account (R. 16-22 incl.; Pros. Exs. 5-17 incl.):

<u>Ch & Spec</u>	<u>Date check made and uttered</u>	<u>Amount of check</u>	<u>Cashed by</u>	<u>Consideration</u>	<u>Drawee bank</u>
Ch II, Spec 2	28 Sep 44	\$15	Koby Drug Co, Louisville, Ky	Cash	Citizens Natl Bank, Abilene, Texas
Ch II, Spec 3	20 Oct 44	\$15	Officers Club, Bowman Field, Louisville, Ky	Cash	Citizens Natl Bank, Abilene, Texas
Ch II, Spec 4	21 Oct 44	\$20	Officers Club, Bowman Field, Louisville, Ky	Cash	Citizens Natl Bank, Abilene, Texas
Ch II, Spec 5	8 Nov 44	\$10	California Bank, Van Nuys, Calif.	Cash	California Bank, Florence Branch, Los Angeles, Calif.
Ch II, Spec 6	13 Nov 44	\$50	California Bank, Van Nuys, Calif.	Cash	Burns Natl Bank, Durango, Calif.
Add Ch, Spec 1	8 Dec 44	\$15	Hospital Sub-sistence Account, Santa Ana, Calif.	Board*	Security-First Natl Bank of Los Angeles, Calif.
Add Ch, Spec 2	18 Dec 44	\$15	Hospital Sub-sistence Account, Santa Ana, Calif.	Merchandise*	Security-First Natl Bank of Los Angeles, Calif.

Add Ch, 17 Sep 44 Spec 3	\$15	J. C. Conniff, Louisville, Ky	Cash	Citizens Natl Bank, Abilene, Texas
Add Ch, 22 Sep 44 Spec 4	\$25	J. C. Conniff, Louisville, Ky	Cash	First Natl Bank of Louisville, Ky
Add Ch, 28 Nov 44 Spec 5	\$25	Desmond's Los Angeles, Calif.	Merchan- dise*	First Natl Bank, Albuquerque, N. M.
Add Ch, 14 Dec 44 Spec 6	\$20	Security-First Natl Bank of Los Angeles, Calif.	Cash	Security-First Natl Bank of Los Angeles, Calif.
Add Ch, 19 Dec 44 Spec 7	\$20	Security-First Natl Bank of Los Angeles, Calif.	Cash	Security-First Natl Bank of Los Angeles, Calif.
Add Ch, 9 Dec 44 Spec 8	\$20	Sears, Roebuck & Co, Santa Ana, Calif.	Cash & merchan- dise*	Security-First Natl Bank of Los Angeles, Calif.

*Specification recites that consideration obtained in exchange for check was "United States Currency."

c. Evidence as to accused's mental condition:

On 19 February 1945 a board of medical officers convened at the Regional Hospital, Fort Knox, Kentucky, to determine the mental condition of accused. The board found that accused was "mentally responsible for his acts" at that time and diagnosed his condition as "psychoneurosis, severe", recommending that he be subjected to further medical observation and that he continue to receive hospital treatment for his psychoneurotic condition (R. 23-25; Pros. Ex. 18). A member of that board of officers defined psychoneurosis as a mental compromise of internal conflicts, a condition which would cause the patient periods of anxiety, depression and hysteria (R. 23). Subsequently, on 3 March 1945 accused was transferred to the Darnall General Hospital, Danville, Kentucky, for further observation and treatment. Thereafter, on 13 March 1945, a Disposition Board convened and reported its diagnosis of accused's condition as "Psychoneurosis, anxiety state, moderate, cause undetermined, manifested by depressive tendencies, emotional instability, history of amnesia, fatigability" (R. 26, 27; Pros. Ex. 19). Psychoneurosis was defined as

(154)

a medical term indicating nervousness as contrasted with psychosis which means insanity (R. 27). One of the members of that board, Captain Martin Grotjahn, testified that medical examination revealed accused had earlier suffered a fracture of the 9th and 10th vertebrae and that during the period accused was under his observation accused was tense, depressed, seclusive and complained of backaches and headaches (R. 28). Captain Grotjahn also testified that during the time accused was under his observation accused knew the difference between right and wrong and was able to adhere to the right and that it was his opinion accused was in the same mental condition at the time he committed the offenses alleged (R. 27, 29).

4. After having been advised of his rights accused elected to testify under oath in his own behalf and gave the following testimony. He entered the military service as a member of a National Guard unit on 7 September 1940 and served as an enlisted man in the Air Corps on armament work and bomb sight maintenance. In April 1942 he became a bombardier gunner at Ladd Field, Fairbanks, Alaska, and thereafter flew fifty-seven missions, presumably in the Alaska Theater, on forty of which contact was made with the enemy. He was credited with destroying two enemy planes. When his plane was shot down by enemy anti-aircraft fire accused suffered head wounds from the enemy fire and injured his back in the crash landing made by the plane. After hospitalization in Alaska and the United States, accused attended Officer Candidate School. Of the past few years he has spent about one year in various hospitals. Since the crash landing he has been bothered with backaches, headaches and has been extremely nervous. He holds the Distinguished Flying Medal (sic), the Air Medal with three clusters and the Purple Heart (R. 32-35).

With respect to his alleged absence without leave, accused testified that he believed he was entitled to travel time in addition to his leave time and consequently thought he had more leave than in fact had been authorized. He became ill on leave and "turned into the Regional Hospital at Pasadena, California." As he expressed it, "When I turned into the hospital at California apparently I was A.W.O.L. I knew the time had expired but I thought they had been notified that I was ill" (R. 32). The authorities at the hospital contacted the authorities at Fort Knox and thereafter informed accused he had been absent without leave for nine days (R. 38). He also testified that a medical officer at the hospital in California gave him some pills and told him to remain at home for four or five days and then if his condition improved to proceed to his station, otherwise to return to the hospital (R. 32).

With respect to his worthless checks accused testified that after he arrived in California on his leave there were periods of three and four days when he was not aware of what he was doing. He doubted that he had been in his right mind for over a year (R. 35). Although he knew he made and uttered some of the alleged checks there were others that he was unaware he had written (R. 35, 39). He did not know exactly

what use he made of the funds produced thereby but believed that a part went to his wife and that some was used to purchase drinks (R. 38). He stated that he and his wife had maintained a joint bank account with The Security-First National Bank which he knew his wife closed. As he stated it, "I know she closed the account and she must have closed it before the checks came in there" (R. 35). For the month or two prior to trial accused had been turning over all but about \$50 of each month's pay to apply in redemption of his worthless checks and within the month following the date of trial accused expected to have all of them paid (R. 35, 43).

First Lieutenant Merlin A. Hitzeman testified that accused served under him as Assistant Special Services Officer for approximately two weeks (apparently shortly prior to trial) and that accused performed all duties assigned to him in a satisfactory manner (R. 44, 45).

5. Under the Specification of Charge I accused is charged with absenting himself without leave from 6 November 1944 to 16 November 1944. The proof establishes that he failed to return from an authorized leave of absence on or before 6 November 1944, the date his leave expired. No entry appears on the officers' register for the period from the commencement of his leave of absence (22 October 1944) to and including 16 November 1944 to indicate that accused signed in upon return from leave. Not only is an unauthorized absence, once shown to exist, presumed to continue until the contrary is shown (MCM, 1928, par. 112a), but furthermore the fact that the officers' register bears no sign in entry made by accused up to 16 November 1944 is substantial evidence that accused had not by that date returned to his organization. In addition, accused's testimony not only concedes that he was absent without leave after conclusion of his authorized leave but also indicates that the unauthorized absence continued for a period of approximately nine days. Accordingly, the evidence sustains the court's findings of guilty of Charge I and its Specification.

With respect to Specifications 2 to 6, inclusive, of Charge II and Specifications 1 to 8, inclusive, of the Additional Charge the evidence establishes, and accused admitted, that he made and uttered a total of thirteen checks aggregating \$265 in amount without having sufficient funds on deposit in the drawee banks to pay the checks drawn thereon either at the time they were uttered or when presented for payment. The only matter in issue is whether accused intended to defraud when he issued these checks. There is no evidence to show what amount accused may have had on deposit in any one of the six drawee banks when he made and uttered the checks thereon and when they were presented for payment. Although accused testified at the trial, the only statement he made relative to his financial relations with any one of these six banks was that he had maintained a joint account with his wife in The Security-First National Bank of Los Angeles, California, which his wife had apparently closed before any of the five checks drawn

thereon had been presented for payment. No evidence was offered by accused to indicate when his wife closed the account in that bank or whether or not accused used any reasonable means to acquaint himself with the balance on deposit in that or any of the other five banks before he drew and uttered the various checks.

The burden of proof was upon accused to establish that dishonor of these checks resulted from an honest mistake rather than from his own misconduct (CM 249232, Norren, 32 B.R. 95, 3 Bull. JAG 290). That burden he failed to discharge. From the evidence before it, the only reasonable conclusion that the court could draw was that accused was content to issue all of these checks with complete disregard as to the adequacy of his deposits to cover them. Such reckless indifference as to the sufficiency of his deposits brands accused's conduct as fraudulent in uttering these checks (CM 270061, Sheridan). The slight variance between the allegations and proof under certain of the Specifications with respect to the consideration received by accused on some of the checks did not injuriously affect the validity of these proceedings (MCM, 1928, par. 87b, AW 37). The evidence sustains the findings of guilty of Specifications 2 to 6, inclusive, of Charge II and of Specifications 1 to 8, inclusive, of the Additional Charge.

6. Accused is 25 years of age and is married. According to records of the War Department, after graduation from high school he was employed by his stepfather in the lumber business from 1937 to 1940. He served in the Colorado National Guard from June 1938 to September 1938 and from May 1939 to September 1940 when he entered Federal military service. From March 1941 to July 1942 he served with the Air Corps in Alaska as an armorer. From 3 June 1942 to 22 July 1942 he served as a gunner aboard a B-17 type bomber participating in air combat against the Japanese in the Aleutian Islands coming into frequent contact with the enemy in the vicinity of Kiska and Attu islands and being responsible for the destruction of two enemy fighter planes. According to official War Department records, verified by information verbally received from The Adjutant General's Office, accused was never wounded nor did he ever receive any military decorations or awards. On 2 January 1943 he was commissioned a second lieutenant after successfully completing the course of instruction at the Armored Force Officer Candidate School, Fort Knox, Kentucky. By General Court-Martial Orders No. 217, 26 October 1944, the reviewing authority approved a fine of \$350 imposed on accused by general court-martial after it found him guilty of cashing 19 checks totaling \$317.75 in amount over the period from 29 April 1944 to 13 August 1944 without maintaining a sufficient bank balance to pay them. On 5 January 1945, after commission of the offenses presently under review, accused submitted his resignation for the good of the service which the Secretary of War directed be not accepted.

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 of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 61 or Article of War 96.

Thomas N. Jaffey, Judge Advocate

William H. Lambrell, Judge Advocate

Robert C. Muttman, Judge Advocate

(158)

SPJGH-CM 280302

1st Ind

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

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant James Z. Nelson (O-1014916), Infantry.

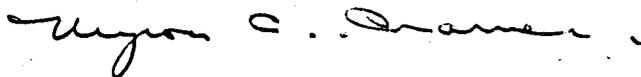
2. Upon trial by general court-martial this officer was found guilty of absenting himself without leave from 6 November 1944 to 16 November 1944, in violation of Article of War 61 (Chg. I, Spec.) and was found guilty of fraudulently cashing thirteen worthless checks whereby he obtained consideration of a total value of \$265, in violation of Article of War 96 (Chg. II, Specs. 2-6, incl.; Add. Chg., Specs. 1-8, incl.). Accused pleaded guilty to all thirteen Specifications concerning the worthless checks except the words "with intent to defraud" and "fraudulently." He was sentenced to dismissal, total forfeitures and confinement for five years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. I concur in that opinion. On 6 November 1944, accused failed to return to his station upon conclusion of a fourteen day leave of absence and he thereafter remained absent without leave until 16 November 1944. Over the period from 17 September 1944 to 19 December 1944, accused fraudulently made and uttered thirteen worthless checks receiving therefor consideration of a total value of \$265. These checks were drawn on six different banks. Both at the time each check was made and uttered and also when presented to the drawee bank for payment accused had insufficient funds on deposit to pay the check. Accused had previously on 26 October 1944, been found guilty by general court-martial of cashing nineteen checks totaling \$317.75 in amount over the period from 29 April 1944 to 13 August 1944 without maintaining a sufficient bank balance to pay them. On 5 January 1945, after commission of the offenses presently under consideration, accused submitted his resignation for the good of the service which was not accepted.

I recommend that the sentence be confirmed but that the forfeitures be remitted and the period of confinement be reduced to one year, and 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.

4. Consideration has been given to the inclosed letter dated 11 June 1945 addressed to the Secretary of War from the Honorable Frank L. Chelf, Member of Congress, in which he incloses a letter from the accused.

5. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.



3 Incls

1. Record of trial
2. Ltr dated 11 Jun 45
from Frank L Chelf, MC,
w/incl
3. Form of action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed but forfeitures remitted and confinement reduced to one year. G.C.M.O. 308, 7 July 1945).



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

(161)

23 MAY 1945

SPJGV-CM 280307

UNITED STATES) 14TH HEADQUARTERS AND HEADQUARTERS DETACHMENT
) SPECIAL TROOPS, FOURTH ARMY
 v.)
) Trial by G.C.M., convened at
Second Lieutenant LEO B.) Camp Polk, Louisiana, 16
AMMONS (O-1061042),) April 1945. Dismissal.
Quartermaster Corps.)

OPINION of the BOARD OF REVIEW
SEMAN, MICELI and BEARDSLEY, 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 arraigned and tried upon the following Charges and Specifications:

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

Specification 1: In that Second Lieutenant Leo B. Ammons, 4121st Quartermaster Truck Company, having received a lawful order from Captain John M. Johnston to be in his slit trench between 2100 and 2400 23 March 1945, the said Captain John M. Johnston being in the execution of his office, did, at or near the bivouac area of the 4121st Quartermaster Truck Company in the vicinity of Camp Polk, Louisiana, on or about 23 March 1945, fail to obey the same.

Specification 2: (Finding of not guilty).

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

Specification 1: In that Second Lieutenant Leo B. Ammons, 4121st Quartermaster Truck Company, did, without proper leave, absent himself from his organization at or near the bivouac area of the 4121st Quartermaster Truck Company in the vicinity of Camp Polk, Louisiana, from about 2130 to about 2400 23 March 1945.

Specification 2: (Finding of not guilty).

Accused pleaded not guilty to the Charges and Specifications. He was found guilty of Specification 1, Charge I, and of Specification 1 of Charge II, and of the Charges, but not guilty of the other Specifications. No evidence of previous convictions was offered. He was sentenced to dismissal, and to forfeiture of all pay and allowances due or to become due. The reviewing authority approved the sentence but remitted the forfeitures. The record of trial was forwarded for action under Article of War 48.

3. The evidence may be briefly stated:

a. For the Prosecution.

The 296th Quartermaster Battalion on 23 March 1945 was engaged in tactical training. Its bivouac area was about 11 miles from Camp Polk, Louisiana (R. 30, 43, 46). It comprised six companies, three of which were colored, the 4120th, 4121st and 4122nd Quartermaster Truck Companies. The other three companies, the 270th, 271st and 417th Quartermaster Companies, were made up of white personnel.

Accused was commander of the third platoon of the 4121st Quartermaster Truck Company, which company was commanded by Captain John M. Johnston, QMC.

According to Captain Johnston, pursuant to an announcement made at Adjutant's call early in the forenoon, he called all the officers of his company together and told them that all the personnel of the company would occupy the slit trenches that night from hours 2100 to 2400 (R. 47, 57, 59) as a part of the field exercise (R. 31, 50).

About hours 2000 on that day at a meeting of the officers, Lieutenant Colonel Arthur J. Spring, the commanding officer of the battalion, announced that the three colored companies would occupy their slit trenches from hours 2100 to 2400, and that the three white companies would occupy their slit trenches from 2100 until dawn. Accused was present at the meeting (R. 33, 64, 87).

Following the battalion officers meeting, all present engaged in a map problem, which began near the entrance to the battalion bivouac area and ended not far from the bivouac area of the 4121st Quartermaster Truck Company (R. 40, 48, 56, 39, 99, 100, 113). Jeeps were used as transportation. Accused and Lieutenant Wallace went in one jeep and Captain Johnston was in another jeep with Lieutenant Jackson. Captain Johnston's jeep stalled in a hole, and it was about hours 2200 when he got back to his company's bivouac area (R. 48, 49). The members of the company were not in the slit trench (R. 49). First Sergeant Devoux had

received the order (R. 66). However, all the enlisted personnel were asleep in their tents (R. 35). The other officers of the company could not be found in the bivouac area (R. 49). Runners were sent out to locate them, but to no avail (R. 49, 68, 71, 74, 75). Captain Johnston went to the battalion command post, and reported these facts to Colonel Spring (R. 35, 49). About 2350, Colonel Spring started to the company area. He saw two jeeps, and followed one into the company area, and stopped his car next to it. The occupants of such jeep were accused and Lieutenant Wallace. Colonel Spring escorted them to Captain Johnston, who asked them where they had been. Accused stated that they had gone to Camp Polk for food after completing the map problem (R. 51).

Standing operating procedure in the battalion prohibited officers from leaving the bivouac area of a company without the permission of the company commander (R. 52). Camp Polk is 11 miles from the bivouac area of the 4121st Quartermaster Truck Company (R. 30). Accused did not ask and Captain Johnston did not grant permission to accused to go to Camp Polk after completing the map problem on the night in question (R. 51).

b. For the defense.

Accused was warned of his rights as a witness, and chose to be sworn and testify in his own behalf. He testified that he was present at the meeting of the officers of the company on the morning of 23 March, but that no orders were given by Captain Johnston concerning occupation of slit trenches by the personnel of the company that night. Nothing was said about it (R. 118, 119). At hours 2000, at the meeting of the battalion officers, after the band concert, accused arrived late and did not hear any instructions by Colonel Spring concerning occupation of the slit trenches (R. 126). Following this, he went with Lieutenants Wallace and Washington to work out the map problem, which the three officers together completed about 2130 (R. 119). Accused "didn't have anything else to do," (R. 120) and rode into Camp Polk with them. Immediately after their return about 2350, he met Colonel Spring, who escorted them to Captain Johnston (R. 123). Accused did not have permission from Captain Johnston to go to Camp Polk to eat, but such permission to leave the bivouac area when off duty had not theretofore been required, and he knew of no orders to that effect.

Lieutenants Anderson, Wallace and Washington all testified that they were at the meeting of the company officers in the forenoon. They testified definitely and positively that Captain Johnston said nothing

(164)

about occupying the slit trenches (R. 76-77, 93-94, 106-107). They were present at the battalion officers' meeting in the evening, and Lieutenant Washington testified that he heard instructions given that the colored companies were to be in the slit trenches from 2100 to 2400 (R. 110-111). These officers testified that permission was not required to be obtained from the company commander before an officer could leave the bivouac area (R. 78, 104-5, 108, 110).

c. Rebuttal.

Colonel Spring was recalled and testified that the battalion was in a tactical situation, during which officers could not leave field problems without permission of the company commander (R. 131). Accused was present at the meeting at 2000 (R. 130, 133), when he gave instructions to occupy the slit trenches. Forty-five minutes was the estimated time required for the map problem, but nothing was said as to what should be done if it took longer (R. 133). Captain Johnston repeated his previous testimony that accused was present when he gave instructions concerning occupancy of the slit trenches, and when Colonel Spring gave his instructions on that subject (R. 134-139).

4. Prior to the hearing on the merits, the court heard evidence in support of and in opposition to accused's special plea in bar, which asserted that trial was precluded by reason of the fact punishment had been imposed upon him by Captain Johnston for the offenses involved in the charges, under Article of War 104 (R. 12, 13, 16-18, 20-22). Accused was restricted to camp for six days under that Article of War as punishment, according to accused and Lieutenants Washington and Wallace. Captain Johnston testified that he made no mention of Article of War 104, but merely told accused that charges would be preferred against him and the other officers (R. 25).

5. Upon the trial, it was strenuously urged by counsel for accused: (1) that trial of the offenses charged was barred by the previous imposition of punishment therefor under the provisions of Article of War 104; (2) that the testimony of Lieutenant Colonel Spring was inadmissible, since accused was charged, not with violating his order, but with failing to obey the orders of Captain Johnston issued pursuant to the battalion commander's direction; and (3) that the testimony of the accused and Lieutenants Anderson, Wallace and Washington that Captain Johnston gave no order to them in relation to occupation of the slit trenches and that there was no requirement in effect that officers not on duty obtain permission of the company before leaving the bivouac area outweighs that of Captain Johnston to the contrary, and that hence guilt was not proven beyond a reasonable doubt. We shall consider these matters in the order stated.

6. Punishment may be imposed under Article of War 104 only for derelictions not involving moral turpitude or any greater degree of criminality or seriousness than is involved in the average offense tried by summary court-martial (MCM, 1928, par. 105). The offenses charged seem to us to be more serious than those usually made the subject of trial by a summary court. Moreover, the company commander denied that he imposed any punishment under Article of War 104. The first of these matters raises a question of law, while the second involves a question of facts. Both questions were resolved by the court against accused, and we believe correctly, since the offenses charged were not minor or trivial, and because the testimony of Captain Johnston, if true, warranted the conclusion that he had not employed the disciplinary powers invested in him by Article of War 104. The judgment of the court on the credibility of witnesses must not arbitrarily be disturbed. There is nothing in the record to indicate any reason for Captain Johnston to bear false witness against accused. In the absence of anything tending to lessen his credibility, a determination of where the truth lay could best be made by those who saw and heard the testimony.

7. The testimony of Colonel Spring was relevant and admissible to establish intent. An officer who had previously heard the battalion commander issue instructions concerning night exercises in slit trenches, would be on notice that the orders of his company commander on the same subject were issued in pursuance of orders from higher authority. If no such orders were or had been given by the company commander, it would be not unnatural for him to anticipate them and to keep himself readily available to receive such orders when given and to promptly comply therewith.

8. The accused and three other lieutenants of the same company categorically deny that the company commander issued orders to occupy the slit trenches at the time in question. It seems to be possible from all the facts and circumstances in evidence that the company commander overlooked the giving of orders to carry out and insure compliance with the instructions of the company commander, and that the officers of the company in order to embarrass him said nothing and when instructions from him were not forthcoming in advance of the exercise, absented themselves from the company area, so that he would not have the opportunity belatedly to issue the proper orders. However, the company commander testified categorically that he did give the orders. Accused and Lieutenants Anderson, Wallace and Washington are equally positive in their testimony to the contrary. A like issue of fact is presented by the diametrically opposite testimony of the prosecution and defense witnesses that permission

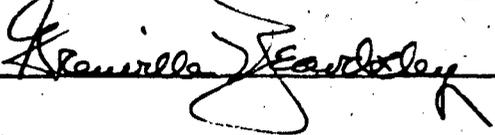
from the company commander was or was not required for officers to leave the bivouac area, even when actually without duties to perform. The question boils down to one of truth and veracity. It is evident that somebody lied. Under circumstances presented by this record, no determination as to who told the truth can possibly be made except upon observation of the manner, conduct and demeanor of the witnesses. The court had the opportunity for such observation. We have not. The conclusion reached by the court does not appear to us to be arbitrary or unreasonable. We have the power to weigh evidence in a case such as this, but such power imposes upon us the exercise of sound discretion. We cannot arbitrarily substitute our judgment for that of the court, in the absence of any fact or circumstance tending to lessen the apparent credibility of the prosecution's witnesses or to bolster that of the defense witnesses. It was suggested in the trial court that Captain Johnston was the only witness who testified that he gave the order in question, while four witnesses testified that he did not. Although numerical preponderance is a factor in determining on which side is the greater weight or preponderance of the evidence, it is only one of several factors, and is not necessarily controlling. Courts weigh evidence. The truth cannot be arrived at by counting witnesses as men count money.

9. Accused was 29 years old on 24 May 1945. He was born in West, Mississippi. He graduated from Alcorn College, with the degree of B.S. He was inducted 12 June 1941 at Camp Shelby, Mississippi, and served as an enlisted man until 6 October 1943, on which date he was honorably discharged to accept a commission as second lieutenant, C.A.C., AUS, he having successfully completed the prescribed course at the Antiaircraft Artillery School, Camp Davis, North Carolina.

10. The court was legally constituted and had jurisdiction of the subject matter and of accused's person. No errors injuriously affecting accused's substantial rights were committed. 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 to dismissal is authorized upon conviction of violations of the 61st and 96th Articles of War.


_____, Judge Advocate


_____, Judge Advocate


_____, Judge Advocate

SPJGV-CM 280307

1st Ind

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

JUL 13 1945

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Leo B. Ammons (O-1061042), Quartermaster Corps.

2. This officer was found guilty by a general court-martial of having failed to obey the lawful order of his superior officer to be in a slit trench during certain hours, in violation of the 96th Article of War, and of absenting himself without leave for 2½ hours from the bivouac area of his organization near Camp Polk, Louisiana, in violation of the 61st Article of War. 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, but remitted the forfeitures, and forwarded the record of trial for action under the 48th Article of War.

3. A summary of the evidence is contained in the foregoing opinion of the Board of Review, which Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, as approved by the reviewing authority, and to warrant confirmation of the sentence. I concur in that opinion.

On 23 March 1945, the 4121st Quartermaster Truck Company was engaged in field exercises near Camp Polk, Louisiana. The company commander told the accused and the other lieutenants of the company that between hours 2100 and 2400 the company would occupy the slit trenches. The order was not complied with. Accused during that time with another officer went to Camp Polk to eat, and did not return until about 2350. Accused and two other lieutenants denied knowledge of the order in question or of standard operating procedure which required permission of the company commander before an officer could leave the bivouac area. The company commander testified that he gave the order in question to accused and the officers, and that the fact that permission to leave the bivouac area was generally known.

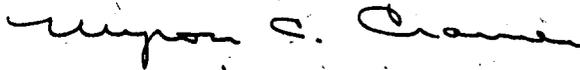
4. In view of the previous record of this officer, I recommend that the sentence as approved by the reviewing authority be confirmed but commuted to a reprimand and forfeiture of \$50 pay per month for three months and that the sentence as thus modified be ordered executed.

(168)

This is one of four cases arising out of the same transaction. In the three cases which have reached this office, and been reviewed, similar recommendations have been made.

5. Consideration has been given to the letter of accused dated 11 May 1945, and to letter of Captain John M. Johnston, recommending reclassification of accused, transmitted therewith.

6. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.



MYRON C. CRAMER
Major General
The Judge Advocate General

- 4 Incls
- 1 Rec of Trial
- 2 Form of Action
- 3 Ltr fr accused dated
11 May 1945
- 4 Ltr fr Capt Johnston
w/reclassificatn proceedings

(Sentence as approved by reviewing authority confirmed but commuted to a reprimand and forfeitures of \$50. per month for three months. GCMO 342, 21-July 1945).

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

(169)

SPJGV-CM 280308

23 MAY 1945

U N I T E D S T A T E S	)	14TH HEADQUARTERS AND HEADQUARTERS DETACHMENT
	)	SPECIAL TROOPS, FOURTH ARMY
v.)	
Second Lieutenant JOE R.	)	Trial by G.C.M., convened at
JACKSON (O-1591824),	)	Camp Polk, Louisiana, 4 May
Quartermaster Corps.	)	1945. Dismissal.

OPINION of the BOARD OF REVIEW
SEMAN, MICELI and BEARDSLEY, Judge Advocates.

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

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

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

Specification: In that Second Lieutenant Joe R. Jackson, 4121st Quartermaster Truck Company, having received a lawful command from Captain John M. Johnston, his superior officer, to get in his slit trench and stay there until the whistle blew did, at or near the bivouac area of the 4121st Quartermaster Truck Company in the vicinity of Camp Polk, Louisiana, on or about 2350, 23 March 1945, willfully disobey the same.

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

Specification: In that Second Lieutenant Joe R. Jackson, 4121st Quartermaster Truck Company, having received a lawful order from Captain John M. Johnston that all personnel of said 4121st Quartermaster Truck Company would be in their slit trenches between 2100 and 2400 23 March 1945, the said Captain John M. Johnston being in the execution of his office, did at or near the bivouac area of the 4121st Quartermaster Truck Company in the vicinity of Camp Polk, Louisiana, on or about 23 March 1945, fail and neglect to cause the enlisted personnel under his supervision and control, and for whose compliance with said order he was responsible, to be in their slit trenches during said hours.

He pleaded not guilty to, and was found guilty of, all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved only so much of the findings of guilty of the Specification of Charge I and Charge I as involves a finding that the accused did, at the time and place alleged, fail to obey the lawful order of his superior officer in violation of Article of War 96, approved the findings of guilty of the Specification of Charge II and Charge II, and the sentence, and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution.

Captain Johnston was Commanding Officer of the 4121st Quartermaster Truck Company at Camp Polk, Louisiana (R. 9). This company was part of the 296th Quartermaster Battalion made up of three white and three colored companies. The 4121st Quartermaster Truck Company was a colored company (R. 11-31). On 23 March 1945 the company was in bivouac, about 11 miles from Camp Polk (R. 10). At 8:30 on the morning of the above date a meeting of all the officers of Captain Johnston's company was held. The accused was present. Captain Johnston told the company that he received orders from Lieutenant Colonel Spring that everyone "would occupy his slit trench that evening from 2100 to 2400", and that he, Captain Johnston issued that as an order to the assembled officers (R. 10). Since this occupation of the slit trenches was a battalion problem, Lieutenant Colonel Spring reminded all the officers of the battalion at a meeting at 8 p.m. that day that the slit trenches were to be occupied by the various companies (the accused's company between 2100 and 2400) and that the accused was present at that meeting (R. 12). Captain Johnston, together with the accused and another officer, completed a map problem that night and were delayed returning to their area until 2200. Upon his arrival Captain Johnston noticed that his company was not occupying the slit trenches in compliance with orders (R. 13). At 2300, after another check, Captain Johnston noticed that the accused or his company were still not in their slit trenches, and that the accused was in fact, asleep in his pup tent (R. 15). Other officers of the company were absent from the area (R. 14). Captain Johnston then sent runners out to collect the company and the accused and his platoon were ordered to appear. This took "some time". Captain Johnston thereupon told the assemblage that they were to go and get into their slit trenches and remain there until the whistle was blown (R. 16). Lieutenant Jackson, the accused, was present when that order was issued. When ordered directly "into his slit trench at once" the accused said he was not going to, but that he was going to check the men in his platoon (R. 23). The accused walked off. Captain Johnston waited a reasonable length of time -- "perhaps three or four or five minutes" and found accused not in the slit trench but walking around his platoon area (R. 17-23). At the time the whistle was blown signaling

the end of this particular exercise for the company Captain Johnston did not know if accused was in the slit trenches or not (R. 18). On cross-examination Captain Johnston admitted that he did not see the accused from sometime that afternoon until 8 p.m., the time of the battalion meeting. Captain Johnston stated also that he had been commanding officer off and on duty with the company for a period of about two weeks (R. 23-24). Lieutenant Colonel Spring himself testified that he called a meeting of his battalion together on the morning of 23 March and told them that all present were to occupy slit trenches; the 4121st Quartermaster Truck Company was one of the companies to occupy the trenches from 2100 to 2400 (R. 31). At 2000 Lieutenant Colonel Spring repeated his orders regarding occupancy of slit trenches, and that Captain Johnston had reported to him at about 2230 that the accused had refused to obey the order to occupy his slit trench (R. 33), and that about 20 minutes later (or about 2350) he arrived in the bivouac area and saw Captain Johnston assembling his troops about 10 minutes before the conclusion of the exercise or the particular time he told his troops to remain in the slit trenches (R. 36).

Sergeant Devaux testified that he was first sergeant of the 4121st Quartermaster Truck Company. He received no orders from anyone regarding occupancy of slit trenches until twenty-five minutes to twelve (R. 37) but he knew of the orders somehow earlier that evening (R. 38), that Staff Sergeant Mays told him about it, but he received no orders from the commanding officer (R. 40).

4. For the defense.

From Captain Anderson's testimony (by stipulation) it appears that he was present at the meeting of company officers called by Captain Johnston. He did not hear Captain Johnston make any mention of the occupancy of slit trenches by the 4121st Quartermaster Truck Company (R. 44). From the record of trial it is not clear whether this testimony was offered on behalf of the defense or the prosecution. Since it is evidence tending to substantiate the accused's story, it is assumed to be defense evidence.

Staff Sergeant Earl Williams of this company testified that he was present at the assembly of the company at about 2300 that evening and heard Captain Johnston tell the accused to get in his slit trench, whereupon the accused started to get in his slit trench, but this witness did not actually see him occupy it (R. 57, 58).

Sergeant Lang of this organization testified that he heard the conversation between the captain and the accused at about 2355, and that he

saw the accused go to his slit trench, which was about five feet from Lang's. This witness remained in his slit trench until the whistle blew and some time after. After getting into his trench he heard a conversation between Captain Johnston and accused, but was unable to make out what was said. When Sergeant Lang got out of his slit trench he saw the accused getting out of his (R. 60, 61).

The accused took the stand as a witness (R. 44). He testified he was in command of the second platoon of the 4121st Quartermaster Truck Company. He further testified that Captain Johnston did not give any instructions relative to the occupancy of slit trenches at the meeting of officers on the morning in question; nor did he have any conversation with Captain Johnston on this point later in the day (R. 46). He did not listen carefully at the battalion officers' meeting with Colonel Spring and therefore heard no mention of the occupancy of the slit trenches (R. 46, 51, 55, 56). He corroborated Captain Johnston's story of their going out on the map problem together but denied any conversation regarding slit trenches until the company was called together after 2200. Meanwhile accused had gone to bed (R. 47-48). After the company was assembled and Captain Johnston had addressed them on the subject of their failure to be in their slit trenches, the captain turned to him (the accused) and asked why he was not in his slit trench. The accused answered that he did not know he was supposed to be, and the captain replied, "I am giving you a direct order to go and get in yours." At this point the accused asked the captain if he wanted the accused to check his platoon first and he received a negative answer. The captain said, "I want you to get in your slit trench now" so the accused left and proceeded to get in his slit trench. After a short time the accused got out of his slit trench to check his platoon, and at this point Captain Johnston came back and asked him why he was not in his slit trench. The accused replied "I am checking my platoon." Whereupon, the captain told the accused to get in his slit trench and stay there until the whistle blew, which the accused did (R. 49, 50, 51, 53, 54, 56). The accused stated that as S-3 his "local schedule" did not call for anything "past about 1800 that afternoon" (R. 56).

5. As to both Charges in this case there is a conflict of evidence. The prosecution's case is fully borne out by Captain Johnston, the officer who testified that he issued the commands which are the subject of this trial. On the other hand, the testimony of the accused is that he substantially complied with the order to get into his slit trench; and the order which is the subject of the second charge was never given, hence he was guilty of no failure or neglect in that connection. There were several witnesses for the defense who bore out various portions of

the accused's story. While it is true that there was only one witness for the prosecution whose testimony bore directly on the alleged offenses (the evidence of Lt. Col. Spring had no bearing on whether they were committed) while the defense produced four witnesses, it is hornbook law that the weight of the evidence has nothing to do with the number of witnesses, and vice versa. It is as just as trite but true a legal saying that the trial court who heard the witnesses and saw them testify is the best judge of the true facts. In this case the court believed the evidence of the prosecution and a fortiori found the accused guilty. This is proper, since all of the elements of the offenses charged were properly supported by the evidence.

6. There is one procedural error which needs comment. On page 63 of the record of trial there appears this statement:

"The court then, at 1745, adjourned to meet again in closed session at 1900 on 4 May 1945."

Since the court also "adjourned" on 4 May 1945, it appears that the time elapsing between the time the court closed and the time it reopened, in this instance, was one and one-quarter hours. This is not an "adjournment", but a recess, and hence the trial judge advocate's failure to sign the record is not error as might first appear.

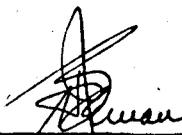
After the quoted statement the record goes on to set forth the findings, data as to service, sentence and proceeds in the regular manner.

The failure to state that the court actually did reconvene after the recess, and that all members of the court, prosecution and defense were present is harmless error (CM 235143, McKinney) since the proper authorities authenticated the record and, under those circumstances, regularity of the proceedings is presumed. The record shows the accused present at this time since the trial judge advocate made a statement "in the presence of the accused" that he had no evidence of previous convictions to submit.

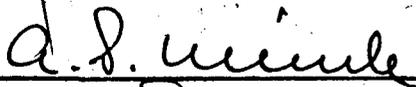
7. According to War Department records the accused is now 25 years of age. He entered the service as an enlisted man 21 October 1941 and served in that capacity until his commission as a second lieutenant in the Army of the United States on the 14th day of May 1943, entering active duty on that date, after graduating from the QMC Officer Candidate School. In enlisted status he attained the grade of technical sergeant. He was assigned to a cavalry unit and realized within three weeks that he was misassigned, requesting a transfer. Shortly thereafter he was sent to a Reclassification Center. The Reclassification Board's impression of the accused was that he was a quiet, intelligent officer, who presented a neat and soldierly bearing, is amenable to discipline and

and eager to learn, and recommended that ne be retained in the service.

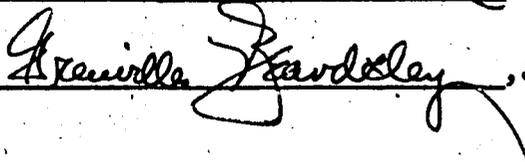
8. The court was legally constituted and had jurisdiction of the subject matter and of the person of the accused. While the legality of some of the rulings of the court are open to question, none are serious, nor are there any other errors which affect the substantial rights of the accused. In the opinion 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 the 96th Article of War.



_____, Judge Advocate



_____, Judge Advocate



_____, Judge Advocate

SPJGV-CM 280308

1st Ind

Hq ASF, JAGO, Washington 25, D. C. JUL 13 1945

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Joe R. Jackson (O-1591824), Quartermaster Corps.

2. Upon trial by general court-martial this officer was found guilty of willfully disobeying a lawful order of his superior officer to get into a slit trench in violation of Article of War 64, and failure and neglect to cause the enlisted personnel under his supervision and control to be in their slit trenches in compliance with the order of his commanding officer in violation of Article of War 96. He was sentenced to be dismissed the service. The reviewing authority approved only so much of the finding of guilty of the Specification of Charge I and Charge I as involves a finding that the accused did, at the time and place alleged, fail to obey the lawful order of his superior officer in violation of Article of War 96, approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of all the evidence may be found in the accompanying opinion of the Board of Review, which Board is of the opinion 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 concur in that opinion.

Captain Johnston, the Commanding Officer of a colored Quartermaster Truck Company in bivouac near Camp Polk, Louisiana, told the accused officer and other officers of his company that they were to occupy certain slit trenches together with their men between 2100 and 2400 on 23 March 1945. At the time when these trenches were to be occupied neither accused nor other of Captain Johnston's officers or men were in them. The accused was roused from his bed and ordered to occupy the slit trench. Shortly thereafter Captain Johnston passed the slit trench where the accused was supposed to be and the accused was not there. Accused's explanation was that he was checking his platoon to see that his men were in the slit trenches.

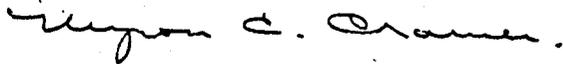
(176)

Due to the good conduct of the accused, and his potential value to the Army, I recommend that the sentence be confirmed but commuted to a reprimand and forfeiture of \$50 pay per month for three months and that the sentence as thus modified be ordered executed.

This is one of four cases arising out of the same transaction, three of which have already been reviewed and a similar recommendation made in each.

4. Consideration has been given to the letter of accused dated 12 May 1945, and to letter of Captain John M. Johnston, recommending reclassification of accused, transmitted therewith.

5. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.



MYRON C. CRAMER
Major General
The Judge Advocate General

- 4 Incls
- 1 Rec of Trial
- 2 Form of Action
- 3 Ltr fr accused dated
12 May 1945
- 4 Ltr fr Capt Johnston
w/reclassification
proceedings

(Sentence confirmed but commuted to a reprimand and forfeitures of \$50. per month for three months. (OCMO 352, 21 July 1945).

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

SPJGK - CM 280335

24 MAY 1945

UNITED STATES)

FOURTH AIR FORCE)

v.)

Trial by G.C.M., convened at
 Walla Walla Army Air Field,
 Washington, 10 April 1945.
 Dismissal.

Second Lieutenant THEODORE
 L. ALEXANDER. (O-2076491),
 Air Corps.)

 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 I: Violation of the 61st Article of War.

Specification: In that Second Lieutenant Theodore L. Alexander, Squadron T-1, 423rd Army Air Forces Base Unit, did, without proper leave, absent himself from his organization and station at Walla Walla Army Air Field, Washington, from about 27 February 1945 to about 28 February 1945.

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

Specifications: In that Second Lieutenant Theodore L. Alexander,***, did, at Portland, Oregon, on or about 28 February 1945, with intent to deceive Private First Class Keith Sorensen, and Private First Class John W. Smith, of the Military Police, officially state to the said Military Police that he and Flight Officer Robert J. Edmundson were on a three-day leave under verbal orders of their Commanding Officer, which statement was known by the said Second Lieutenant Theodore L. Alexander to be untrue in that, he nor Flight Officer Robert J. Edmundson, did not have authority, either verbal or written, to be absent from his organization at that time.

He pleaded guilty to Charge I and its Specification and not guilty to Charge II and its Specification. He was found guilty of both Charges and Specifications. Evidence was introduced of a previous conviction by a general court-martial on 15 February 1945 of a violation of the 96th Article of War on or

about 14 January 1945 by wrongfully using a truck without the consent of the owner, for which the accused was sentenced to be restricted to the limits of the post for three months and to forfeit \$100 per month for 12 months. In the instant case 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 findings of the Specification of Charge II as finds that the accused did, at the time and place alleged, with intent to deceive Private First Class Keith Sorensen and Private First Class John W. Smith, of the Military Police, officially state to the said Military Police that he was on a three-day leave under verbal orders of his Commanding Officer, which statement was known by the said Second Lieutenant Theodore L. Alexander to be untrue in that he did not have authority, either verbal or written, to be absent from his organization at that time, approved the sentence, remitted the forfeitures, and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution.

Charge I and its Specification. In view of the plea of guilty to this Charge and its Specification the prosecution introduced in evidence in support thereof only an extract copy of the morning report of the military organization of which accused was a member, which showed that the accused was absent without leave from his organization from 0001 27 February 1945 to 1800 28 February 1945 (R. 6; Ex. 1).

Charge II and its Specification. The commanding officer of Squadron T-1, 423rd AAFBU, Walla Walla Army Air Field, Washington, testified that the accused was a member of that organization during the latter part of February 1945, assigned as a navigator to a crew, and was absent from his duties on the 27th and 28th of February. The accused had received "blanket" instructions to be on the field from 8 a.m. until 5 p.m. daily unless he obtained permission from the witness to be absent. No authority had been granted the accused to be in Portland, Oregon, on either of those days (R. 7-8).

There was offered in evidence the depositions of Private First Class Keith Sorensen, Private First Class John W. Smith, and Corporal William D. Dick. Defense counsel objected to their admission on the ground that there was nothing in the depositions to identify the accused as the Lieutenant Alexander referred to in the depositions. The objection was overruled by the law member and the depositions admitted in evidence (R. 11).

By deposition Privates First Class Keith Sorensen and John W. Smith testified that they first saw the accused in a room in the Park Avenue Hotel, Portland, Oregon, with his younger brother, another officer, and two girls. They were members of the Military Police in Portland, and about 1:45 a.m. of 28 February 1945 in the course of routine duty were

checking hotels for vice conditions. In response to a knock on the door accused's brother opened the door. The girls retired to the bath room and locked the bath room door. Accused was in a chair with a blanket over his lap. A "civil" officer removed the blanket and disclosed the fact that the accused's trousers and shorts were open and his sexual organ exposed. When asked for his identification accused produced his W.D.A.G.O. card. The accused and the other officer were placed under arrest and taken to the Military Police headquarters and questioned. In his "official capacity" Private First Class Sorensen inquired of the accused for his orders authorizing his presence in Portland, Oregon. Accused stated, "I do not need any to come to Portland from Walla Walla." Later, according to Sorensen, he stated that "he was on VOCCO for three days." According to Smith, accused said, "I am on VOCCO from Walla Walla and I do not need any orders." Accused was thereafter released from custody by Corporal William D. Dick, the desk corporal in charge of the Military Police desk at the police station. (Exs. 2 and 3)

Corporal Dick testified that he was acting desk sergeant of Military Police at the police station in Portland, Oregon, about 2 a.m. of 28 February 1945 when a person identified by his W.D.A.G.O. card as the accused was brought into the station by Sorensen and Smith and he heard Sorensen ask accused for his leave papers or orders authorizing him to visit Portland. Lieutenant Alexander said, "I do not need any to visit Portland. I am on VOCCO from my commanding officer." By reason of accused's statement he released him from custody (Ex. 4).

4. The accused, having been advised concerning his right to testify, elected to remain silent.

5. With reference to Charge I and its Specification, the evidence for the prosecution coupled with the accused's plea of guilty conclusively established that the accused was absent without proper leave from his organization during the time and at the place alleged in the Specification.

With reference to Charge II and its Specification, the accused stands convicted of the serious offense of having made a false official statement with intent to deceive in violation of Article of War 95. The burden of proving all of the elements of the offense beyond any reasonable doubt rests upon the prosecution. Among those elements in this particular case are (1) that the accused made the statement alleged, (2) that it was false, and (3) that it was official. If these three elements appear the intent to deceive may be inferred from the surrounding circumstances.

As to (1), three witnesses heard the accused state in response to a request to produce his orders for his authority to be away from his organization that he was "on VOCCO from my commanding officer." One of the three, Private First Class Sorensen, claimed that accused added the words

"for three days." It was Sorensen's recollection that the court adopted in its findings. While these words "for three days," included in the findings, are not supported by the weight of the evidence, the error, if any, does not play any part in the determination of the legality of the conviction and therefore no substantial right of the accused was materially affected. It is clear from the record that the accused did state to the Military Police that he was in Portland under verbal orders of his commanding officer, meaning that he had the verbal authority of his commanding officer to be where he was at the time.

As to (2), the commanding officer testified that he did not authorize the accused to be in Portland at the time - that he had only given "blanket instructions" to the members of his squadron that they must be on the field (Walla Walla) daily between 8 a.m. and 5 p.m., unless they had written or verbal permission from him to be absent. Although it might be implied from these instructions that absence from the field was permitted at all other hours and that accused's presence in Portland, 180 miles from Walla Walla, at 2 a.m. was therefore authorized, the record shows that accused absented himself without leave at 0001 27 February 1945, the day preceding his being discovered in Portland, and at the time he made the statement complained of he was still in an absent-without-leave status. Under such circumstances he could not be "under VOCO" even if it might be implied that he had the right to be anywhere he pleased between 5 p.m. and 8 a.m. following. Where one who is permitted to be off a military station at night absents himself without leave to a distant point during the day and remains away his AWOL status continues as long as he remains away. He may not properly claim that he is on leave at night and absent without it during the day. His authority to leave at 5 p.m. is predicated upon his presence during duty hours (CM 263608, St. John). The accused knew that he was absent without leave all of the 27th of February and that he was not on VOCO at 2 a.m. of the 28th. His statement to that effect was therefore knowingly false.

As to (3), it was shown without contradiction that the Military Police in questioning accused as to his authority to be in Portland were doing so in performance of their duties as Military Police. The question put to the accused which brought out the answer complained of was therefore authorized and official. It follows that the accused's answer was official and that the accused was properly found guilty of making a false official statement. The intent to deceive may be inferred from the circumstances.

The fact that the statement was made by an officer to an enlisted man is immaterial. The gravamen of the offense is the making of a false official statement. (CM 248919, 31 B.R. 377, CM 122249, Dig. Op. JAG 1912-40, par. 454 (49), MCM 1928, par. 151.)

Making a false official statement with intent to deceive may properly be found to violate the 95th Article of War (CM 249824, Graves;

CM 275353, Garris; CM 277595, Raokin).

6. War Department records show the accused to be 20 years of age and single. He graduated from high school and for six months attended the University of Portland. On 7 September 1943 he entered the military service and upon completion of his training as a navigator was commissioned a second lieutenant, Air Corps, AUS, on 11 November 1944. On 15 February 1945 he was convicted by a general court-martial of a violation of the 96th Article of War by wrongfully taking and using a delivery truck without the consent of the owner. He was sentenced to be restricted to the limits of his post for three months and to forfeit \$100 per month for 12 months. On W.D.A.G.O. Form No. 45 he was reported as absent without leave from his station on 11 April 1945.

7. The court was legally constituted and had jurisdiction over 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 as approved by the reviewing authority and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 61 and is mandatory upon a conviction of a violation of Article of War 95.

Lang E. Egan, Judge Advocate.
Earl H. Stetson, Judge Advocate.
Thomas M. Magee, Judge Advocate.

(182)

SPJGK - CM 280335

1st Ind.

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

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Theodore L. Alexander (O-2076491), Air Corps.

2. Upon trial by general court-martial this officer pleaded guilty to, and was found guilty of, absenting himself without leave from his organization for two days in violation of Article of War 61 (Charge I and its Specification). He was also found guilty of making a false official statement with intent to deceive in violation of Article of War 95 (Charge II and its Specification). He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the findings except as to the words "and Flight Officer Robert J. Edmundson" and all reference to that officer in the Specification of Charge II, approved the sentence, remitted the forfeitures, and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. 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.

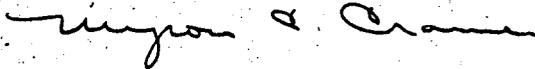
On 15 February 1945 accused was convicted by general court-martial of a violation of the 96th Article of War for wrongfully using a truck without the consent of the owner, for which he was sentenced to be restricted to the limits of his post for three months and to forfeit \$100 per month for 12 months. On 27 February 1945, before the above sentence had been approved by proper authority, accused absented himself without leave from his station at Walla Walla, Washington, for a period of two days. In the early morning of 28 February 1945 the vice squad of the Military Police of Portland, Oregon, while making a routine check of hotels in that city, found the accused, his brother, and a flight officer and two girls in a room of one of the Portland hotels. The accused and the flight officer were taken in custody by the Military Police. Upon being questioned by the Military Police as to his authority for being in Portland, the accused falsely stated that he was there under the verbal orders of his commanding officer, and upon this statement he was released from custody.

The accused is less than 20 years of age. While the absence without leave was of short duration it was aggravated by the making of a false statement with the intent to deceive the Military Police. The conduct of the accused

(183)

in the case at hand together with his recent previous conviction by general court-martial clearly indicate that he has no proper regard for the duties and responsibilities of a commissioned officer. I recommend that the sentence as approved by the reviewing authority be confirmed and carried into execution.

5. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.



2 Incls

1. Record of trial
2. Form of action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence as approved by reviewing authority confirmed. GCMO 288, 7 July 1945)



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

SPJGQ-CM 280356

13 JUL 1945

UNITED STATES	)	EIGHTH SERVICE COMMAND
	)	ARMY SERVICE FORCES
v.)	
Soldat HEINZ BARTEL (SIG 403976)	)	Trial by G.C.M., convened at Camp
and Soldat HEINRICH WEIDEMANN	)	Chaffee, Arkansas, 17-19 April 1945.
(SIG 129013), German Prisoners	)	Both: Total forfeitures and con-
of War.	)	finement for five (5) years.
	)	Disciplinary Barracks.

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

1. The record of trial in the case of the German Prisoners of War named above has been examined in the Office of The Judge Advocate General and there found to be legally insufficient to support the findings and the sentence as to each. The record has now been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

2. The record of trial has been examined in the International Law Division of this office and there held to show that the proceedings have been conducted in compliance with the terms of the Geneva Convention.

3. The accused, with their express consent, were tried jointly, upon the following Charge and Specification:

CHARGE: Violation of the 96th Article of War.

Specification: In that Heinz Bartel and Heinrich Weidemann, Prisoners of War, Prisoner of War Camp, Camp Chaffee, Arkansas, acting jointly, and in pursuance of a common intent, did, in conjunction with other Prisoners of War whose names are unknown, at Camp Chaffee, Arkansas, on or about 23 January 1945, willfully and unlawfully damage, to an extent in excess of \$50.00, 35 tires and tubes, value in excess of \$50.00, property of the United States.

Each of the accused pleaded not guilty to and was found guilty of the Specification and the Charge. No evidence of previous convictions was introduced at the trial. Each of the accused was sentenced 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, as to each of the accused, approved the findings and approved only so much of the sentence as provides for confinement at hard labor for five years and forfeiture of all pay and allowances due or to become due for a like period, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and ordered each sentence executed. The proceedings were published in General Court-Martial Orders No. 233, Headquarters Eighth Service Command, 6 May 1945.

4. The evidence for the prosecution established the facts that the two accused were members (R. 32, 41) of a detail of forty to fifty German prisoners of war working with about fifteen civilian workmen on a loading ramp at Camp Chaffee, Arkansas, on 23 January 1945. The prisoners were under guard (R. 23). The work consisted of loading Government vehicles on flat cars for shipment and making them secure on the cars by nailing wooden blocks to the car floor in front of and behind, and two-inch by four-inch wooden pieces alongside, the wheels of the vehicles (R. 22, 96). An inspection discovered that, in this process, twenty-penny nails which should have been driven vertically through the two-by-fours into the car floor had been driven at an angle through the two-by-fours into thirty-five of the pneumatic tires mounted on various prime movers, one-quarter-ton trucks and three-quarter-ton trucks among the vehicles loaded (R. 17-18, 34, 36), inflicting such damage that the shipment was delayed by the necessity for replacing the punctured tires, which were later repaired (R. 21, 27, 99, 102, semble).

5. The only evidence connecting the accused individually with the acts of sabotage was by their own confessions.

The two accused were members of a group of about fifteen or twenty prisoners of war separated from the others on the loading detail and taken to the Prisoner of War Stockade for questioning after discovery of the damage done to the tires (R. 33, 41). There questioned, accused Bartel denied that he had damaged any tires, but pointed out Weidemann as having done so (R. 41, 42, 69). Weidemann, when confronted by Bartel, orally admitted to Technician Fourth Grade Samuel Klehr, Intelligence Office investigator (R. 40) that he, Weidemann, had driven four or five nails into the tires of jeeps, pursuant to a decision reached among a group of the prisoners at the 10:30 break that morning, to puncture all the tires they could to prevent the vehicles from going forward for use against their comrades in the German Army (R. 47, 69). As to this oral confession by Weidemann, Sergeant Klehr's testimony was corroborated by Prisoner of War Alfred Kaden, German company leader (R. 90, 93). Weidemann then put his confession into a written, signed and sworn

statement before Captain Louis M. Colbert, Corps of Military Police, wherein he admitted that he himself "drove in several nails into the tires" after seeing several comrades doing so, pursuant to the discussion during the break, but could not then see if anyone else was driving in nails, because he then "came to a different working place" (R. 71, 79; Pros. Ex. G, G-1). Objection was sustained to Sergeant Klehr's testimony that Weidemann, in connection with his own oral confession, also accused Bartel of driving nails into the tires (R. 45).

Sergeant Klehr further testified that Bartel, confronted by Weidemann, (R. 44-45) then orally admitted that he, Bartel, "drove in one nail, just one" (R. 69, 70, 74, 76). Sergeant Klehr testified that Bartel's statement to that effect was made in the presence of Captain John R. Wheat (R. 72). Captain Wheat, Cavalry, Intelligence Officer at the Prisoner of War Camp, testified (R. 81, 87), but made no reference to such statement by Bartel, except that he testified that Alfred Kaden came into the room after "they had admitted that they were guilty" (R. 88). This statement was made on Captain Wheat's cross-examination and directed primarily to the question of what part of the interview was in the presence of Kaden. Kaden, the Prisoner of War company leader, testified that Bartel "said he had nothing to do with it but was accused from the other one" (Weidemann) (R. 91). Sergeant Klehr had made a written, signed and sworn statement as an investigation report on the interview, wherein he had stated that Weidemann and another witness accused Bartel, but made no reference to any such admission by Bartel (R. 78; Def. Ex. A). Cross-examined concerning this omission, Sergeant Klehr recognized it as "pretty important", but his only explanation was: "I probably skipped it out because I just didn't write it down" (R. 74). There was no other evidence that Bartel ever confessed his own participation in the damaging of the tires.

6. Weidemann's confession and Sergeant Klehr's testimony to Bartel's confession were admitted over objection that such confessions were not voluntary, and after evidence was introduced concerning their voluntary character. Sergeant Klehr testified that both were voluntary, after proper warning to the accused of their rights against self-incrimination, and that no force or threats, and no promises, were used to induce them, and that no one struck either prisoner (R. 42, 46, 73, 76). He was corroborated as to the warnings and the absence of threats and inducements by Captain Wheat (R. 81-82, 87), and by company leader Kaden (R. 85-86) as to the absence of threats and inducements and that "it was voluntarily". However, according to Captain Wheat, Kaden came in after the accused had been questioned for twenty to thirty minutes and "had admitted that they were guilty" (R. 88). Captain Colbert, who was present at the questioning a part of the time, (R. 41, 72, 75, 86), was not called as a witness and did not testify. His absence was not accounted for.

In support of their objections to the admissibility of the confessions, both accused testified under oath that they made their statements under force and duress. Bartel testified (R. 51) that Sergeant Klehr and an officer, whose name he did not know, struck him in the face, twice knocked him unconscious, threatened him with a pistol, and threatened to kill him unless he made a statement, and, on cross-examination, that he was forced to "give them names" and so accused Weidemann because he had seen Weidemann drive two or three nails into tires and was afraid that if he did not tell, they would whip him more (R. 53, 55). He himself drove no nails into tires (R. 53). Bartel was cross-examined to some document purporting to be a statement by him, never introduced nor offered in evidence, and said that it was all true except that Weidemann drove nails into tires, which was untrue and made in fear of more whipping (R. 54, 56).

Weidemann testified (R. 58) that Captain Colbert struck him several times in the face and threatened him with a pistol, and that some very large Master Sergeant or Technical Sergeant, whose name he did not know, struck him twice very hard with his fists. Both his assailants were larger men than he, and failed to knock him down only because he was strong and tough (R. 59, 60). Weidemann did not know whether or not the nails he drove actually went into tires (R. 61, 62). He accused Bartel because he "got mad" when Bartel accused him (R. 61), and did not know whether Bartel drove nails into tires, nor whether Bartel was in the group of ten or fifteen prisoners who did discuss damaging the tires during their break that morning (R. 62). His statement that he, Weidemann, intentionally drove nails into tires was untrue (R. 62, 63). He pointed to his left eye as a "black eye which I still have" (R. 65) as an injury received in the beating by his questioners. He did not ask for treatment, as "it happens often" (R. 65).

7. In support of their objections to the admission in evidence of the confessions, the defense asked permission to put the accused on the witness stand for the limited purpose of showing that their statements were made under duress and were not voluntary. The Law Member of the court ruled that they could take the stand only for all purposes and would be subject to cross-examination on the whole case. The defense then withdrew its request (R. 44). Subsequently, faced with the prosecution's evidence of the confessions, the accused elected to testify despite the Law Member's ruling, and understanding that their cross-examination would not be limited, but with an announcement by the defense that their direct examination would be offered for the sole purpose of disqualifying the confessions (R. 49, 50). They testified as above stated to duress used in forcing their statements, and cross-examination which followed, permitted by the Law Member's ruling to embrace the whole case, elicited the further testimony above neted, going to the merits of the case and the truth of the contested statements (R. 52-57, Bartel; 59-65, Weidemann).

8. Upon the prosecution's resting its case, with all of the above evidence admitted, the accused then elected to testify on the case in

chief, after explanation of their rights (R. 108).

Bartel, a 20-year old German prisoner of war, a truck-driver as a civilian, with an eighth-grade education, (R. 109), denied driving any nails into the tires (R. 110). Weidemann, also a 20-year old German prisoner of war, a motor mechanic as a civilian (R. 112), could not say whether any of the nails which he drove into the wooden blocks punctured any tires. It was necessary to drive some at an angle because the platform was rotten, and one might have got into a tire. He did not see it (R. 113).

9. The case against Bartel rests only upon his oral confession, very doubtfully established by the testimony of Sergeant Klehr and later repudiated. The case against Weidemann rests only upon his written and oral confession, positively established though later repudiated, plus Bartel's inadvertent reiteration on cross-examination of his previous extra-judicial accusation of Weidemann, and Weidemann's admissions on cross-examination. Testifying generally on cross-examination that his accusation of Weidemann was false and that he did not see Weidemann drive nails into tires, though he did see him drive nails into blocking, Bartel was led into testifying (R. 53):

"Q. How many nails did you see Weidemann drive into the tires?

A. Two or three nails."

This question and answer, through an interpreter, in contradiction of all the rest of Bartel's testimony, was very damaging, but, under the circumstances in which it was given, and considered with the context of Bartel's testimony, it would not support conviction of Weidemann without Weidemann's confession. Weidemann, on cross-examination, denying that he intentionally drove any nails into tires, was forced into the positive admission that he had been present at a discussion that morning among the German prisoners proposing to do that very thing (R. 62), which was highly damaging, and the general character and effect of his testimony on cross-examination, which created a definitely adverse impression, was also damaging.

The admission of the confessions in evidence upon conflicting testimony as to their voluntary character was within the province of the court. The denial to the accused of the right to testify for the limited purpose of disqualifying their confessions was reversible error.

In CM 275738, Kidder, 17 April 1945, the Board of Review considered a case where, upon a like ruling refusing to permit the accused so to limit his testimony, the accused elected not to testify, and so, the confession being essential to the findings of guilty, "potential evidence in which the court is vitally interested was suppressed and the fundamental rights of the accused were prejudiced". In holding that the right of an accused person to testify for a limited purpose not including facts

directly relative to his guilt or innocence extends to testimony attacking the alleged voluntary character of his confession, the Board, in its opinion, said:

"Any ruling of a court-martial which would circumvent the accused's right to limit his testimony to statements relative to the procuring of his confession would jeopardize the constitutional guarantee against self-incrimination, a right which the courts are under an obligation to guard. Unless this right of an accused is respected and protected, law-enforcing officers will be tempted to resort to unlawful practises. The court is under a duty, therefore, not only to guard itself from the possible consequences of an involuntary and untrustworthy confession, but to shield all persons accused of crime from maltreatment by overzealous officers."

In CM ETO 3931, Marquez, 24 November 1944, the Board of Review upheld the right of the accused to testify for the limited purpose of showing that his confession was obtained by duress, and said in its opinion:

"Since accused became a witness on his own behalf for an expressly limited purpose which excluded inquiry into the issue of his guilt or innocence of the offense charged, the prosecution's question-- 'Was the statement you made true?'--was highly improper. The question and the affirmative answer by accused, in view of the fact that the statement was subsequently received in evidence, were substantially a confession of his guilt in open court and constituted an invasion of his privilege to remain silent on the issue of his guilt."

The Board in the Marquez case held that the improper question and the answer elicited may well have influenced the court to admit the confession and to convict the accused, and that, accordingly the admission of the confession was error.

We cannot doubt that in the instant case, the vice of the error made in denying the accused their right to testify to the interlocutory issue, as to the confessions only, pervaded all that followed it. Their election to testify to the merits of the case was not an act of free volition, but one compelled by the state of the case against them, including damaging admissions wrung from them on improper cross-examination outside the scope of their limited testimony.

"Whenever the accused, because of some incident in the trial and through no fault of his, is forced to testify for fear that adverse inferences might be drawn from his failure, then he has not volunteered as a witness and has not waived his rights. Such waiver only follows when liberty of choice has been fully accorded." (Powell v. Commonwealth, 167 Va. 558; 189 SE 433).

"It cannot be said that a witness who has been put under the imputation of guilt . . . in defiance of the Constitution of the state, and who offers himself as a witness to explain so far as he can the testimony which in law he has been forced to give against himself by inferential and indirect methods, is a voluntary witness." (State v. Jackson, 83 Wash. 514; 145 P. 470).

"In the instant case the alleged confession was excluded on the statement of the officers themselves, but if it had been testified to by only a single witness for the Commonwealth, and he had made out a prima facie case, the accused would have been in the position where he would have been compelled to have submitted to a conviction on such confession or else go on the stand and deny it. If he had done the latter, although he could not then have testified to his guilt or innocence on this preliminary inquiry, to subject him to cross-examination on the merits would have been to compel him to testify against himself." (Enoch v. Commonwealth, 141 Va. 411; 120 SE 222).

The right of an accused person against self-incrimination is "designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him". (United States v. White, 322 US 694; 64 Sup. Ct. 1248). It is a substantial and fundamental right, not to be circumvented nor lightly evaded. It is deeply ingrained in our system of jurisprudence, in the light of lessons learned from centuries of "confessions" wrung from writhing wretches by the thumb-screw and the rack. It is written into our basic law in the fifth article of amendments to the Constitution of the United States, and into our military law by the 24th Article of War. It is a part of our judicial process, inherent in the administration of justice by our courts, whether that process be applied to our most worthy citizen or to an alien enemy prisoner of war. When we try that prisoner in our courts, we extend to him our system of justice and our full guarantees of fair prosecution and a fair trial. More than that is inappropriate to him; less is unbecoming to us.

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

Fletcher R. Andrews, Judge Advocate

Alfred B. [Signature], Judge Advocate

Ronald D. Hickman, Judge Advocate

(192)

SPJGQ - CM 280356

1st Ind

Hq ASF, JAGO, Washington 25, D. C. 13 JUL 1945

TO: The Secretary of War

1. Herewith transmitted for your action under Article of War 50 $\frac{1}{2}$, as amended by the act of 20 August 1937 (50 Stat. 724; 10 U.S.C. 1522) and the act of 1 August 1942 (56 Stat. 732), is the record of trial in the case of Soldat Heinz Bartel (81G 403976) and Soldat Heinrich Weidemann (81G 129013), German Prisoners of War, together with the foregoing opinion of the Board of Review.

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

3. Inclosed is a form of action suitable to carry into effect these recommendations, should such action meet with your approval.



2 Incls

1 - Record of trial
2 - Form of action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Findings and sentence vacated. GCMO 411, 21 Aug 1945).

(194)

The accused immediately attempted to arrange for the satisfaction and appeasement both of the injured parties and the law but was not able to accomplish his purpose until the very end of the leave period (R. 11-12).

Having apparently finally settled the matter satisfactorily, though perhaps not conclusively, he commenced the return trip to Victorville, California (R. 12-14). Arriving in Chicago, Illinois, he discovered that his money and railroad tickets had been either lost or stolen. Since he had no means with which to establish his identity, he was unable to cash a check and was compelled to appeal to the local military authorities for assistance. By the time they acted the banks had closed and he was stranded in Chicago for another day. Not until 26 March, two days after the expiration of his leave, was he able to board a train for Los Angeles, California (R. 12; Pros. Ex. 1).

Upon completion of the journey to that city he called "his girl" and was informed that she was ill. He promptly contacted his Group Commander and represented that he was returning to the Post, but, when her condition took a turn for the worse, he decided to stay with her for awhile. Her recovery being slow, he remained with her until 14 April 1945, some sixteen days after the termination of his emergency leave. On that day he again reported to his station for duty (R. 12; Pros. Ex. 1).

4. After being apprised of his rights as witness, he elected to remain silent. The only evidence introduced on his behalf consisted of a true extract copy of his WD AGO Form 66-2 and a letter of commendation from a Lieutenant Colonel Thomas D. Farrish, Transport Commander. The Form 66-2 showed that the accused had consistently received ratings of excellent, that he had participated in thirty-one combat missions, that he was entitled to wear the "EAME Theater" ribbon with two stars, and that he had been awarded the Distinguished Flying Cross and the Air Medal with five Oak Leaf clusters (R. 15, Def. Ex. A). The letter of commendation read as follows:

"1. On the completion of this voyage, I wish to commend 1st Lt. R. F. Parent who acted on the staff while on board this Transport.

2. His untiring efforts as Assistant Provost Marshal and the most excellent way he handled his Staff duties added immeasurably to the successful completion of the voyage.

3. It is with the greatest of pleasure, therefore, that I congratulate 1st Lt. Parent for his efficient work in completing a task to my utmost satisfaction." (R. 16; Def. Ex. B)

5. The Specification of the Charge alleges that the accused did "without proper leave absent himself from his command from about 24 March 1945, to about 12 April 1945". This offense was laid under Article of War 61.

The evidence adduced by the prosecution and the accused's pleas of guilty establish beyond a reasonable doubt that he was absent without authority during the period alleged. Although his delays may have been for the most part motivated by worthy causes, they cannot be excused or condoned in any effective military system.

6. The accused, who is single and about 25 years of age, was graduated from high school. After working as a telephone operator and as the manager of a filling station, he entered the Army as an aviation cadet on 6 April 1942. He had active enlisted service from 12 November 1942 to 1 October 1943 when he was commissioned as a second lieutenant. Upon being assigned overseas in 1944 he participated in thirty-one combat missions and earned the Distinguished Flying Cross and the Air Medal with five Oak Leaf Clusters.

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 61.

Abner E. L. Spencer, Judge Advocate.

Robert J. Cannon, Judge Advocate.

Samuel Morgan, Judge Advocate.

(196)

SPJGN-CM 280375 1st Ind
Hq ASF, JAGO, Washington 25, D. C.
TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Richard F. Parent (O-693470), Air Corps.

2. Upon trial by general court-martial this officer pleaded guilty to, and was found guilty of, absenting himself without proper leave from his command for a period of nineteen days, in violation of Article of War 61. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for two years. The reviewing authority approved the sentence but reduced the period of confinement to eight months and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence as approved by the reviewing authority and to warrant confirmation thereof.

Upon the termination of a twenty-three day emergency leave early in March of 1945 the accused absented himself without leave for a further period of nineteen days. Most of this unauthorized absence was allegedly spent by him in extricating his father from certain financial and legal difficulties and in staying with a sick "girl friend". Although neither act justified his serious breach of military discipline, his prior good record and, in particular, the awarding to him of the Distinguished Flying Cross and the Air Medal with five Oak Leaf Clusters for extremely meritorious conduct while participating in thirty-one combat missions strongly suggests that he is deserving of clemency.

In view of the combat record of the accused, I recommend that the sentence as approved by the reviewing authority be confirmed but that the forfeitures and confinement imposed be remitted and that the sentence as thus modified be suspended during good behavior.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.

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


MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence as approved by reviewing authority confirmed. Forfeitures and confinement remitted. Sentence suspended. GCMO 328, 9 July 1945)E

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

SPJGQ-CM 280450

13 JUN 1945

UNITED STATES)

INFANTRY REPLACEMENT TRAINING CENTER

v.)

Trial by G.C.M., convened
at Camp Blanding, Florida,
4 May 1945. Dismissal.

Captain ULYSSES T. BUCKNER
(O-1295989), Infantry.)

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 Specification:

CHARGE: Violation of the 95th Article of War.

Specification: In that Captain Ulysses T Buckner, 208th Infantry Training Battalion, Camp Blanding, Florida, was, on or about 11 April 1945, at Camp Blanding, Florida, in the 64th Infantry Training Regiment Officers' Club and the close vicinity thereof, drunk and disorderly while in uniform.

He pleaded not guilty to and was found guilty of the Specification and the Charge. 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 established the following state of facts.

On the evening of 11 April 1945, at Infantry Replacement Training Center, Camp Blanding, Florida, the accused was drinking beer, rum and whiskey at the bar of a regimental officers' club (R. 6, 8). The club building was composed of a main club room and a small bar room (R. 6). At about 1930 hours, the accused was engaged in conversation at the bar with Captain Wildsmith and First Lieutenant Daily. Two other officers

were present, and an enlisted man was tending the bar (R. 6, 16). The accused was then "about half drunk" (R. 7). In an innocuous conversation about rifle range training, he seemed unable to understand the discussion, became loud and profane, and stated that Lieutenant Daily "acted like a God-damn fool" and sounded like "the silliest son-of-a-bitch" he ever talked to (R. 7). At about 2000 or 2045, this conversation was interrupted by the approach of Major Peden and Major Ronai with their wives and Major Ronai's small daughter. By that time the accused was in much worse condition (R. 8), having become loud, vulgar, very profane, and very drunk (R. 14). Captain Wildsmith (R. 14) and Lieutenant Daily (R. 8) tried to quiet him. He "continued to talk" (R. 8), but was not profane in the presence of the ladies (R. 19), after they entered the club (R. 14). The majors and their party came to the bar (R. 14), but, on observing that the accused was drunk, Major Peden told the ladies to go on into the club room and himself went over and admonished the accused to "shut up" (R. 18). The accused looked up at Major Peden with doubtful recognition, then went into the club room, sat in a chair and fell asleep (R. 18), in a drunken stupor (R. 14). He slumped or fell into the chair after staggering into the room, and remained there, drooling at the mouth, with his head leaning over his shoulder (R. 9). The majors and their party drank Coca-Colas and remained a short time in the club, then departed, after Major Peden had told Captain Wildsmith and Lieutenant Daily to get the accused to his hut and put him to bed (R. 9, 14, 19). A few minutes later, the accused staggered back into the bar, bumping into the officers present, and asked for another drink (R. 9). While Captain Wildsmith and Lieutenant Daily were deliberating upon their most propitious approach, Major Travelstead came in, saw that the accused was drunk, and, after a few minutes persuasion, took him out of the club. It was then about 2100 hours (R. 12; Ex. A (Deposition); R. 9, 10; 15). The accused was staggering, his hair was mussed, he was drooling at the mouth, talking loud but mumbling his words (R. 10). There were about seven people present other than those herein named (Ex. A). Major Travelstead took him out of the club and about halfway down the row of hutments toward the accused's quarters. The accused then assured Major Travelstead that he would continue by himself and go to bed, so Major Travelstead let him go and returned to the club (Ex. A). About 2115, some fifteen minutes later, the accused again staggered into the club bar room. The fly of his trousers was open, his trouser legs were wet from crotch to bottom, his shirt was open about four buttons, his hair was mussed, he was "very slobbery" and running at the nose (R. 10, 15; Ex. A). He was again escorted from the club by Major Travelstead (R. 10, 15; Ex. A) who this time took him to his quarters and left him sitting on the bed (Ex. A). Major Travelstead returned to the club, but left shortly thereafter (R. 10). The accused returned to the bar about fifteen minutes later, dishevelled as before, and demanded a drink. He was given a glass of water, and protested that he wanted whiskey (R. 11). Captain Wildsmith, Lieutenant Daily, and Lieutenant Spence were there (R. 11; 15; 20). It was about 2230 hours (R. 20).

Lieutenant Daily handed the bartender a chit for Coca-Colas. The accused advised the bartender not to take the chit, saying that Lieutenant Daily was "a God-damn cheat" and a "no-good officer", a "bastard", "son-of-a-bitch", and "God-damn chiseler" (R. 11, 16). Lieutenant Daily remained silent, but Captain Wildsmith rebuked the accused for such mistreatment of a junior officer (R. 11, 12, 16, 21), and told the accused that an officer, soldier and man the accused was "no damn good" (R. 21), whereupon the accused called Captain Wildsmith a "son-of-a-bitch" (R. 21).

The conclusion of the scene at the club is not in evidence, but at about 2300 hours, Lieutenant Spence observed the accused tossing on his bed in his hut. Lieutenant Spence was quartered in the same hut, but elected to sleep elsewhere that night. Moving to a nearby hut, Lieutenant Spence saw the accused at about 2330 hours, staggering down the walk from his hut to the latrine, dressed in underwear and shower clogs, bumping into the buildings and losing his shower clogs, which he found and retrieved with difficulty (R. 21, 22). Thirty to forty-five minutes later, the accused again arose from his bed, knocking over objects in his hut and making a commotion, dressed himself and left the hut (R. 22).

4. The accused elected to remain silent and no evidence was introduced for the defense.

5. The evidence abundantly proves that the accused officer was drunk and disorderly in uniform as charged, in and about the regimental officers' club on the night and at the place specified. The case presented is an unusually disgusting one of complete drunkenness — sodden, maudlin and revolting — in the presence of other officers, of an enlisted man, and, for a time, in the presence of ladies and a young girl, the wives and daughter of officers present.

Twice escorted from the club by reason of his condition, the accused twice returned, dishevelled and obscene, to annoy those present with his drunken appearance and offensive language. His condition, self-induced, was such as clearly to pass all bounds of tolerance and constitute the offense charged.

7. The accused officer is 37 years of age, unmarried, a native citizen of Waxahachie, Texas. A high school graduate, his civilian occupations were tax collector, bond salesman, and cotton broker. He entered the service 3 January 1942, was commissioned through Officer Candidate School at Fort Benning, Georgia, 10 October 1942, as a temporary second lieutenant of Infantry, promoted to the grade of first lieutenant 4 February 1943 and to that of captain 8 February 1944. To that time, he had served as assistant Regimental Adjutant and as Regimental Adjutant, generally in superior manner. His War Department personnel record shows no previous punitive or disciplinary action, but the Staff Judge Advocate states in his Review of the present case that

the accused has previously been punished by forfeiture and severe reprimand under Article of War 104 for drunken misbehavior, and that his efficiency has declined by reason of alcoholic indulgence for which he is not well suited.

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

Fletcher R. Andrews Judge Advocate.

Herbert R. Frederick, Judge Advocate.

A. B. Jones Judge Advocate.

SPJGQ-CM 280450

1st Ind

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

JUN 27 1945

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain Ulysses T. Buckner (O-1295989), Infantry.

2. Upon trial by general court-martial this officer was found guilty of being drunk and disorderly in uniform at a regimental officers' club at Camp Blanding, Florida, in violation of the 95th Article of War. 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. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings and sentence as approved by the reviewing authority and to warrant confirmation thereof. I concur in that opinion.

At the Infantry Replacement Training Center, Camp Blanding, Florida, on the evening and night of 11 April 1945, the accused officer drank himself into a state of maudlin intoxication at a regimental officers' club. There, in the presence of other officers, of an enlisted man tending the bar, and at one time in the presence of two ladies and a young girl, the wives and daughter of officers present, he was sodden drunk. Twice escorted from the club, he returned, after the ladies' departure, and remained in a dishevelled state, his trousers front and shirt open, his trousers leg wet from crotch to bottom, tousled, staggering, slobbering and mumbling. He was loud, profane, abusive and offensive, and, without cause, reviled a junior officer in indecent language. Although no violence was involved, his drunken, debauched condition was such as to be intolerably offensive and disgraceful even by the most lenient standards of conduct, and its imposition upon others present under the circumstances was inexcusable in one obligated to conduct himself as an officer and a gentleman.

4. I recommend that the sentence be confirmed and carried into execution.

5. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.



MYRON C. CRANER
Major General
The Judge Advocate General

2 Incls

1. Form of action
2. Record of trial

(Sentence confirmed. GCMO 274. 5 July 1945).



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

SPJGN-CM 280470

UNITED STATES

v.

Staff Sergeant FRANK M.
 HILLARY (20846315), De-
 tachment of Patients,
 1074th Army Air Forces
 Base Unit.

ARMY AIR FORCES PERSONNEL
 DISTRIBUTION COMMAND

Trial by G.C.M., convened at
 Army Air Forces Convalescent
 Hospital, Fort George Wright,
 Washington, 13 March 1945.
 Dishonorable discharge and con-
 finement for ten (10) years.
 Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
 LIPSCOMB, O'CONNOR and MORGAN, 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 64th Article of War.

Specification: In that Staff Sergeant Frank M. Hillary, Detachment of Patients, 1074th AAF Base Unit, did, at AAF Convalescent Hospital, Fort George Wright, Washington, on or about 1 February 1945, draw a weapon, to wit a knife against Captain Marshall E. Porter, his superior officer, who was then in the execution of his office.

The accused pleaded not guilty to, and was found guilty of, both the Charge and the Specification thereunder. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for fifteen years. The reviewing authority approved the sentence, but reduced the period of confinement

to ten years; designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement; and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The evidence for the prosecution shows that the accused was a patient in the hospital at Fort George Wright, Washington. For about two days around 10 January 1945 he was confined in Ward 18, which was set aside for the treatment of psychiatric cases. Upon his release he was marked "ready for return to duty" by Captain Marshall E. Porter, a neuropsychiatrist, and was assigned to Ward 20, apparently for further observation (R. 12, 24-25, 43-44, 46). The chart on which this finding was entered was read by the accused on 30 or 31 January 1945. He immediately proceeded to Captain Porter's office and engaged him in conversation. At that time it was the Captain's opinion that the accused revealed "no evidence of operational fatigue; that he was definitely a constitutional psychopath state and that he was ready to return to full general duty". The conference, from all indications terminated without any untoward incident (R. 25, 46).

Between "ten and ten-fifteen on the morning" of 1 February 1945 Captain Porter was in his office in Ward 18 holding a consultation with Private Henry Curtis, a patient. Suddenly the heavy door leading into the room "swung open", and the accused walked in with a pocket knife in his hand. Advancing to within one pace of Captain Porter, he said, "Good morning, El Capitan. So you're going to send me back to duty. I hate you, and I'm going to kill you". He attempted to suit his action to words by seizing Captain Porter by the throat. Captain Porter quickly rose to his feet, broke his assailant's grip, grappled with him, and called for help. Two ward boys came to the rescue, overpowered the accused, and removed him to another room in Ward 18 (R. 12-22, 25-27, 29-32, 47-48, 50-51). Having regained some measure of composure, he was handed a cigarette. After taking a puff or two on it, he threw it to the floor, stamped on it, and twice repeated, "I should have got him before I let him go" (R. 49, 51).

4. After being apprised of his rights as a witness, the accused elected to remain silent. Numerous other witnesses were, however, presented by the defense for the purpose of proving that he was both drunk and not mentally accountable at the time of his assault upon Captain Porter.

5. The Specification of the Charge alleges that the accused did, "on or about 1 February 1945, draw a weapon, to wit a knife against Captain Marshall E. Porter, his superior officer, who was then in the execution of his office". The offense described was set forth as a violation of Article of War 64.

a. At the very outset of the trial the accused introduced a Mr. Eagan Ridenour as Assistant Defense Counsel. It was immediately patent

that Mr. Ridenour was to perform the role not of legal counselor but of special court reporter (R. 3). The reasons for this "subterfuge" were stated as follows in a brief submitted by Defense Counsel on 29 March 1945:

"3. The cases defended by this counsel have resulted, in my opinion, in grossly inadequate records. I have become more confirmed in my conviction of the inadequacy of our reportorial staff through comparison of the completed transcript, with notes I have made wherein I have outlined in advance the exact phraseology I intended to use in propounding questions to my witnesses.

"4. The Hillary case involves a charge wherein it was necessary to contemplate that the death penalty could be administered. It was more than ever necessary to take steps to assure an adequate record. I therefore, since the boy had some savings and was willing to use them, suggested to the Trial Judge Advocate that a professional reporter be obtained from Spokane, the defense to pay the excess costs. This was refused. I then offered to pay the entire costs of a professional reporter if the Trial Judge Advocate would use the transcript to reconcile the differences which have arisen between us in the past. This likewise was refused. I thereupon approached the President of the Court, who stated that there was no 'authority' for two reporters, and permission was refused to even permit a civilian reporter in the court room. I thereupon, using funds of the accused, broached the subject to the reviewing authority. I was advised, as you will recall, that you could not interfere with the Court in its conduct of the proceedings. Thereafter I sought permission from local higher authority. Permission was again refused.

"5. That same evening, I approached the President of the Court and inquired if he would object to the accused hiring associate civilian counsel, bearing in mind said counsel would be a qualified court reporter. I was told there would be no objection, but that there would be only one 'official' reporter; that associate defense counsel would not interrupt witnesses for any purpose, and any 'reading back' would be done by the 'official' reporter. To this I acquiesced."

When, after the trial, Mr. Ridenour's transcription of the record of proceedings was compared with that of the official reporter, certain discrepancies were noted. These moved Major C. E. Vollmayer, a member of the court who authenticated the official record "in the absence of the president", to address a letter containing the following remarks to the Staff Judge Advocate:

"2. I have carefully read this entire record and compared it with the record submitted by the assistant defense counsel, Mr. Eagan Ridenour. Assuming Mr. Ridenour's record to be correct, it appears to me that the record transcribed by the official court reporter is replete with errors, inaccuracies, and omissions, and is more a summary of the proceedings than an accurate transcription.

"3. I am more inclined to give credence to the record of Mr. Ridenour because I observed during the trial that he was constantly occupied with his notes, whereas there were many occasions when the pencil of the official reporter was still, at times when I thought he should be taking notes. In addition, as my memory serves me at this date, the record of Mr. Ridenour has a truer ring.

"4. I have affixed my name to the official record, however, as there appears to me to be no alternative, for the President of the Court, I understand, stated there would be only one 'official' reporter in the court room, who would be Sergeant Bartell, whose record I have signed."

Despite numerous obvious and material variations between the two transcriptions, the Assistant Staff Judge Advocate in his review advised the reviewing authority as follows:

"This [Ridenour's] transcript has been examined word for word in comparison with the official record, and there is not one iota of difference in the substance of the two transcripts. There are naturally the usual and expected differences in verbage and even in entire sentences, which might be expected from two reporters taking down the same testimony. In some instances the transcript of Mr. Ridenour appears to more nearly express the probable verbage of a witness while in other instances the official record appears to be more nearly correct. This transcript adds nothing to a consideration of this case and is considered as simply an unauthorized expenditure fostered on the accused by the defense counsel.

* * *

"If the defense counsel does not consider the reporter competent, he should have moved the court to secure a competent reporter. An obstinate defense counsel, by such procedure, cannot effect the authenticity of a record of trial" (underscoring supplied).

These assertions were unnecessarily critical of a defense counsel whose only sin was a determined effort to perform his duty in strict compliance with the Manual's admonition to "guard the interests of the accused by all honorable and legitimate means known to the law". MCM, 1928, par. 45b.

Some of the errors discovered in the official record are merely humorous because of their manifest absurdity, others are distinctly prejudicial to the accused. Since it would serve no useful purpose to set them all out verbatim, only two in the latter category need be reproduced by way of illustration. One of the basic issues in the case was the accused's mental accountability on the day of the offense. Among the expert witnesses on this subject were Captain Marshall E. Porter for the prosecution and Captain Eugene J. Baldeck for the defense. Their testimony was variously reported as follows in the two transcripts:

Official

Porter (R. 43).

"Q. The ward is the jail of the hospital?

A. It is a psychiatric ward set up by Army Regulations and essential for patients of this type.

* * *

Q. It was best to leave the accused in Ward 18?

A. He could not conduct himself as a soldier. Difficult to get along with personnel involved. Felt he should be sent to Ward 18 at least he would have to be confined. Arrived at Ward 18 and acquired care under supervision" (underscoring supplied).

Baldeck (R. 60).

"Q. Did you at any time under your observation reach the conclusion that perhaps he was psychopathic?

Unofficial

Porter (Ridenour's transcript pp. 48-49).

"Q. What is it used for?

A. It is a psychotic ward set up by army regulations and is very essential for patients of this type.

* * *

Q. On what basis did you believe it was necessary to leave the accused in Ward 18?

A. Because he was on the barracks and he was unable to conduct himself as a soldier. The personnel in investigating whatever difficulty he was in at that time felt he should be sent to Ward 18; at least he had to be confined. He was not able to conduct his own affairs, and therefore he arrived on Ward 18, and he required care under supervision, because he had demonstrated his inability to supervise himself" (underscoring supplied).

Baldeck (Ridenour's Transcript, p. 75).

"Q. Did you at any time while he was under your observation reach the conclusion that perhaps he was psychotic?

A. After his behavior in the barracks, or I was told of his behavior in the barracks, he might be psychopathic or a constitutional psychopat /sic/" (underscoring supplied).

A. After his behavior at the barracks, or I was told of his behavior, I thought there might be periods when the man was a psychotic or a constitutional psychopath" (underscoring supplied).

Since a psychopath is usually accountable for his offenses and a psychotic is rarely accountable, the conflict in nomenclature contained in the two transcripts is extremely significant. Of equal importance is the omission in the official record of Captain Porter's observation that the accused "was not able to conduct his own affairs" and "had demonstrated his inability to supervise himself". These words describe a mental condition which would tend to exonerate the accused of responsibility for his act; if actually uttered, their omission from the official transcript is highly prejudicial to the defense.

The Boards of Review and The Judge Advocate General are completely dependent upon accurate reporting for the proper performance of their statutory functions. It is idle to speak of reviewing records of trial for legal sufficiency when they are replete with errors, omissions, and distortions. Such false transcriptions strike at the very cornerstone of the system created by Congress under Article of War 50 $\frac{1}{2}$ for the protection of the legal rights of military offenders.

Major Vollmayer in his communication of 29 March 1945 has attempted to explain his authentication of a false record by the statement that he had "no alternative". But an alternative was available to him, and that was to decline to affix his name to a transcript which he was convinced did not speak the truth. This was his plain and inescapable duty under Article of War 33, the meaning of which can not be easily mistaken. In requiring authentication, this provision imposed, as a condition precedent to the validity of every court-martial record, an attestation that it is trustworthy, credible, and genuine. By indicating in his letter that he believed the official record to be false and unreliable, Major Vollmayer has impeached his own authentication.

b. In the Staff Judge Advocate's review and in a supplemental review the following statements are made:

"1. The defense counsel, in connection with his transcript, has submitted a brief 13 pages in length which is merely an attempt to reargue his case, and an attempt to explain the presence of Mr. Ridenour. This brief is highly improper, and while it has been thoroughly reviewed, it merits no consideration, in connection with this case."

*

*

*

"1. On 9 April 1945, this headquarters was advised by civilian counsel retained to represent the accused in the review of general court-martial, that they desired to forward written objections to the record. While this procedure is highly irregular, it was determined that in order to grant the accused every possible consideration, the civilian counsel would be permitted to submit their brief.

*

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"4. Although it is realized that they have no proper standing in connection with the record of trial in this case, it is recommended that the transcript prepared by Mr. Eagan Ridenour, the brief of Lt. Kregler, defense counsel and the briefs prepared by civilian counsel * * * be transmitted to The Judge Advocate General with the official record so that the entire picture of the case may be presented."

These words reflect an erroneous concept of military justice. Suffice it to say, that briefs by defense counsel, whether military or civilian, are never "improper" or "irregular" but, on the contrary, should always be welcomed. They may be submitted by him or on his behalf before the court, before the reviewing authority, or before the Board of Review. Any other ruling, by confining defense counsel's activities to the actual trial, would unduly circumscribe the appellate review prescribed by Article of War 50 $\frac{1}{2}$.

c. In the course of his closing argument the Trial Judge Advocate commented that "the accused is a very talkative person, although you would not think so from the trial today" (R. 101-102). Since the accused had elected not to take the stand, the innuendo which was intended to be conveyed could not have been missed by the court. In discussing this slip of the tongue the Staff Judge Advocate's review concluded that:

"This was an error, but in view of the surrounding statements it does not prejudice the rights of the accused."

We agree that error was committed, but we fail to see how any of the surrounding statements cured it. The Manual for Courts-Martial, 1928, expressly provides that the "failure of an accused to take the stand must not be commented upon". By his sarcastic reference to the accused's failure to take the stand the Trial Judge Advocate has deliberately flouted this explicit prohibition. Whether the error committed was prejudicial depends upon whether the competent evidence of guilt which was adduced was compelling. See CM 275792, Elair et al. In view of the state of the official record we cannot at this time adjudicate this question.

6. The record shows that the accused is about 21 years of age; that he enlisted on 21 July 1942 at Phoenix, Arizona; and that he had prior service between 16 September and 19 November 1940 but was then discharged by reason of minority.

7. For the reasons stated above the Board of Review holds the record of trial legally insufficient to support the findings of guilty and the sentence.

Abner E. Lipscomb, Judge Advocate.

Robert J. Olenick, Judge Advocate.

Samuel Morgan, Judge Advocate.

SPJGN-CM 280470

1st Ind.

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

TO: The Commanding General, Army Air Forces Personnel Distribution Command, Atlantic City, New Jersey.

1. In the case of Staff Sergeant Frank M. Hillary (20846315), Detachment of Patients, 1074th Army Air Forces Base Unit, Fort George Wright, Washington, I concur in the foregoing holding of the Board of Review and for the reasons therein stated recommend that the findings of guilty and the sentence be disapproved.

2. In the event that you shall deem it advisable to direct a rehearing in this case, it is recommended that the accused be placed in a general hospital for observation and examination by a board of qualified and impartial medical officers, at least one of whom shall be an experienced psychiatrist, for the purposes of determining the following questions:

(a) Was the accused at the time of the alleged offense "so far free from mental defect, disease, and derangement as to be able concerning the particular acts charged" to distinguish right from wrong? Fifth subparagraph, paragraph 78a, MCM, 1928.

(b) Was the accused at the time of the alleged offense "so far free from mental defect, disease, and derangement as to be able concerning the particular acts charged * * * to adhere to the right?" Fifth subparagraph of paragraph 78a, MCM, 1928.

(c) Was the accused at the time of his trial sufficiently sane "intelligently to conduct or cooperate in his defense"? First subparagraph of paragraph 63, MCM, 1928.

If any of the above interrogatories are answered in the negative, the accused should not again be brought to trial. Your attention is particularly invited to the provisions of the Manual for Courts-Martial, 1928, cited above.

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

(CM 280470).

Myron C. Cramer

1 Incl
Record of trial

JUN 20 45 AM

MYRON C. CRAMER
Major General
The Judge Advocate General

(212)

WAR DEPARTMENT

IN THE OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON 25, D. C.

Board of Review

CM 280470

UNITED STATES

v.

Staff Sergeant FRANK M.
HILLARY (20846315), De-
tachment of Patients,
1074th Army Air Forces
Base Unit.

ARMY AIR FORCES PERSONNEL
DISTRIBUTION COMMAND

Trial by G.C.M., convened at
Fort George Wright, Washington,
15-17 November 1945. Dishonorable
discharge and confinement for
one (1) year. Disciplinary Bar-
racks, Fort Missoula, Montana.

HOLDING by the BOARD OF REVIEW
HEPBURN, O'CONNOR and MORGAN, Judge Advocates

The record of trial in the case of the soldier named above has
been examined and is held by the Board of Review to be legally sufficient
to support the sentence .

Charles Stephens, Judge Advocate.

William H. Taylor, Judge Advocate.

Samuel Morgan, Judge Advocate.

1st Indorsement

War Department, J.A.G.O. FEB 25 1946 To the Commanding General,
Army Air Forces Personnel Distribution Command, Louisville, Kentucky.

1. In the case of Staff Sergeant Frank M. Hillary (20846315), Detach-
ment of Patients, 1074th Army Air Forces Base Unit,

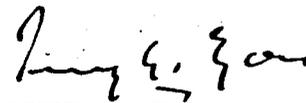
attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$, and Executive Order No. 9363, dated 23 July 1943, you now have authority to order the execution of the sentence.

2. Under all of the facts and circumstances in this case and in view of the length of time accused has been in confinement pending final determination of his case, it is recommended that all confinement imposed by the sentence be remitted.

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

(CM 280470).

MAR 4 7 46 AM



TERRY A. LYON
Colonel, JAGD
Assistant Judge Advocate General
In Charge of Military Justice Matters



DISPATCHED
MAR 4 1944



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

23 MAY 1945

SPJGV-CM 280537

UNITED STATES	)	ARMY AIR FORCES
	)	WESTERN TECHNICAL TRAINING COMMAND
v.)	
	)	Trial by G.C.M., convened at
Second Lieutenant ROBERT	)	Denver, Colorado, 5 May
E. WILLIAMS (O-826813),	)	1945. Dismissal and total
Air Corps.	)	forfeitures.

 OPINION of the BOARD OF REVIEW
 SEMAN, MICELI and BEARDSLEY, 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 95th Article of War.

Specification: In that Second Lieutenant Robert E. Williams, Air Corps, Air Corps Unassigned, attached Squadron T, 3705th Army Air Forces Base Unit (Technical School), having been restricted to the limits of his Post, did, at Lowry Field, Colorado, on or about 23 April 1945, break said restriction by going to the city of Denver, Colorado.

He pleaded guilty to (R. 6) and was found guilty (R. 8) of the Specification. To the Charge he pleaded, and was found, not guilty, but guilty of a violation of Article of War 96. Evidence of one previous conviction was considered (R. 8; Pros. Ex. B). He was sentenced to dismissal and to forfeit all pay and allowances due or to become due (R. 9). The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. No testimony was heard upon the trial. A copy of General Court-Martial Orders No. 90, Headquarters, Army Air Forces Western Technical Training Command (Pros. Ex. A), dated 12 March 1945, was admitted in evidence (R. 6). This order promulgated the sentence adjudged on 6 March 1945 by a general court-martial, which found accused guilty of absence without leave from his duties at Lowry Field, Denver, Colorado, from about 7 February 1945 to about 10 February 1945, in violation of Article of War 61. To the Specification and Charge in that case accused had pleaded guilty.

(216)

He was sentenced to be restricted to the limits of his post for three (3) months, and to forfeit fifty dollars (\$50.00) of his pay per month for twelve (12) months. The reviewing authority approved the sentence, but remitted so much of the forfeitures as exceeded \$50 per month for six months. As thus modified, the sentence was ordered executed (Pros. Ex. A).

It was stipulated (R. 6) between the accused, his counsel and the prosecution that, if Major Joseph R. Johnston, Air Corps, were present, he would testify:

"On 27 April 1945, the undersigned called in 2d Lt. Robert E. Williams of Squadron T, Lowry Field and questioned him concerning a breach of restriction by him. When 2d Lt. Williams was interviewed, he was first advised of his rights under the 24th Article of War and the Constitution of the United States. After being so advised, Williams stated that he knew he was under restriction; that he had broken the restriction by going to Denver on the night of 23 April 1945, to attend a picture show; that he was apprehended coming in the 6th Avenue gate at approximately 1030 on 24 April 1945; that he had no excuse for this breach of restriction; that he had tried hard to stay on the field and that this was the only time that he had gone into town or had left the field while serving this restriction. He states that he understood that this is a serious breach of military discipline and that he will be court-martialed for it. He had no witnesses that he desired to call before the investigating officer." (R. 6)

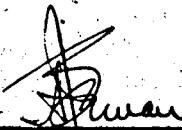
The prosecution rested. Accused was advised of his rights as a witness (R. 7), and having consulted with defense counsel, elected to remain silent. The defense then rested (R. 7).

4. Extended comment is unnecessary. By his pleas, accused admitted every element of the offense charged in the Specification, in violation of the 96th Article of War. No extenuating or mitigating circumstances were attempted to be shown. Only 48 days before, accused had been found guilty of a serious military offense, absence without leave for three days. Upon that conviction, a sentence to dismissal, total forfeitures and confinement at hard labor might legally have been imposed by the sentence of the court. The court, however, tempered justice with mercy, and sentenced him merely to undergo restriction to the post for three months and to forfeiture of \$50 per month for 12 months. The reviewing authority mitigated this comparatively mild sentence by remitting

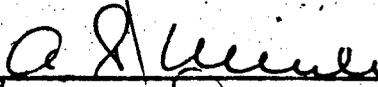
one-half of the forfeitures. After being thus lightly whipped of justice, the accused, either from lack of appreciation of the mercy shown him, or from want of appreciation of his responsibilities as an officer, or for other reasons or for no reason, breached the restriction, and was apprehended while returning to the post.

5. The records of the War Department show that the accused will be 22 years old on 2 June 1945. He was appointed a Second Lieutenant, Air Corps, AUS, and entered upon extended active duty on 12 March 1944. He entered the military service as a private in January 1943, and was appointed an aviation cadet in July 1943. He is a high school graduate, and attended Boston University for one year. From 12 March to 20 October 1944 he was a pilot instructor, and received an efficiency rating of Very Satisfactory for the period prior to 1 July, and of Excellent for the period between then and 20 October. He then was given pre-flight engineering training at Amarillo, Texas, and then was assigned as a student to the Flight Engineers School at Lowry Field.

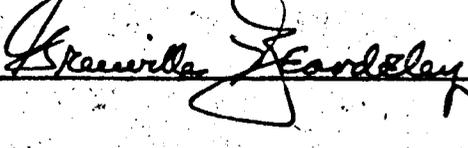
8. The court was legally constituted and had jurisdiction of the person and the subject matter. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings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



Judge Advocate



Judge Advocate



Judge Advocate

(218)

SPJGV-CM 280537

1st Ind

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

TO: The Secretary of War,

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Robert E. Williams (O-826813), Air Corps.

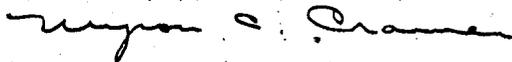
2. A general court-martial found this officer guilty of breaking a restriction to the limits of Lowry Field, Colorado, by going to Denver on 23 April 1945, in violation of the 96th Article of War. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The evidence is summarized in the foregoing opinion of the Board of Review. The Board 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. In that opinion I concur.

On 6 March 1945 accused was convicted by a general court-martial of absence from his duties without leave for three days. Under the sentence in that case, as modified and promulgated by the reviewing authority, he was restricted to the limits of the post for 90 days and to forfeiture of \$50 per month of his pay for six months. Forty-eight days later he broke the restriction and went to Denver for which offense he was here tried. Accused pleaded guilty, and did not testify or present any evidence to excuse or extenuate his offense.

I recommend that the sentence be confirmed but that the forfeitures be remitted, and that the sentence as thus modified be ordered executed.

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



2 Incls

1. Rec of Trial

2. Form of Action

MYRON C. CRAMER

Major General

The Judge Advocate General

(Sentence confirmed but forfeitures remitted. As modified ordered executed. GCMO 315, 7 July 1945).

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

SPJGH-CM 280538

27 JUN 1945

UNITED STATES

v.

Second Lieutenant PHILIP
R. CORBY (O-832350), Air
Corps.

ARMY AIR FORCES
WESTERN TECHNICAL TRAINING COMMAND

Trial by G.C.M., convened at
Keesler Field, Mississippi,
4 May 1945. Dismissal and
total forfeitures.

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 Specifications:

CHARGE: Violation of the 96th Article of War

Specification 1: In that Second Lieutenant Philip R. Corby, Squadron "Y" (Student Officer), 3704th Army Air Forces Base Unit, did, at Keesler Field, Mississippi, on or about 31 January 1945, wrongfully fail to submit a Flight Plan on AAF Form 23 prior to his flying an Army BT-13 airplane, #421, from Keesler Field, Mississippi, for a planned landing at Municipal Airport, Pascagoula, Mississippi, in violation of Paragraph 1, Operations Circular No. 5, Flying Regulations, AAF Technical School, Keesler Field, Mississippi, dated 1 August 1944.

Specification 2: In that Second Lieutenant Philip R. Corby, * * *, did, at Pascagoula, Mississippi, on or about 31 January 1945, wrongfully make a landing in an Army BT-13 airplane, #421, at the Pascagoula Municipal Airport, in violation of Paragraph No. 1, AAF Regulation 85-12, dated 20 June 1944.

Specification 3: In that Second Lieutenant Philip R. Corby, * * *, did, at Pascagoula, Mississippi, on or about 31 January 1945, wrongfully and illegally carry a civilian passenger in an Army BT-13 airplane in violation of Paragraphs No. 1 and 7, AR 95-90, as amended by Change No. 5, 31 August 1944.

Specification 4: In that Second Lieutenant Philip R. Corby, * * *, did, at Pascagoula, Mississippi, on or about

31 January 1945, wrongfully and illegally, and without proper authority, fly an army airplane, BT-13, #390, which airplane was then absent from its home station, in violation of Paragraphs 1 and 2, AAF Regulation No. 60-12, dated 10 April 1942, to the prejudice of good order and military discipline.

He pleaded guilty to and was found guilty of the Charge and all Specifications. No evidence of any previous convictions was considered. He was sentenced to dismissal, total forfeitures and confinement for five years. The reviewing authority approved only so much of the sentence as provides for dismissal and total forfeitures and forwarded the record of trial for action under Article of War 48.

3. The prosecution introduced evidence tending to prove the commission by accused of the offenses alleged in Specifications 3 and 4 only.

On 31 January 1945 Second Lieutenant Stanley A. Jenkinson flew a BT-13 plane from Keesler Field, Mississippi, to the Pascagoula Municipal Airport, Pascagoula, Mississippi. He was accompanied on this flight by a Lieutenant Altman, as a passenger. Accused, who was also flying a BT-13 plane, landed at the Municipal Airport, Pascagoula, about 15 minutes after Lieutenant Jenkinson. The trio had previously agreed to fly to Pascagoula for the purpose of obtaining a CAA license. Accused joined Lieutenant Jenkinson and Lieutenant Altman in the office of the airport where the manager of the airport urged one of them to take a Reverend Kenneth Erwin for a flight. There was some discussion about the use of parachutes on such a flight and Lieutenant Jenkinson remarked that there were two parachutes in his plane. Accused and the Reverend Kenneth Erwin left the office and took off in Lieutenant Jenkinson's plane. They crashed a short distance from the airport. Lieutenant Jenkinson did not know accused was going to use his plane, nor did he recollect accused asking permission to do so, although he admitted that accused might have inferred he had such permission from the fact that he, Lieutenant Jenkinson, had mentioned that he had two parachutes in his plane and from the fact that it was necessary to move Lieutenant Jenkinson's plane before accused could take off in his own (R. 7-13).

4. After being advised of his rights accused elected to be sworn and testify. He stated that his home was in Hartford, Connecticut, and that before he entered the Army he worked in a defense plant so that he could go to college and become a cadet. He has always worked hard in the Army to attain a pilot's rating - his ambition in life - and he has already made application for a commission in the Regular Army. After parking his plane at Pascagoula he went into the airport office. The manager was persistent in his urging that one of the three lieutenants take the minister up. He finally agreed. He believed that Lieutenant Jenkinson had given

him permission to use his, Lieutenant Jenkinson's, plane because of the reference he made to the two parachutes and because accused could not move his plane without first moving Lieutenant Jenkinson's. The plane stalled at an altitude of about 150 feet and crashed (R. 15-17).

On cross-examination he stated that his reason for not filing "Form 23" in connection with his flight to Pascagoula was that he did not have sufficient time to obtain a record of his "Army time" which is apparently required before a CAA license will be issued. He knew that in flying to Pascagoula Airport he was violating Army Regulations. He admitted that Lieutenant Jenkinson had no authority to grant him permission to use his plane for the purpose of giving a civilian a ride. Accused was sorry the incident occurred, not so much on account of himself as on account of the other people involved (R. 17, 18).

5. a. Specification 1 of the Charge :

This Specification alleges that accused, prior to flying an Army plane from Keesler Field, Mississippi, in failing to submit a Flight Plan on AAF Form 23 indicating that he intended to land at the Municipal Airport, Pascagoula, Mississippi, violated paragraph 1, Operations Circular No. 5, Flying Regulations, AAF Technical School, Keesler Field, Mississippi, dated 1 August 1944.

This circular provides as follows:

"1. All flights which plan landings away from this station * * * will submit a Flight Plan for local and CAA approval on AAF Form 23."

The accused's plea of guilty and his admission that he landed at Pascagoula without submitting AAF Form 23 amply sustain the finding of guilty of this Specification.

b. Specification 2 of the Charge:

This Specification alleges that accused wrongfully landed an Army plane at Pascagoula Municipal Airport in violation of paragraph 1, AAF Regulations No. 85-12, dated 20 June 1944.

This regulation provides as follows:

"1. The use by Army aircraft of municipal and other airports which have not been leased, purchased, or otherwise acquired by the Government is unauthorized except in case of emergencies and authorized official visits."

Accused's plea of guilty, his admissions and the other evidence that he landed at Pascagoula Municipal Airport justify the finding of guilty of this Specification.

c. Specification 3 of the Charge:

This Specification alleges that accused wrongfully and illegally carried a civilian passenger in an Army plane in violation of paragraphs 1 and 7, AR 95-90, as amended by Changes No. 5, 31 August 1944. These regulations with their changes are too lengthy to incorporate verbatim in this opinion. Suffice it to say they delegate to the commanding officers of AAF stations or higher authority the power to permit certain categories of persons to ride as passengers in Army aircraft. The record shows that accused was not a commanding officer and the Reverend Kenneth Erwin was not a person within the categories listed in the regulations. They make no provision for civilians who are flying for their own amusement. Accused's plea of guilty and the foregoing evidence fully warrant the finding of guilty of this Specification.

d. Specification 4 of the Charge:

This Specification alleges that accused wrongfully and illegally, without proper authority, flew an Army plane, which was then absent from its home station, in violation of paragraphs 1 and 2, AAF Regulations No. 60-12, dated 10 April 1942.

This regulation provides that:

"1. Aircraft absent from its home station, visiting or in transit, at a field or a station, will not be flown except on the direct authority of the pilot or the responsible flight commander, or for grave emergency.

"2. The authority vested in the pilot or flight commander permitting aircraft to be flown by personnel other than those assigned by its home station, will be in keeping with the orders and policies issued by the commanders of detachments, groups, or higher units, to which the aircraft is assigned."

The plane which accused flew was, when it was at Pascagoula, absent from its home station. The pilot of that plane, Lieutenant Jenkinson, had authority to permit accused to fly but this authority must be exercised in accordance with the orders and policies issued by the commander of the unit to which the plane was assigned. While we are not referred to any particular order or policy governing the exercise of this authority by pilots, in view of the provisions of paragraphs 1 and 7, AR 95-90, 24 July 1942, as changed by paragraph 1, C 5, 31 August 1944, discussed in paragraph 5c of this opinion, we have no doubt that it did not extend to permitting pilots to take civilians on pleasure flights. The plea of guilty to this Specification and the evidence that the accused did fly Lieutenant Jenkinson's plane is sufficient to sustain the finding of guilty of this Specification.

6. War Department records show that accused is 21 years of age and single. He is a high school graduate. Prior to enlisting in the Army as an aviation cadet in February 1943, he worked in a defense plant. Following completion of the prescribed Training Command course of instruction in Advanced-Single Engine School at Marianna Army Air Field, Marianna, Florida, on 23 May 1944, he was appointed a second lieutenant, Army of the United States, and ordered to active duty with the Air Corps the same date.

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

Thomas N. Jaffy, Judge Advocate

William H. Kammell, Judge Advocate

Robert E. Newtham, Judge Advocate

(224)

SPJGH-CM 280538

1st Ind

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

JUL 11 1945

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Philip R. Corby (O-832350), Air Corps.

2. Upon trial by general court-martial this officer pleaded guilty to and was found guilty of failing to submit a flight plan disclosing where he intended to make a landing, in violation of paragraph 1, Operations Circular No. 5, Flying Regulations, AAF Technical School, Keesler Field, Mississippi (Chg., Spec. 1); of making an unauthorized landing at Pascagoula Municipal Airport in violation of paragraph 1, Army Air Forces Regulations 85-12 (Chg., Spec. 2); of wrongfully transporting an unauthorized civilian passenger in violation of paragraphs 1 and 7, Army Regulations 95-90, as amended by Changes No. 5 (Chg., Spec. 3) and of piloting an Army airplane charged to another officer when it was absent from its home station in violation of paragraphs 1 and 2, Army Air Forces Regulations 60-12 (Chg., Spec. 4), all in violation of Article of War 96. He was sentenced to dismissal, total forfeitures and confinement for five years. The reviewing authority approved only so much of the sentence as provides for dismissal and total forfeitures and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, as approved by the reviewing authority, and to warrant confirmation of the sentence. I concur in that opinion. On 31 January 1945 Second Lieutenant Stanley A. Jenkinson flew a BT-13 plane from Keesler Field, Mississippi, to the Pascagoula Municipal Airport, Pascagoula, Mississippi. He was accompanied on this flight by a Lieutenant Altman, as a passenger. Accused, who was also flying a BT-13 plane, landed at the Municipal Airport, Pascagoula, about 15 minutes after Lieutenant Jenkinson. The trio had previously agreed to fly to Pascagoula for the purpose of obtaining a Civil Aeronautics Authority license. Accused joined Lieutenant Jenkinson and Lieutenant Altman in the office of the airport where the manager of the airport urged one of them to take a Reverend Kenneth Erwin for a flight. There was some discussion about the use of parachutes on such a flight and Lieutenant Jenkinson remarked that there were two parachutes in his plane. Accused

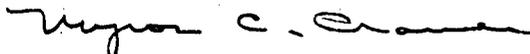
and the Reverend Kenneth Erwin left the office and took off in Lieutenant Jenkinson's plane. They crashed a short distance from the airport. Lieutenant Jenkinson did not know accused was going to use his plane, nor did he recollect accused asking permission to do so, although he admitted that accused might have inferred he had such permission from the fact that he, Lieutenant Jenkinson, had mentioned that he had two parachutes in his plane and from the fact that it was necessary to move Lieutenant Jenkinson's plane before accused could take off in his own.

Transmitted with the record of trial is a Memorandum for The Judge Advocate General, dated 20 June 1945, from the Commanding General, Army Air Forces, and signed by Lieutenant General Ira C. Eaker, Deputy Commander, Army Air Forces. It is recommended therein that the sentence be confirmed and ordered executed but that the forfeitures be remitted. The following sentiments concerning accused's conduct are also expressed in the memorandum:

"* * * These acts, committed in absolute disregard of regulations, clearly constituted serious and wilful violations. In addition thereto he took aloft the BT-13 aircraft charged to his companion while it was absent from its home station, which is specifically prohibited by AAF Regulations. This act he excuses by asserting that he had the implied consent of his companion, a fact that, if conceded, would not justify or excuse this violation. During this unauthorized flight a crash occurred, resulting in the complete destruction of the aircraft, and severe injuries to the civilian passenger and accused. Although the accused is not charged with having violated any regulation pertaining to the manner in which he piloted the aircraft, nevertheless, there is a strong implication from his description of the accident that he was embarking upon a maneuver of exhibitionism at the time, and that his negligence in so doing was the direct cause of the accident. All of the circumstances of this case indicate a carelessness and a demonstrated disregard for regulations that cannot be condoned."

I concur with the opinion expressed by the Commanding General, Army Air Forces, and I recommend that the sentence as approved by the reviewing authority be confirmed but that the forfeitures be remitted and that the sentence as thus modified be carried into execution.

4. Inclosed is a form of action designed to carry the above recommendation into effect, should such recommendation meet with your approval.



MYRON C. CRAMER
Major General
The Judge Advocate General

- 3 Incls
1. Record of trial
2. Ltr fr Hq AAF, 20 Jun 45
3. Form of action



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

SPJGN-CM 280581

UNITED STATES)

THIRD AIR FORCE

v.)

Trial by G.C.M., convened at
Hunter Field, Georgia, 18
April 1945. Dishonorable
discharge and confinement
for life. Penitentiary.

Private CHARLES V. CAMPBELL
(13009758), Squadron V, 302nd
Army Air Forces Base Unit
(SW), Third Air Force Staging
Wing.)

REVIEW by the BOARD OF REVIEW
LIPSCOMB, O'CONNOR and MORGAN, 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 Charles V. Campbell, Squadron V, 302nd AAF Base Unit (SW), Hunter Field, Georgia, did, at 311 West Waldburg Street, Savannah, Georgia, on or about 8 March 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Alberta Campbell, a human being, by choking her with his hands.

Before the accused pleaded to the Charge and Specification evidence was presented both by the prosecution and the defense concerning the accused's mental accountability and the court ruled that he was mentally responsible. Thereupon he pleaded not guilty to, and was thereafter found guilty of, the Charge and the Specification thereunder. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to

become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Atlanta, Georgia, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution shows that on 8 March 1945 the accused lived with his wife, Alberta Campbell, in a room at 311 West Waldburg Street, Savannah, Georgia. The adjoining room was occupied by Private First Class Frank G. Parry and his wife. Both the accused and Private Parry were military policemen on duty in the city of Savannah, Georgia (R. 35, 36, 39). On the evening of 7 March 1945 the accused went on duty before six o'clock, leaving his wife in their room. During the course of the evening the accused frequently spoke of his wife and of their quarrels. He stated to Private First Class Robert D. Gauss, with whom he was serving on patrol duty that night, that he, the accused, would not be surprised to find his wife drunk when he returned home, because they had had a quarrel before he had left concerning her desire to go to a "movie" (R. 48). During his tour of duty the accused and Private Gauss stopped at Stroud's lunchroom where the accused talked to a waitress and told her that his wife had threatened to get drunk that evening and that if she did so there would be trouble (R. 50).

According to a voluntary pre-trial statement made by the accused, he came off duty at approximately one o'clock on the morning of 8 March 1945. He proceeded directly to his room where he found his wife drunk and in an argumentative mood. After he had turned out the lights and gone to bed, he became angry with her and started choking her with both hands. She called to Mrs. Parry, who was in the adjoining room, and Mrs. Parry responded, but, when the accused told her to attend to her own business, she made no further inquiries. He then turned on the lights, and his wife got out of bed and smoked a cigarette. They proceeded to engage in further argument, but, according to him, "Neither one of us became angry or violent and neither of us raised our voices". When his wife threatened to leave him and go home to her mother, he told her that he would not let her go. She asserted that she was not afraid of him, that she wanted him to kill her, and that she would not resist or scream if he tried to do so. At this point she put out her cigarette, and accused turned off the lights. He choked her again and this time did not desist until she stopped breathing. While strangling her, he kissed her once or twice. When she ceased to breath, he arose, dressed himself in a clean uniform, wrote a note on blue stationery stating that, "I loved her so much I killed her rather than to part with her cause we shall meet again in death", placed the note on the bed beside his wife, and, after locking the door from the inside, left the room by way of a window. He walked directly to military police headquarters and surrendered himself (Pros. Ex. B).

When asked by the desk sergeant at military police headquarters

why he had killed his wife, the accused replied that, "she got drunk and [I] killed her" (R. 52). The accused, accompanied by the Provost Marshal and two military policemen, was taken back to his room. There the accused's wife was found dead. The note written by the accused was lying beside her (R. 55; Pros. Ex. C). Two empty wine bottles and a glass were found on the floor (R. 55-56).

In the opinion of the physician who examined the deceased her death was caused by "strangulation due to pressure in the region of the trachea and the great vessels of the neck, pressure by the hand or thumbs" (R. 44).

4. The accused, after his rights relative to testifying or remaining silent had been explained to him, elected to testify under oath. He explained that he had been in the service since 8 October 1940. He had spent two and one-half years of his service in Iceland, after which he had gone to England, France, and Belgium, spending a total of three years and four months overseas. He stated that his service in Iceland, where the recreational facilities were very poor, had made him nervous. After returning to this country and while on leave, he met his future wife, a woman twenty-two years of age, who had been previously married twice. He married her on 10 February 1945. Early in their relationship they had "jealous quarrels" and quarrels over his wife's drinking, over his smoking, and over her reception of letters from her former husband. In testifying concerning the evidence of the crime in question, the accused repeated substantially the same facts which he had set forth in his pre-trial statement. In addition, however, he stated that, after he had returned from his tour of duty on the night of his fatal act, his wife had threatened to return to her mother and to have him sent to an insane asylum. She knew he did not like hospitals, and her statement goaded him. Prior to that time she had never mentioned sending him to an insane asylum. As a result of her goading he became upset and commenced choking her. After his wife had called Mrs. Parry, the argument between himself and his wife had continued and he had again choked her, this time until she was dead (R. 59-64).

On cross-examination the accused admitted that he had talked to a waitress at Stroud's restaurant on the evening before his attack upon his wife, but denied that he had said there would be trouble if he found his wife drunk that night (R. 68). He admitted writing the note found by his wife's side (R. 70). He further admitted that, although he had grown very nervous while overseas, the only ailment for which he had reported to a dispensary was neuralgia (R. 73-74).

The prosecution introduced two exhibits in the form of messages which the accused said he had sent to his father and his mother-in-law by telegraph. The telegram to his father was as follows:

"Dear Dad, I just killed my wife. I can't explain it all to you but we were to jealous to be happy on earth and I feel we are better off dead. Love Chuck" (R. 72; Pros. Ex. E).

To his mother-in-law he wrote, as follows:

"Dearest Mother, I just killed Bertie. We were to jealous to be completely happy on earth. I think in death we will be content. Love Chuck" (R. 72; Pros. Ex. E).

The defense offered in evidence eight stipulations concerning what certain persons would testify to if present (Def. Exs. 1-8). The first four stipulations reflected upon the character of the deceased by asserting that she drank heavily of intoxicating liquors and was sexually promiscuous. The other four stipulations attested to the good character of the accused as a quiet and peaceful young man in his home community.

5. The Specification alleges that the accused did, on or about 8 March 1945, "with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Alberta Campbell, a human being, by choking her with his hands".

Murder is defined as "* * * the unlawful killing of a human being with malice aforethought". The word "unlawful" as used in this definition means "* * * without legal justification or excuse". Par. 148a, MCM, 1928. Malice aforethought has been authoritatively defined as a technical term,

"* * * including not only anger, hatred, and revenge, but every other unlawful and unjustifiable motive. It is not confined to ill-will towards one or more individual persons, but is intended to denote an action flowing from any wicked and corrupt motive, a thing done malo animo, where the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty, and fatally bent on mischief. And therefore malice is implied from any deliberate or cruel act against another, however sudden". Commonwealth v. Webster, 5 Cush 296; 52 Am. Dec. 711.

The Manual for Courts-Martial similarly defines malice aforethought. Par. 148a, MCM, 1928.

The words "deliberately" and "with premeditation" have been held to mean "* * * an intent to kill, simply, executed in furtherance of a formed design to gratify a feeling for revenge, or for the accomplishment of some unlawful act". Wharton's Criminal Law, vol. 1, sec. 420.

The evidence against the accused must be examined in the light of the above concepts. It clearly shows that on the evening preceding the accused's fatal act he quarreled with his wife over her desire to go to a picture show. As a result of this quarrel she threatened to get drunk and he warned her against doing so. During the course of his evening's duty he talked of the quarrel with her and stated that, if he found her drunk when he came home, there would be trouble. Thereafter, when he returned to his room and found that she had been drinking and was quarrelsome, he deliberately choked her. When she called for help, he interrupted his brutal act and permitted her to smoke a cigarette. Thereafter, following his wife's threat to leave him, he choked her to death. The studied and protracted violence of the accused, particularly in the light of the time interval between the periods in which he choked his wife, show that he killed her with malice aforethought, deliberately, and with premeditation. The evidence establishes beyond a reasonable doubt every element of the crime charged.

5. As previously stated, at the beginning of the trial evidence was presented both by the prosecution and the defense concerning the accused's mental accountability. After both sides had rested on this issue, the court ruled that the accused was mentally accountable for the crime charged.

Major Paul Rosenfels, Assistant Chief of the Neuropsychiatric Section at LaGarde General Hospital, New Orleans, Louisiana, had served as one of three psychiatrists on a board of medical officers which had examined the accused for approximately eight days at the LaGarde General Hospital. This board had concluded that, although the accused was suffering from a state of psychopathic personality, severe, he was, both at the time of the examination and at the time of the offense alleged, so far free from mental disease as to be able both to distinguish right from wrong and to adhere to the right and refrain from the wrong. The board also concluded that the accused was able to cooperate in his own defense. The accused had been subjected to the Electroencephalogram test, the Army Wechsler test, the Shipley-Hartford Retreat test, the Halstead Category test, the Vigotsky test, and the Selected Army Handbook test, in an effort to determine if he was suffering from any organic brain disease. None of the tests employed revealed any signs of mental deterioration of an organic type although the reactions of the accused were those of an emotionally disturbed individual. Major Rosenfels was of the opinion that the accused was suffering from an impelling emotional disturbance, symptoms of which were the accused's history of nomadism, his neurotic marriage, his seclusiveness, his indifference, and his Schizoid personality. Major Rosenfels was also of the opinion that the offense in question "was a symptom in the course of the accused's mental illness". Although believing that the accused was suffering from mental illness, Major Rosenfels was nevertheless of the opinion that the illness was not so severe as to deprive the accused of his power to distinguish right from wrong and to adhere to the right (R. 4-18).

Captain Hyman H. Fingert, Chief of the Neuropsychiatric Section, Army Air Forces Regional Hospital, Hunter Field, Georgia, testified that he had examined the accused during the period from 10 March to 13 March 1945 and had diagnosed him as a constitutional psychopath with emotional instability and anti-social trends. Although the accused's judgment was impaired as a result of strong emotional difficulties, he was, both at the time of the examination and at the time of the alleged crime, able both to distinguish right from wrong and to adhere to the right and refrain from the wrong. In Captain Fingert's opinion strong feelings are not abnormal, and an individual can adhere to the right even when suffering from deep emotion (R. 18-21).

Captain Joe E. Freed, Neuropsychiatrist, attached to the Army Air Forces Regional Hospital at Hunter Field, had observed the accused from 8 March to 15 March 1945. While diagnosing the accused as being in a constitutional psychopathic state with emotional instability and anti-social trends, Captain Freed concluded that the accused was not psychotic either at the time of the examination or at the time of the alleged offense and was at those times able to distinguish right from wrong and to adhere to the right. Captain Freed also testified that the accused was able to cooperate in his own defense (R. 22-23).

The defense introduced as witnesses two soldiers who had served with the accused in Iceland. They testified that the isolation of their assignment and the lack of adequate recreational facilities caused many members of their organization to acquire a marked nervousness. They described the accused, however, as rendering faithful service while there and as never having been seen in a drunken condition (R. 24, 28). The defense also presented as its witness Major Herbert Harmes, a psychiatrist stationed at MacDill Field, Florida, who had examined the accused for one hour on the day before the trial. On the basis of this examination and a study of the accused's medical record, Major Harmes had concluded that the accused was mentally ill, was a constitutional psychopath, and was, on 8 March 1945, suffering from such intense emotional disturbance as not to be able at that time to distinguish right from wrong or to adhere to the right. Major Harmes considered the accused so unstable as not to be able to withstand the external stimuli caused by his wife's continual goading and to resist the urge to commit the crime charged. When asked particularly if the accused could refrain from the wrong, this witness stated that, "The fact remains that he did not and I assume he was not able to do so" (R. 29-31).

The above testimony shows that, although the accused was not entirely free from mental illness and emotional disturbance, he was sufficiently able, concerning the offense charged, both to distinguish right from wrong and to adhere to the right. The evidence beyond a reasonable doubt sustains the court's ruling that the accused was mentally accountable for the crime charged.

6. The charge sheet shows that the accused is approximately 25 years of age, that he enlisted in the Army on 8 August 1940, and that he has had no prior service.

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

Abner E. Lipscomb, Judge Advocate.

Felix Cannon, Judge Advocate.

Samuel Morgan, Judge Advocate.

(234)

WAR DEPARTMENT
IN THE OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON 25, D. C.

Board of Review

CM 280581

UNITED STATES

v.

Private CHARLES V. CAMPBELL
(13009758), Squadron V,
302nd Army Air Forces Base
Unit (SW), Third Air Force
Staging Wing.

THIRD AIR FORCE

Trial by G.C.M., convened at
Hunter Field, Georgia, 18
April 1945. Dishonorable
discharge and confinement
for life. Penitentiary.

HOLDING by the BOARD OF REVIEW
LIPSCOMB, O'CONNOR and MORGAN, Judge Advocates

The record of trial in the case of the soldier named above has
been examined and is held by the Board of Review to be legally sufficient
to support the sentence .

Abner E. Lipscomb, Judge Advocate.
Robert J. O'Connor, Judge Advocate.
Samuel Morgan, Judge Advocate.

1st Indorsement

War Department, J.A.G.O.
Third Air Force, Tampa, Florida.

105 To the Commanding General,

1. In the case of Private Charles V. Campbell (13009758), Squadron V,
302nd Army Air Forces Base Unit (SW), Third Air Force Staging Wing,

attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50%, you now 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 280581).

MYRON C. CRAMER
Major General
The Judge Advocate General.

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

(237)

SPJGK - CM 280587

25 MAY 1945

UNITED STATES)

v.)

First Lieutenant JOHN L.
SWAN (O-819207), Air Corps.)

ARMY AIR FORCES
CENTRAL FLYING TRAINING COMMAND

Trial by G.C.M., convened at
Waco Army Air Field, Waco, Texas,
24 April 1945. 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 I: Violation of the 96th Article of War.

Specification 1: In that First Lieutenant John L. Swan, Air Corps, was at Waco Army Air Field, Waco, Texas, on or about 29 March 1945, drunk in station.

Specification 2: In that First Lieutenant John L. Swan, Air Corps, did, at Waco Army Air Field, Waco, Texas, on or about 29 March 1945, with intent to deceive First Lieutenant John H. Lindsay, Air Corps, then Second Lieutenant, the Officer of the Day, officially state to the said Lieutenant Lindsay that he, First Lieutenant John L. Swan, was the Junior Officer of the Day, or words to that effect, which statement was known by the said Lieutenant Swan to be untrue.

CHARGE II and its Specification: (Nolle Prosequi entered by direction of the appointing authority).

He pleaded guilty to and was found guilty of the Charge and its Specifications. Evidence of one previous conviction by general court-martial on 13 January 1945 of being drunk and disorderly on 25 December 1944 in a public place in violation of Article of War 96 and of being sentenced therefor to forfeit \$75 of his pay per month for six months was introduced. In the present case he was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence.

a. For the prosecution.

On the date of the offenses alleged and at the time of trial accused was in the military service of the United States and a person subject to military law (R. 10).

Private Mary S. Weller was on duty as Charge of Quarters of the orderly room of Squadron D, WAC Detachment, Waco Army Air Field from 1700 on 28 March 1945 until 0730 29 March 1945 (R. 14,15). About midnight on 28 March she and Private Grace Grady retired for the night, occupying a room together near the orderly room (R. 16). Private Weller stated that she was awakened by the front door slamming about 3 a.m. She got up to investigate the noise. She stated,

"* * * When I jumped up I was met at the door of our bed room by two officers. They said they were the Junior OD and Senior OD of C.I.S., and that we had called them about a disturbance. I told them that I was in charge of quarters and I hadn't called them. They kept insisting that I did. So I took them down to the barracks where the First Sergeant sleeps and called her out and asked her did she call them. She said she didn't. I went back up and called the OD of the field and he sent an MP out there. While I was talking to the MP one of the officers came back around" (R. 16).

She testified that accused was the officer that had come back (R. 16). Accused stated in his conversations with her, as he did to the military policeman and the Officer of the Day after their arrival, that he was the Junior Officer of the Day of Instructors School, Central (hereinafter referred to as "OD" and "C.I.S.") (R. 17,21). She further stated that Lieutenant Lindsay, the Officer of the Day, without difficulty, took from the accused a whiskey bottle with liquid in it (R. 18). She stated that accused used no abusive or insulting language and made no indecent advances towards her (R. 19,20). When asked, upon cross-examination, if he attempted to exercise any authority as Junior OD, she stated, "No, sir. He just kept insisting that we had called him and I knew we hadn't" (R. 20). It was her opinion that the accused was under the influence of liquor (R. 18).

First Sergeant Lillian P. Heidlebaugh, Squadron D, Waco Army Air Field, was awakened in the early morning hours of 29 March 1945 by loud talking on the part of two men near her barracks (R. 22,23). She advised them that the area was restricted. They replied that they were going to the hospital. When they moved on, she went back to sleep. Later that morning she was awakened by Private Grady with a report that two officers were in front of the orderly room. She proceeded outside to find accused and another officer, both of whom she identified as the persons ordered away from her barracks earlier (R. 23,24,28). She said that they maintained they had come in answer to a call to the OD to check the fact that two officers were hanging around the WAC barracks. They asked her for her name and serial

number and started to write it down. She became angry and told them to leave, stating that she would have given them all the necessary information the next morning (R. 24, 25). The other officer with the accused did most of the talking (R. 25). Accused had been drinking, she said, and seemed to enjoy the whole affair (R. 26,27). The other officer claimed to be the Officer of the Day and said that accused was the Junior Officer of the Day. She stated that accused did not deny such designation (R. 27).

Sergeant James L. Boyd, Sergeant of the Guard at Waco Army Air Field, went to the WAC orderly room during the early morning hours of 29 March 1945 (R. 29). Upon arrival he found two WAC's standing in the doorway of their orderly room. He said an officer, whom he identified as accused, came from the rear of the orderly room (R. 30,31). The officer asked him to assist in a search of the rear of the premises (R. 31). Some 5 or 10 minutes later Lieutenant Lindsay, the Officer of the Day, arrived and asked accused what he was doing. Accused replied that he was the "J.O.D. from C.I.S., headquarters, Waco Army Air Field", whereupon Lieutenant Lindsay told the sergeant to escort accused to the guardhouse (R. 32). While in the WAC area Lieutenant Lindsay took a half-filled bottle of whiskey from accused (R. 34,35). He expressed the opinion that accused was drunk (R. 33).

First Lieutenant John H. Lindsay of Waco Army Air Field was a Second Lieutenant on 29 March 1945, serving as Officer of the Day. In response to a call he proceeded to a point in front of the orderly room of the WAC Detachment at that station about 0310 where he saw accused with Sergeant Boyd (R. 37,38). Inquiring of accused his purpose in being there, accused stated that he was the Senior Officer of the Day on an investigation, that his office had been called by the WAC Detachment about a disturbance (R. 38). Lieutenant Lindsay then advised accused that he was the OD of the field and that any disturbance report would be made either to him or to the guardhouse. Accused replied, "Well, then I must be the Junior OD" (R. 38). They then went inside where accused sat on a desk and started again to explain that he was the Junior OD (R. 39). About this time Lieutenant Lindsay said he noticed a quart bottle of whiskey in accused's pocket. He took it from accused and instructed Sergeant Boyd to escort accused to the guardhouse (R. 39). After going to the C.I.S. he found the OD who accompanied him to the guardhouse to interview the accused. It was then established that the accused was neither the Senior OD nor the Junior OD for C.I.S. Accused was under the influence of intoxicating liquor according to the witness, but in the opinion of witness accused knew what he was doing and saying (R. 40). Lieutenant Lindsay stated that on 28-29 March 1945 there was only one Officer of the Day at Waco Army Air Field and that he served in such official capacity (R. 42).

On 28 and 29 March 1945 Second Lieutenant Vincent Berardi was Junior Officer of the Day of the Trainees Squadron, C.I.S., while First Lieutenant Franklin Eason was Senior Officer of the Day (R. 43; Pros. Ex. 4).

b. For the defense.

After an explanation of his rights as a witness, accused made the following unsworn statement in extenuation of the offenses charged (R. 44):

"Gentlemen, I have elected to make an unsworn statement of the facts which are no excuse, but I will make it so as to bring out any circumstances that might be construed as extenuating. On the night in question I was more or less worried over financial difficulties and difficulties that came up between my wife, my child and I, and I was drinking over in the Stag Officers Quarters with some friends of mine. That is over in the Trainees area. We drank several bottles of beer and some one proposed that we go to town. We went into town to one of the local night spots in the outskirts of town, and I met some one there that I knew who had whiskey, and we had several drinks and we stayed until it closed, and some friends brought us out to the field and let us out in front of the gymnasium. I had with me at the time an open bottle of whiskey and we had several drinks and we decided that neither of us was ready to go to bed, so we sort of set out on adventure, and we were wandering around and we were headed over toward the hospital and we walked through the WAC area, and someone hollered out of the window, and she said we were in a restricted area, and we told them we were going to the hospital, and the idea suggested itself that we start a search with ourselves in the searching party. So we went over to the WAC orderly room, and got the CQ and whoever else it was in there. I believe it was Private Grace Grady, or something like that, and told them that we had a call; that we were the Senior and the Junior OD, and that we had a call that there was a disturbance on the area, and we would like to search the area, and take any steps we could. They said there had been no call. And I guess that we insisted that there was, and they took us down to the barracks where the First Sergeant was, and called the First Sergeant out, and the First Sergeant said there hadn't been any call, and we stayed around there until she decided to go in and I was just - I don't know what happened to the other fellow. I don't know where he went, but I saw Sergeant Boyd standing out on the steps of the orderly room there. I don't know what prompted me to do it, but I went up there, and from there the case has been brought out to you, and I won't take up your time telling any more about it. I hope that the Court will agree with me that I am guilty of the act, but more of the act than the intent. And the only wish I have at this time is to take my punishment and return as soon as possible to some tactical outfit where I feel like I can be of the best service to my country and to myself." (R. 45-46)

4. By his plea of guilty accused admitted that he was drunk at Waco Army Air Field, his station, on or about 29 March 1945, and that on or about the same date with intent to deceive the Officer of the Day he officially stated to that officer that he, accused, was the Junior Officer of the Day, "or words to that effect," which statement was known by accused to be untrue. The testimony fully establishes accused's drunken condition, and further shows that he made the false official statement substantially as charged.

It appears from the record that accused, a young married aviator, with an outstanding combat record, in a spell of despondency over financial and domestic difficulties, overindulged in intoxicating liquors, with the normal and logical result that he became drunk. This over-indulgence, without rendering him unaware of what he was doing, created a spirit of adventure which eventuated in a decision by him and his companion, as they were walking through the WAC Area, to "start a search" with themselves "in the searching party." The episode, out of which the present charges sprang, resulted from this unfortunate decision. Neither accused nor his companion sought to exercise any authority, nor was the conduct of either toward any member of the Women's Army Corps in the slightest degree improper or questionable. Accused was undoubtedly drunk, and any doubt of his intent to deceive the regularly appointed Officer of the Day by his statement to that officer substantially to the effect that he, accused, was the Junior Officer of the Day, is removed by accused's plea of guilty, which admitted all of the allegations contained in the Specifications, and by his unsworn statement. Thus, regardless of the fact that the whole affair apparently started out as an unwise but harmless drunken prank, accused was properly found guilty of the offenses with which he was charged.

It is elementary, of course, that being drunk in station, and making a false official statement to an officer are offenses under Article of War, 96 (MCM, 1928, par. 152a, page 187).

5. Attached to the record of trial is a plea for clemency, filed by defense counsel. In requesting mitigation of the sentence, defense counsel emphasized accused's combat record, his lack of criminal or unworthy intent in the commission of the offenses of which he pleaded guilty, and his mental turmoil over financial and domestic affairs.

6. War Department records show that accused is 22 years and 10 months of age, married and has one child. He attended high school for three years and was employed in an airplane factory during the summer of 1942. He entered the military service 22 October 1942 as an enlisted man, later transferred to the aviation cadet program, completed his pilot training, and was commissioned a second lieutenant on 5 December 1943. In April 1944, he was transferred to the European Theater of Operations and served in combat until August 1944. Upon his return to the United States he was assigned to the

(242)

Eastern Flying Training Command, from which he was later transferred to the Instructors School, Central. At the time of his trial he was an instructor trainee with a total of 756 flying hours, of which 250 were combat flying time. He holds the Distinguished Flying Cross, the Air Medal with three Oak Leaf Clusters, and the EAME Theater Ribbon with two stars. He was promoted to first lieutenant 10 July 1944.

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 96.

Wm. E. Zou, Judge Advocate
Charles Stephen, Judge Advocate
William Wayne, Judge Advocate

SPJGK - CM 280587

1st Ind.

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

TO: The Secretary of War

1. Pursuant to Executive Order No. 9566, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant John L. Swan (O-819207), Air Corps.

2. Upon trial by general court-martial this officer pleaded guilty to, and was found guilty of, being drunk in station at Waco, Texas, on or about 29 March 1945 (Specification 1 of Charge I), and of making on the same date a false official statement to the Officer of the Day that he, accused, was the Junior Officer of the Day (Specification 2 of Charge I), both in violation of Article of War 96. Evidence was introduced of one previous conviction by a general court-martial on 13 January 1945 of being drunk and disorderly in a public place on 25 December 1944, for which offense he was sentenced to forfeit \$75 of his pay per month for six months. In the present case 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. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence.

As a result of despondency over financial and domestic difficulties, accused, a young married aviator, with an outstanding combat record, became drunk, and, while passing by the quarters, occupied by a detachment of the Women's Army Corps with another officer decided, as he expressed it, in a spirit of adventure to "start a search with ourselves in the searching parties." After arousing the charge of quarters they announced to her that they were the Senior and Junior Officers of the Day and repeated this statement to other members of the detachment who were awakened and to the Sergeant of the Guard and the Senior Officer of the Day, who were summoned by telephone. Accused made no effort to exercise any authority or to force his way into the quarters, nor was his conduct towards any member of the Women's Army Corps in any way questionable or improper.

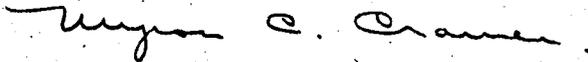
Accused served overseas from April to August 1944 with 250 combat flying hours to his credit. He was awarded the Distinguished Flying Cross for extraordinary achievement while serving as a co-pilot "on a number of bombardments over Germany and Germany-occupied countries," and the Air Medal

(244)

with three Oak Leaf Clusters. He is also entitled to wear the EAME Theater Ribbon with two stars. While accused's conduct was inexcusable, his actions appear not to have been maliciously or criminally conceived, but were apparently the result solely of over-indulgence in intoxicants. In view of this fact and his impressive combat record, despite his prior conviction for drunkenness and disorderly conduct on Christmas 1944, I recommend that the sentence be confirmed but commuted to forfeiture of \$75.00 of his pay per month for six months, and that the sentence as thus modified be carried into execution.

4. Consideration has been given to a plea for clemency filed by defense counsel and attached to the record of trial.

5. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.



2 Incls

1. Record of trial
2. Form of action

MYRON C. GRAMER
Major General
The Judge Advocate General

(Sentence confirmed but commuted to forfeiture of \$75. pay per month for six months. *s modified ordered executed. GCMO 253, 19 June 1945).

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

SPJGN-CM 280595

UNITED STATES

v.

Second Lieutenant GEORGE O.
GILBERT (O-751304), Air
Corps.

ARMY AIR FORCES WESTERN
FLYING TRAINING COMMAND

Trial by G.C.M., convened at
Pecos Army Air Field, Pecos,
Texas, 1 May 1945. Dismissal
and total forfeitures.

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

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

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

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

Specification 1: In that Second Lieutenant George O. Gilbert, 3027th Army Air Forces Base Unit, Pecos Army Air Field, Pecos, Texas, did at Pecos Army Air Field, Pecos, Texas, on or about 31 March 1944, present for approval and payment, a claim against the United States, by presenting to Captain James W. Perry, Finance Officer at Pecos Army Air Field, an officer of the United States duly authorized to approve and pay such claims, a certain Pay and Allowance Account, War Department Form Number 336, dated said date, in the amount of \$179.20, for services alleged to have been rendered to the United States by him, which claim was false and fraudulent, and then known by him, the said Second Lieutenant George O. Gilbert, to be false and fraudulent in that he then had outstanding two (2) Class "E" Allotments in the sum of \$100.00

per month each, payable for his account to the National Bank of Fort Sam Houston, San Antonio, Texas, and the Valley National Bank, Phoenix, Arizona, respectively, and said Pay and Allowance Account listed only one (1) such Allotment in the sum of \$100.00.

Specification 2: Similar to Specification 1 except date of presentation of claim is 30 April 1944 and amount of claim \$178.50.

Specification 3: Similar to Specification 1 except date of presentation of claim is 31 May 1944.

Specification 4: Similar to Specification 1 except date of presentation of claim is 30 June 1944 and amount of claim is \$178.50.

Specification 5: Similar to Specification 1 except date of presentation of claim is 31 July 1944.

Specification 6: Similar to Specification 1 except date of presentation of claim is 31 August 1944.

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

Specification 1: In that Second Lieutenant George O. Gilbert, 3027th Army Air Forces Base Unit, Pecos Army Air Field, Pecos, Texas, did at Pecos Army Air Field, Pecos, Texas, on or about 1 October 1944 with intent to deceive Captain James W. Perry, officially state to the said Captain James W. Perry, that he, the said Second Lieutenant George O. Gilbert had contacted the Valley National Bank, Phoenix, Arizona, and it appeared that \$1300.00 was on deposit in his favor with said bank, which statement was known by the said Second Lieutenant George O. Gilbert to be untrue, in that he had not been so advised by said bank, and to his own knowledge he did not have this sum on deposit in his favor with said bank.

Specification 2: (Finding of not guilty).

The accused pleaded not guilty to all Charges and Specifications and was found guilty of all Charges and Specifications except Specification 2, Charge II, of which he was found not guilty. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution: By an "Authorization for Allotment

of Pay" dated at Luke Field, Arizona, 29 July 1943, accused made a Class E allotment of \$100 per month of his pay to the Valley National Bank, Phoenix, Arizona, for an indefinite period commencing 1 August 1943 (R. 12, 23-24; Pros. Exs. 1, 4). Pursuant to this authority, the Office of Dependency Benefits paid the allotted sum to the bank from 1 August 1943 through 31 October 1944, when the allotment was discontinued (R. 14, 24-27; Pros. Exs. 1, 3, 4). By a second "Authorization for Allotment of Pay" dated at Randolph Field, Texas, 13 October 1943, accused made another Class E allotment of \$100 of his pay per month to the National Bank of Fort Sam Houston, San Antonio, Texas, for an indefinite period commencing 1 November 1943 (R. 27; Pros. Exs. 1, 6). This allotment was paid from 1 November 1943 through 30 September 1944 (R. 27-28; Pros. Exs. 1, 3, 7).

About 25 March 1944 accused was transferred from Luke Field, Arizona, to Pecos Army Air Field, Pecos, Texas. Upon arrival there he was requested by the Finance Office to furnish information concerning his pay status. He complied with the request but reported only one Class E allotment of \$100 in enumerating his deductions. The data was entered upon a "check-in" sheet, which accused signed, and was then transferred to a "Pay Card" (WDFD Form No. 3) from which his monthly pay and allowance vouchers were made up (R. 19, 32-34, 49-50; Pros. Exs. 15, 16). Vouchers for the months of March, April, May, June, July, and August 1944, dated the last day of each month, and showing credits of either \$178.50 or \$179.20 and a Class E allotment of \$100, were prepared for accused by the Finance Office. He signed all of the vouchers and presented them for payment to Captain James W. Perry, Finance Officer at the Field (R. 15-21, 28-32, 63-64; Pros. Exs. 8-14).

Following receipt of a letter concerning accused's allotments from the Office of Dependency Benefits in early September, 1944, Captain Perry made an audit of accused's account and discovered that accused had reported only one of his two \$100 Class E allotments (R. 42-45). Upon being questioned by Captain Perry the accused evinced great surprise and said that he thought the allotment to the Valley National Bank had long since been cancelled. Captain Perry suggested that, if accused got in touch with the bank, he would find all of the back payments accumulated to his credit. The accused replied that he would investigate immediately. When Captain Perry saw accused again about 17 September 1944, accused stated that he had talked to the bank and had been advised that \$1300 was deposited in his account (R. 46-47). In actual fact accused's balance in the Valley National Bank was under \$100 during the month of September, 1944. His bank statement disclosed that, commencing with September, 1943, a \$100 deposit was made to his account shortly after the first of each month which was usually drawn down to a small balance by the end of the month (R. 65-67; Pros. Exs. 18, 19).

Captain Perry asked accused to execute a draft for the \$1300 and repay the government but accused said he would go to the bank over

the week end and settle the matter the following Monday. He did not appear at the Finance Office on Monday and, when Captain Perry sought him out, he made further promises which he also did not keep (R. 47-49). Sometime in November the entire indebtedness of accused to the government was paid off, accused's family contributing \$1521 of the total amount (R. 62). This amount covered transactions other than those charged.

After being warned of his rights by the investigating officer on 17 March 1945, accused made a statement concerning the charges (R. 69; Pros. Ex. 20). He asserted that he was commissioned at Luke Field on 28 July 1943 and was assigned to duty at Randolph Field. He was hospitalized because of spinal trouble, suffered severe headaches, and was taken off flying duty. He had previously made a \$100 allotment to the Valley National Bank at Phoenix, Arizona, to repay a loan and, in November 1943, made a similar allotment to the National Bank of Fort Sam Houston to repay a loan which he had contracted to defray the expenses of a trip home. He wrote the Valley National Bank on his return asking if he could repay the loan without putting the allotment into effect and "[it] was at this time that [he] first found that the allotment was being paid but not being deducted from [his] pay". Since he momentarily expected to be returned to a flying status, which would have given him funds to pay the government, he did nothing further (R. 71; Pros. Ex. 21).

According to him, it was the practice at Randolph Field to have officers sign their pay vouchers in blank, the figures being later filled in by the finance officer. When he received "full pay" in November, 1943, he told "the sergeant handling the vouchers" about it but nothing was done. Accused reported the matter on subsequent occasions also but "the allotment" was never deducted while he was at Randolph Field. In February, 1944, he learned that he was disqualified from further flying duty. This unwelcome change in his status caused him to drink heavily and to spend "the money provided at both banks by the allotments even though [he] realized it was not rightfully [his]". Upon reporting at Pecos Army Air Field in March, 1944, he mentioned one allotment for \$100 but concealed the other "hoping all the while that [he] would be placed back on flying in order that [he] could pay this debt to the government". When Captain Perry informed him of his indebtedness to the government on 1 September 1944, he became frightened and stated that he believed the money was on deposit in the Phoenix bank "although [he] knew that [he] had used this money". His family came to his rescue in December, and the indebtedness was discharged (R. 71; Pros. Ex. 21).

4. Evidence for the defense: Accused, cognizant of his rights as a witness, testified concerning his past life and concerning Specification 2, Charge II, of which he was acquitted. By ruling of the law member cross-examination was limited to these two subjects (R. 76, 85-86).

Accused stated that he was 27 years old, a native of New England,

and a high school graduate. He was always active in sports, was on the ski and hockey teams in high school, and later taught swimming. He was prominent in Boy Scout work and was a long-time member of The Young Men's Christian Association (R. 77-78). He had never been in trouble previously. When he entered the Army, in 1940, he was assigned to a medical detachment and subsequently did recruiting and induction work. In 1942 he commenced training as an aviation cadet and received his commission in 1943 (R. 79-80). His left leg began to bother him and he spent considerable time in hospitals where punctures and injections were made in his spinal column in an attempt to remedy the condition. The injections caused severe headaches which still occurred occasionally (R. 80-82).

The good reputation of accused for "truth, veracity and honesty" in his home community was shown by the stipulated testimony of W. Wendall Budrow, Advertising Manager, The Berkshire Evening Eagle; Elliott M. Preble, General Secretary, Young Men's Christian Association; and John L. Sullivan, Chief of Police; all of Pittsfield, Massachusetts (R. 71-72).

5a. Specifications 1 to 6, Charge I allege that on the last day of each of the months of March, April, May, June, July, and August, 1944, accused presented a false claim against the United States, by presenting to Captain James W. Perry, Finance Officer at Pecos Army Air Field, an officer of the United States authorized to pay claims, Pay and Allowance Accounts for the respective months, which accused knew to be false in that only one Class E allotment for \$100 was listed although two such allotments were outstanding. The offenses were laid under the 94th Article of War.

It was shown that, when accused was transferred to Pecos Army Air Field on 25 March 1944, the Finance Office requested that he furnish data concerning his pay account and that he reported having only one \$100 Class E allotment when in fact he had two such allotments. He was certainly aware that both allotments were in existence at the time, for he had not taken any steps to discontinue the allotments after initiating them several months earlier and he had been enjoying the proceeds which were paid to his bank accounts. He admitted in a statement given to the investigating officer that his failure to mention one of the allotments was intentional and not a mere oversight on his part. This false information was reflected in accused's pay vouchers for March, 1944, and the succeeding five months. Although the vouchers were made out by the Finance Office and not by accused personally, he signed each of them after they were completed and presented them for payment to Captain James W. Perry, the Finance Officer at the Field. The evidence is, therefore, beyond dispute that accused knowingly presented false claims against the government as alleged in the Specifications.

He asserted that at the time he failed to report the second allotment he was not on a flying status but expected momentarily to be restored thereto and thus to obtain sufficient funds to repay the government. It is, however, immaterial that he may have expected to repay the government.

It is likewise immaterial that accused did eventually repay the government all of the money which he had illegally obtained and that the government ultimately suffered no financial loss. The fact remains that accused presented false claims against the government knowing that they were false and he is therefore guilty of a violation of Article of War 94. MCM, 1928, pars. 150a, b. The present offense was denounced in the same language under the old 60th Article of War, concerning which Winthrop stated:

"It is not the object or purpose of the party in transaction, but his knowledge that the claim is false or fraudulent which is made by the Article the gist of the offense. If he knew, or the circumstances of the case were such as properly to charge him with the knowledge, that the claim was a fictitious or dishonest one when made or presented, &c., he is amenable to trial under this part of the Article; otherwise not. * * *. Winthrop, Military Law and Precedents, 2nd ed., rev., p. 701.

b. Specification 1, Charge II, alleges that, with intent to deceive, accused officially stated to Captain James W. Perry that accused had contacted the Valley National Bank, Phoenix, Arizona, and it appeared that he had \$1300 on deposit there, which statement was known by accused to be untrue in that he had not been so advised by the bank and to his own knowledge he did not have this sum on deposit. The offense was charged under the 96th Article of War.

When the fact that accused had an unreported allotment came to the attention of Captain Perry, he discussed it with accused who feigned great astonishment and asserted that he thought his allotment to the Valley National Bank of Phoenix, Arizona, had been cancelled some time before. As a matter of fact this allotment was being credited to his checking account monthly and he was constantly drawing on it, the account being under \$100 at that time. Captain Perry, however, was impressed by accused's assertions and suggested that the allotment payments were undoubtedly being accumulated to accused's credit at the bank. Accused said he would investigate and a few days later he reported back to Captain Perry that the bank had advised him that \$1300 was deposited in his account. This statement was a sheer fabrication intended by accused to deceive Captain Perry and thus temporarily to avert any disciplinary action from being taken. Since Captain Perry was acting in his official capacity as Finance Officer at Pecos Army Air Field, accused is guilty of making a false official statement as charged, in violation of Article of War 96.

6. The accused is unmarried and about 27 years and 2 months old having been born 16 April 1918. War Department records show that he is a native of Pittsfield, Massachusetts, where he finished high school in 1936. From that time until 1940 he was employed as a swimming

instructor. He entered the Army 3 October 1940 and, after serving in a medical detachment and a recruiting and induction unit, commenced training as an aviation cadet on 3 November 1942. He was commissioned a temporary second lieutenant, Army of the United States, on 28 July 1943, entering upon active duty on that date.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 94th or 96th Articles of War.

Abner E. Lipscomb, Judge Advocate.

Robert J. Connor, Judge Advocate.

Samuel Morgan, Judge Advocate.

SPJGN-CM 280595
Hq ASF, JAGO, Washington, D. C.
TO: The Secretary of War

1st Ind

JUN 29 1945

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant George O. Gilbert (O-751304), Air Corps.

2. Upon trial by general court-martial this officer pleaded not guilty to, and was found guilty of, presenting false claims against the United States on six occasions, in violation of Article of War 94; and of making a false official statement, in violation of Article of War 96. 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. A summary of the evidence may be found in the accompanying opinion of the Board of Review. 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.

When accused was transferred to Pecos Army Air Field, Pecos, Texas, about 25 March 1944, he was requested to furnish the Post Finance Office with information concerning his pay status. In supplying this data accused intentionally omitted mention of one of his two \$100 Class E allotments. The Finance Office prepared his pay and allowance vouchers for March, 1944, and the succeeding five months on the basis of the false information. He signed all of the vouchers, presented them to the Finance Officer, and received payment. The omission was discovered in September, 1944, and when accused was interrogated he pretended that he thought the omitted allotment, which was payable to his account in a bank, had been discontinued some time previously. The Finance Officer suggested that under these circumstances accused would undoubtedly find the allotments accrued to his credit in the bank and accused promised to investigate. A few days later he reported to the Finance Officer that the bank had advised him that \$1300 was deposited to accused's account. Actually there was less than \$100 in the account at the time, as he had been drawing on the allotment each month as soon as it was deposited in his account. His obvious purpose in making the false statement was to delay the day of reckoning. Although charged with presenting false claims only at Pecos Army Air Field, the evidence discloses a similar practice at his former station. The amount illegally obtained was eventually repaid to the government.

I recommend that the sentence, although inadequate, be confirmed but that the forfeitures be remitted and that the sentence as thus modified be ordered executed.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.

2 Incls

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

Myron C. Cramer
 MYRON C. CRAMER
 Major General
 The Judge Advocate General

(Sentence confirmed but forfeitures remitted. GCMO 298, 7 July 1945).

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

SPJGH-CM 280627

14 JUN 1945

UNITED STATES

v.

Second Lieutenant EDWARD
F. TYREE (O-1305348),
Air Corps.

ARMY AIR FORCES
WESTERN FLYING TRAINING COMMAND

Trial by G.C.M., convened
at Kingman Army Air Field,
Kingman, Arizona, 1 and 2
May 1945. Dismissal, total
forfeitures and confinement
for ten (10) 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 Charges and Specifications:

CHARGE: Violation of the 61st Article of War.

Specification: In that Second Lieutenant Edward F. Tyree, Squadron I, 3018th Army Air Forces Base Unit, did, without proper leave, absent himself from his Command at Kingman Army Air Field, Arizona, from about 26 January 1945, to about 2 February 1945.

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

Specification: In that Second Lieutenant Edward F. Tyree, * * * , did, at Kingman Army Air Field, Kingman, Arizona, on or about 20 February 1945, desert the service of the United States and did remain absent in desertion until he was apprehended at Kingman, Arizona, on or about 28 March 1945.

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

Specification 1: (Finding of not guilty).

Specification 2: (Motion for finding of not guilty granted, R. 71).

(254)

Specification 3: In that Second Lieutenant Edward F. Tyree, * * *, did, at Kingman Army Air Field, Kingman, Arizona, on or about 23 January 1945, with intent to defraud, wrongfully and unlawfully make and utter to Officers' Mess, a certain check in words and figures as follows:

SANTA ANA BRANCH

BANK OF AMERICA

No. 11

Santa Ana, Calif., 23 Jan 19 44

Pay To The
Order of _____ Cash _____ \$10.00
Ten and No/100 _____ Dollars

/s/ Edward F. Tyree
O-1305348 KAAF

and by means thereof, did fraudulently obtain from said Officers' Mess, the sum of Ten (\$10.00) Dollars, lawful money of the United States, he the said Second Lieutenant Edward F. Tyree, then well knowing that he did not have and not intending that he should have sufficient funds in the Bank of America of Santa Ana, California, for the payment of said check.

Specification 4: Same allegations as Specification 3 except check was in the amount of \$100, was dated 4 February 1945 and was made and uttered to Michele at Yuma, Arizona.

Specification 5: Same allegations as Specification 3 except check in the amount of \$10 was dated 6 February 1945, drawn to order of cash on Valley National Bank, Kingman, Arizona, and uttered to Officers' Mess, Kingman Army Air Field.

Specification 6: Same allegations as Specification 3 except check in the amount of \$10 was dated 7 February 1945, drawn to order of cash on Valley National Bank, Kingman, Arizona, and uttered to Officers' Mess, Kingman Army Air Field.

Specification 7: Same allegations as Specification 3 except check in the amount of \$10 was dated 8 February 1945, drawn to order of cash on Valley National Bank, Kingman, Arizona, and uttered to Officers' Mess, Kingman Army Air Field.

Specification 8: Same allegations as Specification 3 except check was in the amount of \$50, dated 8 February 1945, drawn to order of cash on Valley National Bank, Kingman, Arizona, and uttered to First Lieutenant Howell L. Broxton.

Specification 9: Same allegations as Specification 3 except check in the amount of \$10 was dated 9 February 1945, drawn to the order of cash on Valley National Bank, Kingman, Arizona, and uttered to Officers' Mess, Kingman Army Air Field.

Specification 10: Same allegations as Specification 3 except check was in the amount of \$125, dated 9 February 1945, drawn to the order of cash on Valley National Bank, Kingman, Arizona, and uttered to Second Lieutenant Harold C. Barnard.

Specification 11: (Finding of not guilty).

Specification 12: (Finding of not guilty).

Specification 13: (Finding of not guilty).

Specification 14: (Motion for finding of not guilty granted, R. 71).

Specification 15: (Motion for finding of not guilty granted, R. 71).

Specification 16: (Motion for finding of not guilty granted, R. 71).

Specification 17: Same allegations as Specification 3 except check was in amount of \$25, dated 13 February 1945, and made and uttered to Mission Flowers, Santa Ana, California.

Specification 18: Same allegations as Specification 3 except check in amount of \$10 was dated 18 February 1945, drawn to order of cash and uttered to The Biltmore Hotel, Los Angeles, California.

Specification 19: Same allegations as Specification 3 except check in amount of \$10 was dated 18 February 1945, drawn to order of cash and uttered to The Biltmore Hotel, Los Angeles, California.

Specification 20: Same allegations as Specification 3 except check was in the amount of \$14.50, dated 18 February 1945, drawn to the order of cash and uttered to The Biltmore Hotel, Los Angeles, California.

Specification 21: Same allegations as Specification 3 except check was in the amount of \$13.00, dated 19 February 1945, drawn to order of cash and uttered to The Biltmore Hotel, Los Angeles, California.

Specification 22: (Finding of not guilty).

Specification 23: Same allegations as Specification 3 except check in the amount of \$10 was dated 21 March 1945, drawn to order of cash on Broadway and Seventh Office, Bank Of America, Los Angeles, California, and uttered to Kingman Drive In Market.

Accused pleaded guilty to the Charge and its Specification and not guilty to both of the Additional Charges and Specifications thereunder. The defense's motion for findings of not guilty was granted as to Specifications 2, 14, 15 and 16 of Additional Charge II. Accused was found not guilty of Specifications 1, 11, 12, 13 and 22 of Additional Charge II, was found guilty of Specification 4 of Additional Charge II except the words "4 February 1945" and "the sum of One Hundred (\$100.00) Dollars", substituting therefor the words "24 February 1945" and "the sum of Twenty-nine and 70/100 (\$29.70) Dollars", was found guilty of Specification 17 of Additional Charge II except the words "the sum of Twenty-five (\$25.00) Dollars", substituting therefor "the sum of Nineteen (\$19.00) Dollars", was found guilty of Specification 20 except the words "the sum of Fourteen and 50/100 (\$14.50) Dollars", substituting therefor "the sum of Ten (\$10.00) Dollars", and was found guilty of all other Specifications and of all Charges. No evidence of any previous conviction was introduced. He was sentenced to dismissal, total forfeitures and confinement for 20 years. The reviewing authority approved only so much of the findings of guilty of Additional Charge I and its Specification as involves findings of guilty of absence without leave in violation of Article of War 61, approved only so much of the sentence as provides for dismissal, total forfeitures and confinement for 10 years, and forwarded the record of trial for action under Article of War 48.

3. The evidence introduced by the prosecution is hereinafter summarized under appropriate headings indicating the particular Charges and Specifications to which it is pertinent.

a. Charge and Specification:

On 26 January 1945 accused absented himself without leave and did not return to his station until 2 February 1945 (R. 19; Pros. Ex. 1).

b. Additional Charge I and Specification:

On 20 February 1945 accused again absented himself without leave and remained absent until apprehended in uniform by military authorities on 28 March 1945 (R. 19-21; Pros. Ex. 2).

c. Additional Charge II, Specifications 3-10 incl., 17-21 INCL. and 23:

(1) The following checks on all of which accused's name appears as maker were received in the ordinary course of business by the Officers' Club, Kingman Army Air Field, Kingman, Arizona, and after passing through customary banking channels each of these checks was returned unpaid by the drawee bank, viz (R. 40-51; Pros. Exs. 8-12 incl.):

<u>Spec.</u>	<u>Pros. Ex. No.</u>	<u>Date of Check</u>	<u>Amount</u>	<u>Payee</u>	<u>Drawee Bank</u>
3	8	23 Jan 44*	\$10	Cash	Santa Ana Branch, Bank of America
5	9	6 Feb 45	\$10	Cash	Valley National Bank, Kingman, Arizona

6	10	7 Feb 45	\$10	Cash	Valley National Bank, Kingman, Arizona
7	11	8 Feb 45	\$10	Cash	Valley National Bank, Kingman, Arizona
9	12	9 Feb 45	\$10	Cash	Valley National Bank, Kingman, Arizona

* Check misdated. Was actually given on 23 January 1945 (R. 41).

(2) The following checks on all of which accused's name appears as maker were received by the Biltmore Hotel, Los Angeles, California, after the individual presenting the checks had exhibited Army identification documents establishing himself to be accused, and in exchange therefor the hotel gave the following consideration (R. 64-67; Pros. Exs. 23-29):

<u>Spec. No.</u>	<u>Pros. Ex. No.</u>	<u>Date of Check</u>	<u>Amount</u>	<u>Payee</u>	<u>Consideration</u>	<u>Drawee Bank</u>
18	23	18 Feb 45	\$19	Cash	Cash	Santa Ana Branch Bank of America
19	24	18 Feb 45	\$10	Cash	Cash	Santa Ana Branch Bank of America
20	25	18 Feb 45	\$14.50*	Cash	Cash \$10 Room rent \$4.50	Santa Ana Branch Bank of America
21	26	19 Feb 45	\$13	Cash	Cash	Santa Ana Branch Bank of America

* By exceptions and substitutions court found accused guilty of fraudulently obtaining \$10 rather than \$14.50.

After these four checks had passed through ordinary banking channels they were returned to the Biltmore Hotel unpaid by the drawee bank (R. 66; Pros. 27).

(3) The following checks on all of which accused's name appears as maker were received by the following persons hereinafter listed under the heading "Holder" in exchange for the following consideration and after passing through usual banking channels each of these checks was returned to the holder unpaid by the drawee bank (R. 56, 60, 64; Pros. Exs. 17, 18, 22):

<u>Spec. No.</u>	<u>Pros. Ex. No.</u>	<u>Date of Check</u>	<u>Amount</u>	<u>Holder</u>	<u>Consideration</u>	<u>Drawee Bank</u>
8	18	8 Feb 45	\$50	1st Lt H L Broxton	\$50	Valley Natl Bank, Kingman, Ariz

(258)

17	22	13 Feb 45	\$25*	Mission Flower Shop	Cash \$19 Mdse \$6	Santa Ana Branch Bank of America
23	17	21 Mar 45	\$10	Kingman Drive In Market	\$10	Broadway & Seventh Office, Bank of America

* By exceptions and substitutions court found accused guilty of fraudulently obtaining \$19 rather than \$25.

(4) The following checks were made by accused and uttered by him to the following persons hereinafter listed under the heading "Holder" in exchange for the following consideration given to accused, and after passing through usual banking channels each of these checks was returned to the holder unpaid by the drawee bank (R. 61, 62, 64; Pros. Exs. 19, 21):

<u>Spec.</u>	<u>Pros. Ex. No.</u>	<u>Date of Check</u>	<u>Amount</u>	<u>Holder</u>	<u>Consideration</u>	<u>Drawee Bank</u>
4	21	24 Feb 45	\$100*	Michele	Cash \$29.70 Mdse \$70.30	Santa Ana Branch, Bank of America
10	19	9 Feb 45	\$125	2d Lt H 6 Barnard	Cash	Valley Natl Bank, Kingman, Ariz

* By exceptions and substitutions court found accused guilty of obtaining \$29.70 by check dated 24 February 1945.

(5) Each of the fourteen checks listed above was drawn on either the Santa Ana Branch, Bank of America, Santa Ana, California, or Valley National Bank, Kingman, Arizona, or Broadway & Seventh Office, Bank of America, Los Angeles, California. Those drawn on the Santa Ana Branch, Bank of America, were uttered on the following dates in the following amounts:

<u>Spec.</u>	<u>Date</u>	<u>Amount of Check</u>	<u>Accused Found Guilty of Obtaining Cash of</u>
3	23 Jan 45	\$10	\$10
18	18 Feb 45	\$10	\$10
19	18 Feb 45	\$10	\$10
20	18 Feb 45	\$14.50	\$10
21	19 Feb 45	\$13	\$13
17	13 Feb 45	\$25	\$19
4	24 Feb 45	\$100	\$29.70

(259)

From 2 January 1945 until 5 February 1945 accused's balance on deposit in the Santa Ana Branch bank, was less than \$8. On 5 February 1945 a deposit of \$125 was made to accused's account but subsequent withdrawals reduced his balance to \$21.67 on 10 February, to \$6.67 on 15 February 1945 and by 17 February 1945 the account was overdrawn and so remained for at least the rest of the month (R. 23; Pros. Ex. 4).

(6) Six of the checks here involved were drawn on the Valley National Bank, Kingman, Arizona, and were uttered on the following dates in the following amounts:

<u>Spec</u>	<u>Date</u>	<u>Amount of Check</u>
5	6 Feb 45	\$10
6	7 Feb 45	\$10
7	8 Feb 45	\$10
9	9 Feb 45	\$10
8	8 Feb 45	\$50
10	9 Feb 45	\$125

Accused had no bank account with the Valley National Bank, Kingman, Arizona, during the month of February 1945. On 7 February 1945 that branch did receive \$75 from accused but having no account in his name it forwarded the sum to its branch at Phoenix, Arizona. It was returned to the Kingman Branch by the Phoenix Branch on 19 February 1945 where it was held as an unidentified deposit (R. 27-30). In view of accused's defense the following facts should be noted with respect to accused's relations with the Phoenix Branch. The court acquitted accused of three Specifications involving the making and uttering of three checks of \$10 each, drawn on the Phoenix branch of Valley National Bank (Specs. 11, 12, 13). On 16 February 1945 accused had a balance of \$100 on deposit with the Phoenix Branch, the result of an initial deposit made that same day. His bank balance was reduced to \$16.70 by 19 February 1945, after two withdrawals totaling \$83.30 had been made, and remained at that figure for the rest of the month. On 9 March 1945 a deposit of \$100, on 6 April 1945 a deposit of \$75 and on 7 April 1945 a deposit of \$100 were made to accused's account in the Phoenix Branch (R. 24; Pros. Ex. 5).

(7) The remaining check here involved was in the amount of \$10 and drawn on the Broadway and Seventh Office, Bank of America, Los Angeles, California, under date of 21 March 1945 (Spec. 23). Accused had no account with the Broadway and Seventh Office of that bank during the months of February and March 1945 (R. 26; Pros. Ex. 6).

4. The defense introduced evidence to refute so much of the allegations of the Specification of Additional Charge I as charged accused

with intent to desert. Inasmuch as the reviewing authority approved only so much of the findings of guilty of this Specification and Charge as involves absence without leave in violation of Article of War 61, it is unnecessary to summarize at length that evidence.

After having been advised of his rights accused elected to testify under oath only with respect to Additional Charge I and its Specification. So far as is relevant here he testified that he completed eight grades of schooling and thereafter worked first with the Western Union Telegraph Company and later as a grocery clerk to support his widowed mother. He entered military service with the National Guard in grade of corporal in February 1941, serving until 19 October 1941 when he was given a discharge for dependency because of his widowed mother. Subsequently he was inducted and on 23 December 1942 was commissioned a second lieutenant after graduating from the Infantry Officers' Candidate School at Fort Benning, Georgia (R. 87-90. 95; Def. Ex. B).

With respect to the Charges involving worthless checks accused's wife testified that she made purchases at Michele's, a dress shop in Yuma, Arizona, and that accused gave a check for \$100 to pay for the items obtained (R. 80). Accused elected to make the following unsworn statement with respect to these checks. He stated that he opened an account with the Santa Ana Branch, Bank of America, in December 1944 and deposited \$125 in that account in February 1945, sending the deposit via Western Union from Kingman Army Air Field (R. 104, 105). He also stated that he sought to open an account with the Valley National Bank, Phoenix, Arizona, in December 1944 when he delivered \$75 to the branch bank at Kingman, Arizona, along with a deposit slip addressed to the Phoenix bank. That deposit was not credited until April 1945 (R. 104, 105). It was stipulated by the prosecution and the defense that on 9 December 1944 accused authorized an allotment of \$100 of his pay per month for an indefinite period commencing 1 January 1945, to be deposited to his credit in the Valley National Bank, Phoenix, Arizona (R. 73). Accused also stated that he never intended to draw checks on any bank except Santa Ana Branch, Bank of America or the Valley National Bank at Phoenix, Arizona, and that the checks drawn by him on the Los Angeles Branch of Bank of America and the Kingman branch of the Valley National Bank resulted from his use of blank checks on these banks without making appropriate alterations on them to identify specifically the intended drawee bank (R. 105).

5. a. Charge and Specification; Additional Charge I and Specification:

The evidence fully establishes accused's guilt of the absence without leave alleged in the Charge and Specification and demonstrates that his plea of guilty thereto was not improvidently entered. The evidence also establishes accused's unauthorized absence as alleged in the Additional Charge and Specification. Accordingly, the record of trial is legally sufficient to sustain the findings of guilty of these Specifications and Charges.

b. Additional Charge II, Specifications 3-10 incl., 17-21
incl., and 23:

Under this Charge and these fourteen Specifications it is alleged that accused fraudulently made and uttered fourteen checks without having or intending to have sufficient funds on deposit in the respective drawee banks to pay them. The evidence definitely establishes that accused made and uttered two of these checks (See par. 3c (4) above). The evidence also establishes that four of the checks (See par. 3c (2) above) which bore accused's name as maker were presented to the Biltmore Hotel, Los Angeles, California, by an individual who identified himself as accused through Army identification documents; and that eight of the checks (See pars. 3c (1), (3) above) bearing accused's name as maker were received in the ordinary course of business by certain persons. It was for the court to determine as a matter of fact whether or not any or all of these checks were made by the accused. In determining that fact it was appropriate for the court to compare the maker's signatures appearing on the two checks established to have been drawn by accused with the signatures appearing on the remaining twelve checks. It is implicit in the court's findings of guilty that it concluded all of these checks were made by accused. From our examination of these checks we are convinced that the court's conclusion was indeed warranted.

The next matter to be determined is whether or not the evidence establishes that accused made and uttered these checks fraudulently, i.e. without having or intending to have sufficient funds on deposit to pay them. Seven of these checks totaling \$182.50 in face amount were drawn on the Santa Ana Branch, Bank of America, over a period from 23 January 1945 to 24 February 1945 and while either the balance on deposit in his account was insufficient to pay any one of them or the account was in fact overdrawn (See par. 3c (5) above). Accused admitted in his unsworn statement that he opened his account with that bank in December 1944 and deposited \$125 therein in February 1945. That deposit was credited to his account on 5 February 1945 and by 17 February 1945 it had all been withdrawn. Considering that over the period of one month accused issued seven checks totaling \$182.50 in face amount without having sufficient funds on deposit in the drawee bank to pay them, it can only be concluded that he was content to issue these checks with complete disregard as to the adequacy of his deposit to cover them. Such reckless indifference as to the sufficiency of his deposit brands his conduct as fraudulent in uttering these checks (CM 270061, Sheridan; CM 280302, Nelson). Although the total face amount of these checks was \$182.50 accused was only found guilty of fraudulently obtaining \$101.70 in cash on them inasmuch as the difference between these two amounts was received by accused not in cash but in merchandise and services. The court's action was apparently induced by a belief that a fatal variance existed between an allegation that cash was obtained and proof that merchandise or services were received instead. Be that as it may, in analyzing the evidence to determine accused's intent, it was obviously proper for the court, as it is for us, to consider the total face amount of all these checks as against the financial condition of his account with the drawee bank in view of the fact that he received total consideration, in cash or otherwise, equal to the total face amount.

Six of the checks dated during the period from 6 February to 9 February 1945 and totaling \$215 in amount were drawn on the Valley National Bank, Kingman, Arizona, with which accused had no account (See par. 3c (6) above). His defense was that he intended to draw these checks on the Valley National Bank, Phoenix, Arizona, but through error drew them on the Kingman branch. The evidence indicates that accused had sought to open an account either with the Kingman or the Phoenix bank when he sent the sum of \$75 on 7 February 1945 to the Kingman bank. Accused contended that he intended that sum to be transmitted to the Phoenix bank. However, neither of the banks opened an account for accused. The money was eventually held by the Kingman bank as unidentified funds. Subsequently, on 16 February 1945, the Phoenix bank opened an account for accused upon receipt of \$100 allotted by him from his pay. Taking the view most favorable to accused, it would appear from the foregoing that he had sought to deposit \$175 in the Phoenix bank during the month of February 1945. Turning to the debit side of his ledger, accused withdrew the total sum of \$83.30 from his Phoenix account within three days after the account was opened with the \$100 deposit. Furthermore, he was acquitted of three Specifications involving the fraudulent utterance of three checks drawn in February 1945 on the Phoenix bank in the total face amount of \$30 apparently because the court believed that these checks would not have been dishonored if the deposit of \$75 had been credited to accused by the Phoenix bank. Thus, accused drew checks totaling \$113.30 on the Phoenix bank in February 1945. If he had drawn the six checks totaling \$215 on that bank instead of the Kingman bank he would have drawn checks totaling \$328.30 against deposits of \$175 in the Phoenix bank. Consequently, even giving credence to accused's explanation it is quite apparent that he issued checks far in excess of the amount he could have thought available to satisfy them. Such substantial overdraft would only have resulted from a reckless indifference as to the sufficiency of the deposit in his account and, as stated above, such indifference would have branded his conduct in uttering these checks as fraudulent. Thus, even accepting accused's explanation, his utterance of these six checks was fraudulent.

The remaining check, in the amount of \$10 and dated 21 March 1945, was drawn on the Broadway and Seventh Office, Bank of America, Los Angeles, California, with which accused had no bank account (See par. 3c (7) above). Accused's defense given in his unsworn statement was that the check was mistakenly drawn by him on that Branch and that he had intended to draw it on the Santa Ana Branch of that bank. Accused presented no evidence to indicate that even if the check had been so drawn it would have been paid. It lay within the province of the court to determine whether or not credence was to be accorded accused's unsworn explanation unsupported by corroborating evidence and it cannot be said on this record that its rejection of it was unreasonable.

Under Specifications 17 and 20 the court found accused guilty of wrongfully obtaining a lesser sum in cash than alleged in each Specification inasmuch as the proof established that the balance of the face amount of each check was given in exchange for a consideration other than

cash. Such findings were permissible under these two Specifications. Under Specification 4 the court found accused guilty of obtaining a lesser sum in cash than alleged and also found the check to have been dated 24 February 1945 rather than 4 February 1945 as alleged. In all other details, including the name of the payee, the amount and the number of the check, the proof followed the allegations of the Specification. It is apparent from an examination of the photostatic copy of the check admitted in evidence that the error in the Specification as to the date of the check was caused because of partial obliteration of the date by superimposition of a banking stamp. Since the proof was sufficient in all other particulars to identify the check as the one alleged in the Specification, the variance between the proof and the allegations as to the date of the check was immaterial and the proof would have sustained a finding of guilty without substitution as to the date. Thus, even if the court's action was improper in substituting in its findings a date different from that alleged, the balance of its finding constitutes a valid finding of guilty of the offense alleged.

Accordingly, we are of the opinion that the evidence sustains the findings of guilty of these fourteen Specifications involving the fraudulent issue of fourteen worthless checks.

6. Accused is 24 years of age and is married. He attended junior high school for one year and thereafter was employed first as a messenger for Western Union Telegraph Company, next as a grocery clerk and later as a taxicab driver. He was a member of the Virginia National Guard from October 1939 and entered upon active military service with it in February 1941. On 23 December 1942 he was commissioned a second lieutenant upon graduation from The Infantry School, Fort Benning, Georgia. According to the information appearing on accused's charge sheet he was transferred to the Air Corps as a rated pilot on 23 December 1944 although there is nothing in his personal file in The Adjutant General's Office to verify that fact.

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

Thomas M. Jaffy Judge Advocate.

William H. Lambell Judge Advocate.

Robert E. Trevethan Judge Advocate.

(264)

SPJGH-CM 280627

1st Ind

Hq ASF, JAGO, Washington 25, D. C. JUN 20 1945

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Edward F. Tyree (O-1305348), Air Corps.

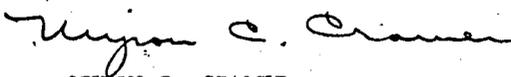
2. Upon trial by general court-martial this officer was found guilty of absenting himself without leave for a period of 7 days, in violation of Article of War 61 (Charge and Specification); of deserting the service and remaining absent in desertion for a period of 35 days, in violation of Article of War 58 (Add. Charge I and Spec.); and of fraudulently making and uttering 14 worthless checks for which he obtained cash in the total amount of \$326.70, in violation of Article of War 96 (Add. Chg. II, Specs. 3-10 incl., 17-21 incl., and 23). He was sentenced to dismissal, total forfeitures and confinement for 20 years. The reviewing authority approved only so much of the findings of guilty of Additional Charge I and its Specification (Article of War 58) as involves findings of guilty of absence without leave in violation of Article of War 61, approved only so much of the sentence as provides for dismissal, total forfeitures and confinement for 10 years, and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. I concur in that opinion. Accused absented himself without leave on two occasions; from 26 January 1945 to 2 February 1945 (7 days) (Chg. & Spec.), and from 20 February 1945 to 28 March 1945 (35 days) (Add. Chg. I and Spec.). During the period from 23 January 1945 to 21 March 1945, he fraudulently made and uttered 14 worthless checks, drawn on three different banks, for which he obtained a total of \$326.70 in cash without having or intending to have sufficient funds on deposit to pay them.

I recommend that the sentence as approved by the reviewing authority be confirmed but that the forfeitures be remitted, that the period of confinement be reduced to five years and 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.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.

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


MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence as approved by reviewing authority confirmed but forfeitures remitted and confinement reduced to five years. GCMO 285, 5 July 1945).

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

SPJGQ - CM 280635

1945

UNITED STATES)

FOURTH AIR FORCE

v.)

Trial by G.C.M., convened at
Tonopah Army Air Field,
Tonopah, Nevada, 4 April 1945.
Dismissal.

Captain JOHN R. ALEXANDER)
(O-341611), Medical Corps.)

OPINION of the BOARD OF REVIEW
ANDREWS, BIEPER and HICKMAN, 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 85th Article of War.

Specification: In that Captain John R. Alexander, Squadron M, 422nd Army Air Forces Base Unit, was, at Station Hospital, Tonopah Army Air Field, Tonopah, Nevada, on or about 11 March 1945, found drunk while on duty as Medical Officer of the Day.

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

3. The evidence for the prosecution established the following state of facts.

The accused, a surgical ward officer (R. 39), was regularly detailed as Medical Officer of the Day at Tonopah Army Air Field, Tonopah, Nevada, for 11 March 1945 (R. 24; Ex. 3), with a tour of duty of 24 hours commencing at 0800 on that day (Stipulation, R. 32). From his own statements hereinafter mentioned and the general tenor of the evidence, he entered upon his duties as such, and was wearing the appropriate brassard on the evening in question (R. 7, 18, 25, 33, 35, 36).

(266)

Commencing at about 1730 and continuing until about 2030 that evening, a cocktail party was held by the Dental Officers at the hospital for the medical staff (R. 29, 31, 34), at which a punch was served which consisted of about four parts champagne, one part brandy, one part apricot brandy, two parts carbonated water, chopped maraschino cherries and pineapple, stirred with ice (R. 30) and served by pitchers, from a punch bowl (R. 31); in champagne cocktail glasses (R. 35). The accused attended, and, at the beginning of the party, offered to assist in serving, stating that he was "MOD" and so could not drink (R. 30, 46). However, host officers of the Dental Corps did the serving. Lieutenant Colonel Vogt mixed the punch (R. 30) and Captains Sobel (R. 31), and Hoot (R. 46, Defense witness) served it. Captain Sobel filled some glasses "a few times" on a table near where the accused and Lieutenant Jindra, a nurse, were sitting, but did not remember seeing the accused take a drink, and did not know whether any of the glasses belonged to the accused (R. 32). Captain Brown saw the accused with a glass in his hand at about 7:00 o'clock, walking across the room to answer the telephone, but did not see him take a drink, nor observe whether there was anything in the glass. He showed no appearance of intoxication (R. 34).

Second Lieutenant Potts (R. 35) had been flying "rather late" that afternoon and had taken a nap to rid himself of a slight headache after completing his flight (R. 36). He had come in from flying about 2:00 o'clock that afternoon (R. 38). His wife, confined as a patient at the hospital, had requested that he bring her some sandwiches. Lieutenant Potts arrived at the hospital, with the sandwiches, between 8:30 and 9:00 o'clock that night (R. 36). Visiting hours "were over at 2230" (R. 38). He saw the accused, wearing the brassard of Medical Officer of the Day, enter the hospital ahead of him. Lieutenant Potts asked the Charge of Quarters, at the desk, for permission to take the sandwiches to his wife. The accused, who was using the telephone, interrupted by saying "You can't go in", asking who was the witness' wife, and, upon learning that she was Mrs. Potts, said "So you are her husband", and that she had been giving the accused a lot of trouble (R. 36). The witness observed that the accused "acted kind of strange for an MOD". He was swaying, his face was red, his speech was hard to understand, and he was "waving his hands back and forth" while he held the telephone. The accused then said "I know what you want to go to see your wife for, and it isn't good, it is bad". Thereupon, the accused left the room. The witness remained only to ask the Charge of Quarters to see that his wife received the sandwiches, and was about to depart. The accused came back into the room and said, "I thought I told you to leave the hospital. Now get the hell out of here". The witness at that time smelled alcohol on the accused's breath (R. 36). In the witness' opinion, the accused was drunk. He had never met the accused before, though the accused had examined the witness' wife for pregnancy (R. 37). His wife had complained of mistreatment by the accused on that occasion, which the witness had not reported until she went to the hospital, and then not officially. She was under quite a

strain at that time (R. 38). The witness did not recall asking the "CQ" if the accused was drunk (R. 38). The witness, twenty years old, was not accustomed to drinking, having been drunk himself only twice: once at the age of ten, which made him sick, and once when he got mad at his wife (R. 37). After trying to contact the Assistant Base Legal Officer, Lieutenant Potts called the Officer of the Day, about forty-five minutes or an hour after leaving the hospital (R. 79).

As a result of a telephone call from Lieutenant Potts, Flight Officer Levy, Officer of the Day (R. 6), went with Sergeant of the Guard McCulley to the hospital dispensary, between 10:30 and 11:00 o'clock, to investigate the Medical Officer of the Day. He met the accused in the corridor leading to the dispensary. The accused said that he was the MOD, and, when told that the witness and the sergeant were there to find out whether he was drunk, became quite angry and insistently asked who sent them, which they refused to answer. The accused's manner was antagonistic. His breath smelled of liquor. He swayed unsteadily as he walked down the hall (R. 7). As a result of their conversation, which took place in the dispensary in the presence of the Charge of Quarters, the witness called the Field Officer of the Day, Major Armstrong, went for Major Armstrong and brought him to the hospital. There they found the accused sitting on the bed in the "MOD"'s room, completely naked, after the Charge of Quarters had aroused him. Asked by Major Armstrong if he felt all right and if he had been drinking, the accused admitted that he had had two or three drinks. He was still antagonistic toward the investigation and wanted to know who had inspired it, but was trying to be pleasant and recognized that Major Armstrong "had his job to do and the Captain had his own" (R. 8). This occurred at about 2315 o'clock. They all went to the Charge of Quarters' office in the dispensary, a door or two down the same hall, the accused remaining completely undressed. There they called the Base Surgeon, Lieutenant Colonel Brannan, who arrived in about ten minutes (R. 9). In Flight Officer Levy's opinion, the accused was under the influence of liquor, but the witness would not attempt to state the degree (R. 10, 16). His speech was clear (R. 15), but he walked unsteadily, his breath smelled of liquor, and he admitted having had two or three drinks (R. 10). He remained completely undressed when Lieutenant Colonel Brannan was there (R. 16).

Staff Sergeant McCulley, Sergeant of the Guard (R. 24), substantially corroborated the testimony of Flight Officer Levy (R. 24-28). Sergeant McCulley was of the opinion that the accused was "very intoxicated", as he staggered when walking down the hall, ten feet wide, so that his shoulder hit the wall (R. 27).

Major Armstrong, Field Officer of the Day (R. 18), arrived at the hospital with the Base Officer of the Day and the Sergeant of

the Guard at about 11:30, and was conducted to the MOD's room by the Charge of Quarters. He found the accused sitting on the bed. Asked twice if he were all right, the accused asked in return who sent the witness there. The accused admitted having had two or three drinks. His attitude was very discourteous. He was stark naked. He said something about the witness being "a good fellow". They went to the dispensary. As they went down the hall, the accused walked very unsteadily and fell over against the wall, "as though he stumbled or his left leg gave out" (R. 19). His speech was not thick, but his answers did not answer Major Armstrong's questions and some were incoherent. Armstrong was convinced that the accused was "fully under the influence of alcohol", but to what extent he "wouldn't want to state" (R. 19). The witness called the Base Surgeon to handle the matter (R. 18).

Lieutenant Colonel Brannan, Medical Corps, Base Surgeon (R. 39), arrived at the dispensary about 11:30, in response to Major Armstrong's call, and took charge of the situation (R. 40). The accused came out of the MOD room and got a drink of water. As the accused was "a little unsteady on his feet", the witness sent him back to bed and relieved him as Medical Officer of the Day (R. 40). After Major Armstrong, Flight Officer Levy and Sergeant McCulley left, Lieutenant Colonel Brannan took the accused to the Bachelor Officers' Quarters (the accused's own quarters), to go to bed (R. 40), and told Captain Daly and other officers to stand by for calls, and that he, the witness, would also be available. The witness aroused the accused in the MOD room and watched him dress (R. 40). The accused "navigated very well" and could have gone to his quarters alone, but the witness took him in an ambulance which was there, as a convenience and because they both were just out of bed and it was rather cold (R. 42).

From his observation that the accused was a little bit unsteady on his feet and that there was an odor which the witness took to be alcohol, the witness thought that the accused had been drinking, and that was sufficient for him to relieve the accused from duty. In Lieutenant Colonel Brannan's opinion, the accused was "moderately under the influence of alcohol". On restatement, he made it "moderately well under the influence of intoxicants" (R. 41). The witness would not attempt to state in what degree the accused's faculties were impaired (R. 41). He regarded a blood-alcohol test as unnecessary for his diagnosis, and none was made (R. 41), although the accused had offered to submit to such a test (R. 12, 25, 28).

Lieutenant Colonel Brannan was not aware that the accused had taken two seconal tablets at about nine o'clock (R. 41). That could have had something to do with his general unsteadiness, but the witness still would have concluded that he was more or less drunk (R. 42). Seconal is a sedative, prescribed to quiet restlessness. Its effects under some circumstances are commonly mistaken for intoxication,

and persons of highschool age frequently take it with alcohol or coca-cola for the purpose of becoming intoxicated. Two capsules, or three grains, would normally have some effect on a person's walk. It would not cause his breath to smell like alcohol (R. 43). Seconal is not a drug in the same sense as morphine but is in the sense that anything in the pharmacy is a drug (R. 44).

In a pretrial statement to the investigating officer on 12 March 1945, duly qualified, the accused had stated that he was not officially relieved as Medical Officer of the Day until Lieutenant Colonel Brannan relieved him about midnight (R. 23; Ex. 1). In a supplemental statement, 20 March 1945 (R. 24; Ex. 2), he had stated that he went to his quarters and took two seconal capsules at about 2100, then returned to the cocktail party and asked Captain Daly, who was Alternate Medical Officer of the Day, if he would be available if needed, and Captain Daly said yes. Such relief by informal arrangement was customary, according to the testimony of Lieutenant Colonel Brannan, for temporary diversions of an hour or two, if personnel concerned were notified (R. 44).

Lieutenant Potts did not know whether the accused's complexion was normally ruddy, but on the night in question his face was just a little bit redder than it appeared at the trial (R. 37). Major Armstrong (R. 20) and Sergeant McCully (R. 27) were not familiar with his normal gait. Lieutenant Colonel Vogt, Base Dental Surgeon (R. 31), had observed that the accused normally walked with a slight limp or swaying motion, said to be due to an old injury, and that at times his leg did not function right.

4. For the defense, Captain Hoot, Dental Corps, testified (R. 46, 47) that he and Captain Sobel were the only persons serving drinks at the cocktail party, that the witness was there all evening, that he served no drinks to the accused, because the accused had said that he was MOD and could not drink, and that the accused showed no appearance of intoxication.

First Lieutenant Alice M. Jindra, Dietitian (R. 47), was with the accused off and on at the party from 6:00 until 9:30, danced with him, spent more time with him than other persons, and he escorted her to her quarters. She had five or six drinks, but did not see the accused take a drink. He did not appear to be intoxicated (R. 47, 48, 49).

Captain Paxton, Medical Administrative Corps, who was Medical Administrative Officer of the Day (R. 50), dropped in on the party for three or four minutes about 1930 and again at about 2115, after everything was cleaned up, and saw the accused at the reception desk shortly after 2100. He saw no appearance of intoxication and did not

see the accused drink anything. At the desk, the accused appeared angry, and was instructing the clerk to notify him immediately if Lieutenant Potts returned to the hospital, saying that he did not like to have visitors there after hours (R. 50, 51).

Captain Daly, Medical Corps, was Alternate Medical Officer of the Day (R. 52). He was at the party from 6:00 until about 10:00 or later, after the others left. He did not see the accused take any drinks, and the accused did not appear to be intoxicated. When the accused left, about 10:00 or earlier, he asked the witness if the witness would be around. The witness said he would, and called the dispensary to give notice that he was holding down the duties of "MOD" (R. 52). This was in accordance with custom, where the regular "MOD" wanted to go out, and had happened frequently, without formality (R. 51-54). The witness assumed that the accused was going out somewhere and would be back before long (R. 53-55). The witness remained in the hospital or nearby and within call (R. 54, 55, 56) and was still "holding down" when Lieutenant Colonel Brannan took over at 11:30 or 12:00 o'clock, whereupon he went to his quarters, after Lieutenant Colonel Brannan had said he should do so and not remain to sleep in the "MOD" room (R. 54). The witness had assumed that he was still acting as "MOD" in place of the accused, and that the accused would notify him when he returned (R. 54). He did not put on the brassard, which the accused retained (R. 55). The witness did not see the accused any more that evening (R. 55). The witness had had two or three drinks at the party (R. 53), but was not intoxicated and did not see fit to turn the job over to someone else (R. 55).

First Lieutenant Anderson, Station Hospital Adjutant, testified (R. 57) that it was common practice for officers there to be relieved from duty assignments informally by merely obtaining substitutes for themselves, and that this was done with the Base Surgeon's knowledge.

Private Rodela (R. 58) was Charge of Quarters, on duty at the main desk at the hospital until 11:00 o'clock on the night in question, and received Lieutenant Potts, at 9:10 o'clock. Lieutenant Potts asked to be allowed to see his wife. The witness said he would have to see the Administrative Officer of the Day, Captain Paxton, as visiting hours ended at 8:30. The accused then came in, used the telephone, and then told Lieutenant Potts that it was after visiting hours and he could not see his wife, but would have to leave. Both officers left the desk. Lieutenant Potts returned and asked the witness if the accused was drunk. The witness said he didn't know (R. 58). The accused did not appear to be intoxicated, nor did he look or act unusual. The witness observed nothing to indicate, and did not know, whether the accused was or was not drunk (R. 59). He acted in a normal manner (R. 60).

Private First Class Hartmann relieved Private Rodela as Charge of Quarters at 11:00 o'clock. Previously, at about 8:30, he saw the accused talking with Private Rodela and saw nothing unusual in his actions or appearance (R. 61).

Captain Kessell's testimony was stipulated (R. 61). He saw the accused at the party during the evening, and afterward, at about 2130, talked with him as they saw that everyone was out of the lounge, and put out the lights. The witness then walked with the accused to the Bachelor Officers' Quarters, where the witness went in and the accused walked to the hospital. The witness did not see the accused drink anything. When he last saw him, the accused's face was a little flushed, as though he might have had some drinks, but he walked and talked normally and showed no indication that he was intoxicated enough to impair the rational and full exercise of his faculties (R. 62).

Captain Bickerman, Medical Corps, Aviation Physiologist (R. 63), qualified as an expert, testified that seconal is a barbiturate derivative used to induce sleep. Its action is hypnotic, for sedative purposes. It is a drug, pharmacologically speaking, but not of the class of opium, cocaine, morphine, paregoric or marihuana. Addiction is rare. The use of three grains in the average individual would result in half an hour in drowsiness and normally in sleep. In a sensitive individual it might produce excitability and even slight emotional disturbances before full sedative action would occur (R. 63). On being awakened, the person would be in a stage of disorientation for several minutes, with sluggish reflexes and thinking (R. 64). This stage of impairment would affect orientation only, not mental or physical efficiency, and would last probably ten or fifteen minutes, after which the subject would be fully aroused and his efficiency would not be significantly impaired (R. 65). Seconal would not leave a breath odor similar to alcohol (R. 64), but many elixirs, cough medicines and throat washes would do so (R. 65).

The accused testified (R. 66). A graduate of the Medical College of the University of Illinois, he practised medicine as a civilian from January 1929 to 24 December 1942, when he entered the military service as a medical officer. His civilian practice was general in character, with emphasis on obstetrics, gynecology and surgery. He ran a thirty-five-bed hospital at Charleston, Illinois. He was assigned to duty as a Ward Officer at Tonopah. On 11 March 1945 he attended the cocktail party. He helped arrange the day room and was there when the party began. Thirty or forty persons attended (R. 66). Accused had one or two drinks (R. 66, 67), one of which was before the crowd got there. He then "kept eating throughout the evening" from a variety of sandwiches and other foods served at the party. The drinks were served in regular, shallow-bowl champagne glasses. The accused was accustomed to drinking, and the one or two drinks had no effect on him. (R. 67) He was in and out two or three

(272)

times during the evening, and left about 9:00 o'clock. The party broke up from a little before 9:00 to about 9:30. At about 9:00, the accused walked with Lieutenant Jindra to her quarters, then went to the reception desk and the "CQ's" desk at the hospital. There he talked on the telephone with Captain DeLaureal. He tried to get the boys to turn off a blaring radio so he could talk better. On finishing the conversation, he turned around, saw Lieutenant Potts, and asked him who he was. Lieutenant Potts said that his name was Potts, he was just down from flying, and wanted to see his wife and take her some sandwiches (R. 67). The accused told him that he could not see her, as it was past visiting hours, but that they would see that she got the sandwiches. Accused did not think that Lieutenant Potts liked what he said to him. Accused then went out the front door, waited a little while, and, as Lieutenant Potts did not come out, went back and told him to get out. Accused was emphatic, as he had "a little trouble between Potts and his wife." Mrs. Potts had made complaints about the accused "that were not justified". Accused did not lose his temper, but was "perhaps a little firm", as his instructions were to keep people out after visiting hours. As "OD", he could do anything he wanted to do and keep anybody out that he wanted to. He was performing duties as Medical Officer of the Day (R. 68). He went back to the party. Before 9:00 o'clock, he got Captain Daly to relieve him when he took Lieutenant Jindra to her "BOQ" (R. 68). He was relieved for as long as that took, which was only a few minutes (R. 71). After leaving Lieutenant Jindra, just before 9:00 o'clock, he went to his own "BOQ", stayed a few minutes, and took two seconal capsules. He went back to the party, helped Captain Kessel close up, about 9:30, and walked with Captain Kessell toward the "BOQ". He met Lieutenant Paxton and had a short conversation with him. He then went to the "MOD" room in the dispensary and went to bed, around 10:00 o'clock (R. 72). He woke up when Major Armstrong came in (R. 73).

The accused further testified that he had sustained an injury to his left leg in 1935, while playing donkey-ball in a Rotary Club game, which required stitches and a cast for three weeks. He was treated by a Chicago bone specialist. The remaining scar was exhibited to the court (R. 69). This injury still gave him a great deal of trouble at times and left him with a noticeable limp and some sway in his walk (R. 69). On the night of 11 March, his leg had been giving him trouble as a result of playing volley-ball and dancing, and consequently he had not slept well and anticipated that the leg would be hurting again that night (R. 69). For that reason, he took the seconal (R. 68). He had taken seconal only twice before, on two successive nights more than a year previously, to assure sleep under noisy conditions (R. 70). On the night of 11 March, considering the cocktails he drank and the seconal he took, the accused considered himself certainly in full possession of his mental and physical faculties at all times (R. 73).

Further testifying, the accused stated that he was not intoxicated when he talked to Lieutenant Potts, nor when he was questioned by Mr. Levy and Sergeant McCulley, Major Armstrong or Lieutenant Colonel Brannan (R. 70). He did not like the idea of being told by Mr. Levy and Sergeant McCulley "something like that", and they would not answer him when he tried to find out what the trouble was about, but just turned around and walked out. Accused did not think that he was discourteous to them, nor to Major Armstrong (R. 69). His normal manner may have become a little brusque from doing sick call duty for a year. "You get kind of tough" (R. 69, 70). He offered to take a blood alcohol test if they thought he was drunk, but they walked out on him (R. 70).

Accused testified that he attended calls earlier in the evening as Medical Officer of the Day and there were none thereafter (R. 72). He was relieved by Lieutenant Colonel Brannan, who told him to go to his room and put some clothes on and then go to his barracks, which orders were specific and he obeyed them (R. 70). Lieutenant Colonel Brannan came back when accused was practically dressed and they walked down the hall. There was an ambulance sitting there and Lieutenant Colonel Brannan said that they might as well ride over (R. 71). Accused had made pre-trial statements (Ex. 1 and 2) in which he had declined to say whether he had been drinking, and had said that he was officially relieved by Lieutenant Colonel Brannan about midnight, and not by anyone before that (R. 71). His statement that he had taken seconal was made in a later supplemental statement and not mentioned in his original statement because it did not then enter his mind "what they were trying to do". He did not then mention the earlier relief (by Captain Daly) because that was only for a few minutes, to take Lieutenant Jindra to her BOQ (R. 71).

Accused admitted walking through the hall and being in the reception room in the dispensary naked, but considered the place secluded at that time of night, in the presence of men only, feminine invasion being possible but unlikely (R. 74, 76). Visiting hours were 6:30 to 8:30 (R. 76). The accused customarily sleeps without pajamas (R. 69) and goes naked about his bedroom or sleeping quarters without consciousness of shame (R. 74).

In response to questions by the court, the accused stated his belief that neither drinks nor seconal had affected his attitude toward Lieutenant Potts, but that he "expected" that he was somewhat antagonistic the second time he told Lieutenant Potts to leave, after waiting to see that he did leave, thinking that Lieutenant Potts might try to go in, in violation of rules, and cause trouble. He considered his attitude normal in view of the circumstances, including Mrs. Potts' previous complaint against him (R. 75, 76).

5. The evidence leaves no doubt that the accused officer drank more than one cocktail glass of a rather potent concoction of champagne-brandy punch at a hospital staff cocktail party at some times between 1730 and 2130 hours on the day and at the place specified, while he was on duty as Medical Officer of the Day. It appears probable that he did not drink heavily nor join in the general course of the drinking at the party, but, on the contrary, deviated only moderately from an expressed intention to refrain from drinking because he was on duty in that capacity.

Nobody remembered seeing him take a drink, but he admitted in his testimony that he took one or two and admitted to the Field Officer of the Day on the night in question that he had two or three. He was once observed walking across the room with a glass in his hand, but the witness did not observe whether there was anything in the glass or what was done with it. One of the two officers who were serving the punch filled a glass near him "a few times", that might have been the accused's glass but was not shown so to be. The witnesses who were at the party, and thus had their perceptive faculties modified or enhanced by their own participation in the convivial spirit of the occasion, saw no indicia of intoxication, whereas, most of those lacking that stimulation observed signs of intoxication in some degree. Neither of the two enlisted men on duty with the accused saw anything unusual, but the Flight Officer who was Officer of the Day, the Sergeant of the Guard, and the Field Officer of the Day all did, and finally the Base Surgeon, the accused's commanding officer, saw him and regarded him as "moderately well" intoxicated. The suggestion that the accused was drunk originated with Lieutenant Potts, the young officer who was brusquely excluded from the hospital after visiting hours by the accused, and between whom and the accused there was some animosity by reason of a previous complaint made against the accused by Mrs. Potts, but the other witnesses who subsequently observed the accused were acting in their official capacities, apparently without animus against him.

The Base Surgeon properly appraised the situation when he relieved the accused from duty as Medical Officer of the Day for the sound and valid reason that the accused's sobriety had been called in question and appearances indicated that he had done some drinking, regardless of extent. Persons needing the services of the Medical Officer of the Day should not be required to speculate upon the degree of his intoxication. Mere suspicion is enough to justify his relief from that duty. It is not enough to convict him of being found drunk on duty.

Drunkenness, within the meaning of Article of War 85, is "any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties". The duty involved "may be of a merely preliminary or anticipatory nature, such as awaiting by a medical officer of a possible call for his services" (MCM 1928, par. 145). According to Winthrop's oft-quoted passage (Military Law and Precedents, Second Edition, 1920

Reprint, p. 612-13), the accused is to be held to be "drunk" when his intoxication is such that, although he may be able to perform his duty imperfectly or get through it after a fashion, he cannot perform it properly, "a due, proper and full execution being that which is required of him", but where he is in fact qualified to perform the duty as it should be done, "the circumstance that he is enlivened or made dull or unwell by his indulgence will not alone render him chargeable under the Article".

A Medical Officer of the Day is peculiarly under the duty to keep himself alert and ready to respond to possible calls for his services (CM 223315, Frawley, 13 BR 367; CM 209825, Stanley, 9 BR 135). The accused was clearly on duty, and should so have conducted himself that his sobriety could not reasonably have been impugned.

The case is not as strong as the Frawley and Stanley cases, cited. The accused did not fail to respond to any call for services, because there was no call and he was not put to that test. Neither did he place himself out of reach of calls, nor does it appear that any substantial difficulty was had in awakening him. Upon the whole record, the case is relatively weak, but sufficient. The accused was not very drunk. By common standards, he may not have been "drunk" at all, and it is regrettable that the record of a professional man who has served his country and his community usefully should be marred by conviction for such an offense, but there was ample evidence before the court to justify its findings that the accused was drunk, by the very rigid standard applicable to his case. With all reasonable allowances for personal peculiarities, the appearance and actions of the accused were such as to convince several witnesses not hostile toward him that he was under the influence of liquor. His mental and physical faculties were impaired to an appreciable extent, he had done some drinking, and he was on duty. That is enough. The appropriateness of the sentence is matter for consideration elsewhere in the due course of military justice.

The use by the accused, according to his own testimony, of secnal as a sedative on the night in question, is not regarded as determinative of any issue in the case. As a physician himself, he may fairly be assumed to have known its effects when used after whatever drinking he had done and to have risked any resulting aggravation of the effects of intoxicants previously consumed. On the evidence, it is unlikely that it had much effect on the condition of the accused. Its use was not such, in our opinion, as to invoke any issue of intoxication by the use of "drugs", within the meaning of par. 145, page 160, MCM 1928.

6. Clemency has been recommended by letter of Colonel Perry B. Griffith, Air Corps, a member of the court who sat at the trial. The letter is attached to the record of trial.

7. The accused officer is nearly 43 years of age, married, with one minor daughter. He is a native citizen, resident of Charleston, Illinois, where he practised medicine for about fourteen years and owned and operated a thirty-five bed hospital. He is a duly qualified and licensed physician and surgeon, a graduate of the College of Physicians and Surgeons of the University of Illinois and a member of the American and other medical associations. He served as a first lieutenant in the Medical Officers' Reserve Corps from 1935 to 25 April 1941. He was appointed and activated as a captain, Medical Corps, Army of the United States, 10 December 1942. His physical examination records show him to be 71½ inches tall, weighing 204 pounds, and to have sustained an operative removal of the semi-lunar cartilage of the left knee six or seven years before his entry upon his present tour of duty.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the finding of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of an officer of a violation of Article of War 85 in time of war.

Fletcher R. Andrews, Judge Advocate

Alfred B. [Signature], Judge Advocate

_____, Judge Advocate

SPJGQ - CM 280635

1st Ind

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

JUL 12 1945

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain John R. Alexander (O-341611), Medical Corps.

2. Upon trial by general court-martial this officer was convicted of being found drunk while on duty as Medical Officer of the Day at Tonopah Army Air Field, Tonopah, Nevada, on 11 March 1945, in violation of Article of War 85. 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. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence. I concur in that opinion.

The accused was on duty as Medical Officer of the Day at Tonopah Army Air Field, his tour of duty extending for 24 hours from 0800 on 11 March 1945. A cocktail party was held that evening by the Dental Officers at the station for the medical staff, in the dayroom of the hospital. The accused attended the party and, although he expressed an intention to refrain from drinking because of his special duty and exercised such restraint that none of the witnesses at the party saw him take a drink or observed any sign of intoxication on his part, he did, according to his own admissions, take from one to three glasses of champagne-brandy punch during a period from 1730 to 2130 o'clock. Shortly after 2100 o'clock, he rather abruptly excluded a young officer from the hospital who had called to ask to see his wife after visiting hours. There was antagonism between the accused and this officer by reason of a previous complaint made by the wife of the officer against the accused, which complaint was regarded by the accused and by his superiors as unsupported. The officer so excluded complained to the Officer of the Day that the accused was drunk. Officers who went to talk with the accused in response to this complaint were convinced from his manner and conduct that he was, to some degree, under the influence of liquor. His commanding officer, the Base Surgeon, was of that opinion when called in to handle the matter and relieved the accused about midnight. There were no calls for the accused to render medical services that evening. He remained within call at all times, except for a few

(278)

minutes earlier in the evening, while he walked with a nurse from the party to her barracks, during which period he made proper arrangements for his temporary relief. The present charges were referred for trial as an exemplary measure over strong recommendations for disposition less onerous in character. One experienced member of the court recommends clemency. The Staff Judge Advocate comments in his review that dismissal is mandatory upon conviction for violation of Article of War 85, and that commutation is matter for the confirming authority, but that there is nothing in the pre-trial investigation or the record to indicate that the accused has not rendered, or might not render, competent and efficient service. Upon the whole record, with full consciousness of the necessity for requiring strict sobriety on the part of an officer in his position, it appears that the extent and gravity of the accused's offense have been somewhat magnified by personal antagonisms and eccentricities, that he was drunk only in the legal sense that his faculties were somewhat impaired and not in the ordinary sense of the term, and that the ends of justice do not require the accused's dismissal.

I recommend that the sentence be confirmed but commuted to a reprimand and forfeiture of \$50 pay per month for three months, and that, as so commuted, the sentence be carried into execution.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.

Myron C. Cramer

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

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed but commuted to a reprimand and forfeitures of \$50. per month for three months. GCMO 365, 25 July 1945).

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

SPJGQ-CM 280656

UNITED STATES v. Major CLEOPAS J. MESSER (O-303156), Air Corps.))))))	AFRICA-MIDDLE EAST THEATER Trial by G.C.M., convened at Cairo, Egypt, 23, 27 April, 1, 2, 3 May 1945. Reprimand and fine of \$250.00.
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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 in the Office of The Judge Advocate General and there found legally insufficient to support the findings and sentence. The record has now been examined by the Board of Review, and the Board submits this, its opinion, to The Judge Advocate General.

2. The only question involved in this case is whether the officer appointing the court was the accuser or prosecutor (AW 8). Accused was found guilty of Charge I alleging a violation of the 61st Article of War and the Specification of Charge I alleging absence without leave from about 11:00 a.m. on 4 April 1945 to about 6:00 a.m. on 6 April 1945. He was found not guilty of the other Charges and Specifications. However, a brief discussion of them is necessary to an understanding of the problem involved. Charge II alleged a violation of the 96th Article of War and Charge III a violation of the 95th Article of War. Specification 1 of Charge II alleged that accused did wrongfully and without authority direct that a United States Government airplane be flown to Alexandria, Egypt, for his own personal benefit. Specification 2 of Charge II and Specification 1 of Charge III alleged that accused, with intent to deceive Brigadier General Ritter, officially stated to General Ritter that he had been on authorized sick leave in Alexandria, Egypt and was in possession of official orders authorizing such leave, which statement was known by the accused to be untrue, in that he had no such orders. Specification 3 of Charge II and Specification 2 of Charge III alleged that accused officially stated to General Ritter, with intent to deceive him, that the trip made by plane to Alexandria, Egypt, was a necessary routine check flight and was not made specifically for the purpose of taking him to Alexandria, Egypt, which statement was known by the accused to be untrue, in that he personally directed the trip be made for his benefit. Accused was sentenced to be reprimanded and to be fined \$250.00. The reviewing authority approved the sentence and ordered it executed. The proceedings were published in General Court-Martial Orders No. 7, Headquarters Africa-Middle East Theater, Cairo, Egypt, 15 May 1945.

3. On 5 April 1945 Brigadier General William L. Ritter, United States Army, was temporarily in command of the Africa-Middle East Theater in the absence of Major General B. F. Giles (R. 21, 22). It came to his attention that the accused was absent in Alexandria, Egypt. After making inquiries for the purpose of ascertaining whether the accused had leave orders and finding that he had none (R. 22, 26), General Ritter called Headquarters of the Middle East Service Command to locate accused and instruct him to return to his station (R. 22). On the morning of 6 April 1945, General Ritter directed Colonel Paul H. McMurray, JAGD, his Staff Judge Advocate, to be present while the accused made his report (R. 23). The General questioned the accused concerning his absence and the flight to Alexandria, Egypt (R. 83). The accused stated to the General that he had authorization for the leave, and that the flight to Alexandria was a routine test or check (R. 84). (These statements are the false official statements alleged in Specifications 2 and 3 of Charge II and Specifications 1 and 2 of Charge III). Thereupon, General Ritter instructed the accused "to return to his quarters in arrest", because he intended to designate an officer to investigate the circumstances connected with the accused's trip to Alexandria (R. 23). After the conference General Ritter stated to Colonel McMurray that it "looked like" the accused was guilty of some serious offense (R. 13, 14). General Ritter then directed the Adjutant General to appoint an officer to investigate the matter (R. 25). At this time General Ritter had a personal but not an official opinion of the guilt of the accused (R. 27, 28), but had no personal ill-will or feeling toward him (R. 28). Upon receipt of a written report from the officer making this preliminary investigation, General Ritter caused charges to be drawn (R. 26), but did not draw them himself and did not "participate actively" in drawing them (R. 9). He testified before the investigating officer (R. 29) and at the trial as a witness for the prosecution (R. 79-86). The General Court-Martial which tried the accused was appointed by command of General Ritter per paragraph 1, Special Orders No. 101, Headquarters, Africa-Middle East Theater, Cairo, Egypt, 11 April 1945. The charges against the accused were signed by Major Stephen L. K. Kay, IGD, as accuser (R. 7).

On behalf of the accused a motion was made to dismiss all of the Charges and Specifications. It was alleged that the court did not have jurisdiction of the subject matter since General Ritter, the appointing authority, was also the prosecutor or accuser (R. 8). Testimony was taken in support of the motion (R. 9-30) and the motion was denied (R. 31). Colonel McMurray, Staff Judge Advocate, Africa-Middle East Theater, testified that General Ritter would not be the reviewing authority (R. 15, 16). The reviewing authority was Major General B. F. Giles.

4. Article of War 8 provides that "... when any such commander (referring to those empowered to appoint general courts-martial) is the accuser or the prosecutor of the person or persons to be tried, the court shall be appointed by superior competent authority....".

Paragraph 5a of the Manual for Courts-Martial (1928) interprets the term "accuser or prosecutor" as used in Article of War 8. It provides:

"Whether the commander who convened the court is the accuser or the prosecutor is mainly determined by his personal feeling or interest in the matter. An accuser either originates the charge or adopts and becomes responsible for it; a prosecutor proposes or undertakes to have it tried and proved.... Action by a commander which is merely official and in the strict line of his duty can not be regarded as sufficient to disqualify him. Thus a division commander, may, without becoming the accuser or prosecutor in the case, direct a subordinate to investigate an alleged offense with a view to formulating and perfering (sic) such charges as the facts may warrant, and may refer such charges for trial as in other cases."

A further definition of the term "accuser" is found in paragraph 60 of the Manual:

"... But while prima facie the person who signs and swears to the charges is the only accuser in the case, that is not always true. There may be another or others who are real accusers."

General Ritter was the commander who convened the court. As the Commanding General for the time being he had authority to convene a General Court-Martial unless his authority was limited by Article of War 8.

In an opinion by Colonel William A. Rounds, Assistant Judge Advocate General (CM 278502, Young), this same question was discussed. The officer having general court-martial jurisdiction gave an order to certain WACs to return to work. For violation of this order they were tried and convicted by a general court-martial appointed by him. In the course of the opinion it was stated:

"In referring to 'merely official' action 'in the strict line of his duty', the Manual is not intended to include a situation like the present one where the convening authority is himself the prime mover and adverse party in the very transaction which forms the basis of the charges. Nowhere have we found even a suggestion that an officer can play so vital a part in the origination of the charges and still sit in judgment upon them. Lack of personal relationship to and direct personal knowledge of the matter out of which charges grew is stressed as a qualification for the right to convene a court (See, for example, 16 Ops. Atty. Gen. 106, 1 Aug. 1878)."

Although General Ritter did not sign the charges as accuser, he had a personal interest in the prosecution of the accused. This personal interest is based upon the fact that the false official statements which are the basis of Specifications 2 and 3 of Charge II and Specifications 1 and 2 of Charge III were alleged to have been made by the accused to General Ritter with the intent to deceive him. General Ritter thus became personally identified with the charges and was a witness against the accused. His interest in this case is readily distinguishable from the official interest of every commanding general when he orders the investigation of charges against a member of his command and refers them for trial. Official action by a commander which does not disqualify him from appointing a court is illustrated in paragraph 5a of the Manual, quoted above.

It is immaterial that General Ritter was not the reviewing authority and that accused was acquitted of the Specifications and Charges upon which General Ritter was a witness for the prosecution. Article of War 8, in providing that a general court-martial shall be appointed by superior competent authority when the commander having the appointing authority is the accuser or the prosecutor, applies to the situation as it existed at the time of the convening of the court. The legality of the appointment of the court cannot be made to depend upon the outcome of the trial and the chance that the officer appointing the court may not be the reviewing authority under Article of War 46.

It is likewise immaterial that General Ritter felt no ill-will toward the accused. The purpose of Article of War 8 is not only to protect the accused from trial by a court appointed by a person actually prejudiced against him, but also to make certain that the appointing authority is so entirely unconnected with the transactions giving rise to the charges that reasonable persons will not impute to him any personal feeling or interest in the matter, but may rely with confidence upon an impartial trial by an unprejudiced court.

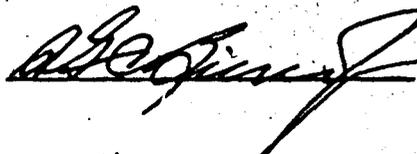
The court having been improperly constituted, the proceedings are null and void.

5. In view of our decision, we refrain from commenting upon other questions of law contained in the record.

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

 Fletcher R. Andrews, Judge Advocate.

 Herbert B. Friedman, Judge Advocate.

 A. G. Jones, Judge Advocate.

(283)

SPJGQ-CH 280656

1st Ind

Hq ASF, JAGO, Washington 25, D. C. JUN 28 1945

TO: The Secretary of War

1. Herewith transmitted for your action under Article of War 50¹, as amended by the act of 20 August 1937 (50 Stat. 724; 10 U.S.C. 1522) and the act of 1 August 1942 (56 Stat. 732), is the record of trial in the case of Major Cleopas J. Messer (O-303156), Air Corps, together with the foregoing opinion of the Board of Review.

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

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



2 Incls.

1. Record of trial
2. Form of action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Findings and sentence vacated, GCMO 327, 9 July 1945).

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

(285)

SPJGV-CM 280661

8 JUN 1945

UNITED STATES)

v.)

Technician Fifth Grade)
THOMAS TERRO (38227107),)
Supply Detachment, Section)
2, Service Command Unit)
1460, Station Complement,)
Camp Butner, North Carolina.)

FOURTH SERVICE COMMAND
ARMY SERVICE FORCES

Trial by G.C.M., convened at
Camp Butner, North Carolina,
9-10 May 1945. Dishonorable
discharge and confinement
for thirty (30) years.
Penitentiary.

REVIEW by the BOARD OF REVIEW
SEMAN, MICELI and BEARDSLEY, Judge Advocates.

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

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

Specification: In that Technician Fifth Grade Thomas Terro, Supply Detachment, Section Two, 1460 Service Command Unit, Station Complement, Camp Butner, North Carolina, did, at Durham, North Carolina, on or about 11 March 1945, with intent to commit a felony, viz, murder, commit an assault upon Allen Filmore, alias Al Filmore, by willfully and feloniously cutting and stabbing the said Allen Filmore, alias Al Filmore, on his body with a knife.

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

Specification: In that Technician Fifth Grade Thomas Terro, Supply Detachment, Section Two, 1460 Service Command Unit, Station Complement, Camp Butner, North Carolina, did, at Durham, North Carolina, on or about 11 March 1945, with malice aforethought willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Ola Patterson, a human being, by cutting and stabbing her on her body with a knife.

He pleaded not guilty to all the Charges and Specifications. He was found guilty of Charge I and its Specification. Under Charge II and its Specification by appropriate exceptions and substitutions he was found guilty of manslaughter in violation of Article of War 93. No evidence of previous convictions was offered. Accused was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor, for thirty years. The reviewing authority approved the sentence, designated the United States Penitentiary at Atlanta, Georgia, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The following is a summary of the evidence adduced upon the trial.

a. For the Prosecution.

Ola Patterson, accused's fiancée (R. 9, 117), with whom he had been keeping company for a year, lived in a "tourist home" (R. 9) which was operated by Viola Snipes in Durham, North Carolina. Miss Patterson was the niece of Allen Filmore. These three persons and accused were drinking and listening to the music of a picalo or juke box in the beer parlor of the resort on Sunday, 11 March 1945. Earlier in the day they had visited another resort, known as Baileys, where they drank together. After a time the Snipes woman left the room and induced a nap by taking sleeping tablets. The first discordant note was struck when accused returned to the room after a brief absence and remarked to his sweetheart and her uncle, "You two are too thick". Ola answered, "No, that is my uncle". "There is nothing between him and me". Filmore said, "If that's the best you can do, she's a lady, I'm going out". (R. 66, 67, 82). Accused whipped a knife out from his pocket, and stabbed or struck his sweetheart about the face or neck. She fell to the floor, crying "Oh, Thomas, you cut me" (R. 233, 235). Filmore started for the door. Accused said, "Nobody goes out of here", and a fight began between him and Filmore, who was cut and stabbed about the arm and neck until he fell to the floor. Filmore pleaded, "Don't cut me no more". Accused replied, "I'll finish you both" (R. 67). Mrs. Snipes was awakened by a crash against the bedroom door. She opened the door into the beer parlor, and, as she did so, accused ran out the front or street door (R. 17, 18), and Filmore said, "You got me, you got me" (R. 18). Blood was on the floor by the doorway. Filmore was lying on the floor, bleeding copiously. She ran back into the bedroom and called the police on the telephone. About this time, Jessie Smith, the daughter of Viola Snipes, came to visit her mother. As she opened the door from the street, she saw accused, who was standing by the door to

the bedroom. He was bleeding about the face. A knife was in his hand (R. 87). She asked accused what the trouble was. He made no answer, but reached down, lifted Filmore up, and drew the knife across his throat. Then, turning toward Miss Smith, accused said, "Come in", and started toward her. She "broke and run" (R. 88), and did not go back in until the police came (R. 89), five or six minutes afterward (R. 94).

Accused left the resort and walked rapidly down the street. Jack Pettigrew saw him stop at the first corner, a block away, where accused removed his blouse and tie, and threw them down an embankment. He started to walk away, and then "broke into a trot" (R. 62).

When the police arrived, both victims of the cutting were unconscious. They were bleeding freely (R. 40, 41, 49). An ambulance was called, and they were taken to the hospital. There Ola Patterson died that evening, without ever regaining consciousness. The physicians found five knife wounds about her face and neck (R. 8; Pros. Exs. 2, 3). Filmore was found to be suffering from two penetrating wounds. One stab wound was in the chest, penetrating to the lung tissue, and the other in the arm. There were three slashes, or cutting wounds on his face, throat and neck. Filmore ultimately recovered, and was a witness for the prosecution upon the trial.

After conversation with Pettigrew, the police officers went to the embankment at the corner, where they found a bloodstained army blouse and necktie (Pros. Exs. 5, 6). The next day, another bloodstained blouse (Pros. Ex. 7) which belonged to accused, was found in a stove in Ola Patterson's bedroom in the basement (R. 100).

b. For the defense.

Accused previously had told his first sergeant that he was going to marry Ola Patterson (R. 113). Accused had served under this first sergeant for two years, and had never been court-martialed or given company punishment (R. 112). He had never been in any difficulties, and there had never been any complaint about his conduct.

Corporal John J. Biscardi arrested accused near the bus station in Durham about hours 2015 on 11 March 1945. Witness noticed accused was not wearing a tie, and called to him to stop. After the order had been repeated to, and ignored by, accused three times, Biscardi ran after and stopped him (R. 193). Accused's shirt was wrong side out. He was bleeding from the head. The corporal took him into the station for first

aid, and then, after a telephone conversation, handcuffed him and took him to the stockade at Camp Butner. Captain Frederick West, M.C., was called to treat accused (R. 177). He took three stitches in accused's scalp (Def. Ex. A). He withdrew a sample of accused's blood (R. 178), which was analyzed by Second Lieutenant Morris Sebovitz, San. Corps, and was found to contain 1.5 milligrams of alcohol per cubic centimeter of blood, an alcoholic content so large as to indicate that accused was intoxicated at the time when the sample was taken (R. 188-189).

After due warning of his rights in the premises, accused was sworn as a witness. He testified that he spent the night of 10 March with Ola Patterson. The next day they drank beer and whiskey together. Allen Filmore joined them. He drank heavily in two resorts. They returned to Viola's, where he fell asleep. He came to when Filmore knocked him over and stabbed him in the head. They began to fight. There was "something" in Filmore's hand. Ola ran up and said, "don't do that". Accused shoved her away. He was defending himself (R. 119) with an old switch blade knife, which he had owned for about eight years. Viola opened the door, and said she was going to call the police. Accused left. He had lived with the deceased for nearly a year, and had planned to marry her in May of the present year (R. 116-117). He admitted ownership of the articles of clothing (Pros. Exs. 5, 6, 7), found a block away and in the stove in deceased's room, but could not remember placing the blouse in the stove (R. 122). Accused did not desire to harm or kill anyone. He fought in self-defense (R. 119). He loved Ola and pushed her away, because he did not want her to get hurt (R. 121). When the MPs asked him about the trouble, he could remember little of what happened (R. 122). He had no memory of leaving the scene (R. 125). He had drunk a great deal of whiskey (R. 128).

4. The questions presented by this record are for the most part questions of fact. If accused's version be correct, then he was so drunk as to be unable to entertain a felonious intent, and in necessary self-defense fought back when Filmore attacked him with a knife or razor. Miss Patterson was shoved away, to save her from injury, when she intervened in the melee. Accused is corroborated to some extent by the fact that the medical examination revealed a cut in his scalp, to close which three stitches were necessary. The blood test indicates that he told the truth, when he said he had drunk large quantities of whiskey. Accused, however, does not satisfactorily explain how Ola Patterson was wounded unto death. The process of shoving her to one side, "to keep her from getting hurt", might result in one wound but would hardly cause five knife wounds about the head and neck.

Filmore's version of the affair is corroborated in part by the testimony of Mrs. Snipes and Miss Smith. He, too, fails to explain how Ola Patterson came to her death, since he says that accused struck the woman in her neck and she fell to the floor at the side of the room and remained there. This explanation might account for one wound but not five. According to Filmore, accused made an unprovoked assault upon him and announced the intention to kill both him and Ola. From this testimony, and that of Mrs. Snipes and Miss Smith it would appear that accused was the aggressor. When these witnesses saw accused and Filmore, the latter had been vanquished. Accused was in the act of slitting Filmore's weasand. All the circumstances in evidence tend to indicate that accused and not Filmore inflicted the fatal wounds upon the woman. The evidence may be reconciled more readily with the prosecution's hypothesis of a wanton, brutal and unprovoked homicidal assault than with the defense theory of self-defense.

If it were conceded that the fatal stabbing of Ola Patterson was accidental, and was never intended by accused, nevertheless he would be guilty of homicide if the unintended and accidental stabbing of the deceased was the proximate result of a felonious assault by accused upon Filmore. The factual situation, which this record presents, is somewhat similar to that considered by the Board of Review in CM CBI 219, Price, where the accused shot at his first sergeant, but as a result of poor marksmanship the bullet struck and fatally wounded another and unintended victim. In that case, the accused was found guilty of murder. In its opinion, holding the record of trial to be legally sufficient, the Board of Review said:

"The fact that accused intended to shoot First Sergeant Hawkins and actually shot 'his best friend', Corporal Miller, does not relieve accused in the slightest of the consequences of his rash act. The overwhelming weight of judicial authority is that a homicide such as this partakes of the quality of the original act, so that the legal responsibility of the slayer is precisely what it would have been had his aim been true and his bullet struck the individual for whom it was intended. The criminal intent and malice of the slayer follow his bullet, and he may properly be found guilty of the murder of one whose death he neither intended or desired, if the circumstances are such as would make him guilty of murder had he killed the person at whom he shot. (Ryan v. People, 50 Col. 99, 114 Pac. 306, Anno. Cas. 1912 B 1232; Mayweather v. State, 29 Ariz. 460, 242 Pac. 864, 865; People v. Aranda, 12 Calif. 2d 307, 83 Pac. 2d 928; Bulter v. People, 125 Ill. 641, 18 N.E. 338, 1 L.R.A. 211, 8 Am. St. Rep. 423; Comm. v. Caldwell, 223

Ky. 65, 2 S.W. 2d 1055; State v. Batson, 339 Mo. 298, 96 S.W. 2d 384, 388; People v. Sobieskoda, 235 NY 411, 139 N.E. 558; State v. Dalton, 178 N.C. 779, 101 S.E. 548; Comm. v. Lyons, 283 Pa. 327, 129 Atl. 86). From the facts and circumstances in evidence, the court could, as it did, reasonably find that the attempt to shoot Hawkins was malicious and premeditated, and that since the death of Miller resulted therefrom, accused was guilty of murder." (CM CBI 219, Price).

If in the foregoing quotation the names "Filmore" and "Patterson" were to be substituted for "Hawkins" and "Miller" and the words "stabbed" and "knife" substituted for "shot" and "bullet", the language would almost precisely fit the facts of this case.

The evidence was of compelling effect, and warranted the court in reaching the conclusion that accused feloniously assaulted Filmore with a knife and inflicted wounds upon him, with intent to murder him, since:

"This is an assault aggravated by the concurrence of a specific intent to murder; in other words, it is an attempt to murder. * * *" (MCM, 1928, par. 1491).

Accused's statement, "I'll finish you both" (R. 67), the ferocious nature of the attack, the cutting of Filmore's throat after he was helpless, abundantly prove accused's malice, and his intent to murder.

Since the court found from the evidence that accused was guilty of assault with intent to murder Filmore, it would appear that the evidence was such as to impel a finding that accused was guilty of the murder of Ola Patterson. However, by exceptions and substitutions, the court found accused guilty of manslaughter, an offense lesser than and included in murder. In this respect, the findings of guilty are inconsistent, for the two assaults upon Filmore and deceased were in reality part of one and the same transaction, and as we have pointed out the degree of the homicide upon deceased must necessarily have been the same as the degree of the assault upon Filmore. If the assault was malicious, and if accused's intent was to murder Filmore, as found by the court, then it would necessarily follow that the killing of deceased must have been murder and accused should have been found guilty of that offense, as charged. On the other hand, if the homicide was voluntary manslaughter, as found by the court, then it would seem equally to follow that the assault upon Filmore must have involved the intent to commit manslaughter and not murder.

Since the evidence supports the finding of guilty of assault with intent to commit murder, we do not regard the finding of guilty of that offense as to the victim who recovered, and the finding of guilty of manslaughter as to the victim who died, which finding was an acquittal of the greater offense of murder, as illegal, however inconsistent these findings may appear to be. In CM 197115, Froelich, 3 BR 81, the Board of Review examined a record of trial, wherein the accused had been found guilty of one Specification and not guilty of another Specification, growing out of one transaction. The evidence was of such a nature that if accused was guilty of one of the offenses, he must also have been guilty of the other. It was there held:

"While the precise question before us would seem to be an open one in military justice administration, in the field of Federal criminal procedure the better rule on principle and authority is that inconsistent verdicts of guilty and not guilty in the same criminal proceeding do not vitiate the former (Dealy v. U.S., 152 U.S. 542; Huffman v. U.S., 259 Fed. 335; Achanasius v. U.S., 227 U.S. 326; Roark v. U.S. 17 F. (2d) 570; Hopkins Federal Criminal Law, p. 22, and other authorities there cited). It follows, therefore, that in the instant case the findings of not guilty of Charge II and its Specification in no wise affect the findings of guilty of Charge I and its Specification." CM.197115, Froelich, 3 B.R. 81, 82-83.

We conclude therefore that the acquittal by the court of accused of the murder of Ola Patterson, implicit in its findings by exceptions and substitutions of guilty of manslaughter under Charge II and its Specification cannot operate to vitiate the findings that he was guilty of assault with intent to murder Filmore under Charge I and its Specification.

5. Accused is 29 years and 11 months of age and was inducted on 28 September 1942.

6. The court was legally constituted, and had jurisdiction of the subject matter and of the person of accused. No errors injuriously affecting the substantial rights of accused were committed upon the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the sentence, which is within the limits authorized for the offenses of which accused was found guilty. A penitentiary was properly designated as the place of confinement.

[Signature], Judge Advocate
[Signature], Judge Advocate
[Signature], Judge Advocate

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

(293)

26 MAY 1945

SPJGV-CM 280665

UNITED STATES)

v.)

First Lieutenant ERNEST S.)
MATHERON (O-691401), Air)
Corps.)

ARMY AIR FORCES
WESTERN FLYING TRAINING COMMAND

Trial by G.C.M., convened
at Victorville Army Air
Field, Victorville, Cali-
fornia, 7 May 1945.
Dismissal, total forfeit-
ures and confinement for
one (1) year.

OPINION of the BOARD OF REVIEW
SEMAN, MICELI and BEARDSLEY, 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 61st Article of War.

Specification 1: In that 1st Lieutenant Ernest S. Matheron, Air Corps, Squadron B, 3035th AAF Base Unit, did, without proper leave, absent himself from his command at Victorville Army Air Field, Victorville, California, from about 7 March 1945, to about 14 March 1945.

Specification 2: In that 1st Lieutenant Ernest S. Matheron, Air Corps, Squadron B, 3035th AAF Base Unit, did, without proper leave, absent himself from his command at Victorville Army Air Field, Victorville, California, from about 16 March 1945, to about 5 April 1945.

Specification 3: In that 1st Lieutenant Ernest S. Matheron, Air Corps, Squadron B, 3035th AAF Base Unit, did, without leave, absent himself from his command at Victorville Army Air Field, Victorville, California, from about 7 April 1945, to about 16 April 1945.

He pleaded not guilty to and was found guilty of the Charge and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct, for one (1) year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. a. Evidence for the Prosecution.

On 6 March 1945 and for some time thereafter the accused was assigned to the Radar Group V at the Victorville Army Air Field (R. 9). He was a member of the 3035th Army Air Forces Base Unit of which Captain Stockton was commanding officer (R. 6-7).

Captain Stockton noticed that the accused was not present at his assigned place of duty on 17 March 1945 (R. 9). He made an investigation which included checking the station hospital to see if the accused was a patient there and found he was not (R. 10). He was informed by the Flight Surgeon's Office that accused was placed on D.N.I.F. (duty not involving flying) on 6 March 1945. Captain Stockton found that the accused was not listed as sick in hospital between 7 March and 17 April. He checked the Special Orders of the Victorville Army Air Field and found the accused not on "furlough"; checked the quarters of the accused on the post and failed to find him there. About 28 March, Captain Stockton told the finance officer to tell accused that he (Captain Stockton) wanted to see the accused (R. 12). From the 31st of March to the 17th of April he was attempting to locate the accused but failed (R. 13-14). On the 17th of April the accused was picked up on the field at the post office. He was taken to the Provost Marshal's office and then to the commanding officer's office where he was warned of his rights (R. 17). The accused then admitted to the commanding officer that his absence without leave had begun 7 March (R. 17), that he had been absent from his post from that date until 17 April, except for the 15th of March and the 6th of April; that on the first of these dates he had come to the field to sign his pay voucher, and on the second of these dates he attempted to pick up his pay check (R. 18). Captain Stockton testified that the accused had not taken "P.T."; had not attended orientation; had not appeared in his department for work, and was actually off the station from the 6th of March until the date he was picked up with the exception of the two times mentioned (R. 18).

Major Cole testified that he was the officer in charge of Radar Group V; that the accused was in that group; that the accused was not marked present for duty at any time after 5 March 1945 (R. 22) and did not report for duty (R. 23); that on 19 March 1945 a letter was posted

on the bulletin board and an "initial roster" was posted, and the accused failed to initial this roster at any time (R. 22).

On cross-examination Major Cole admitted that when a man went on D.I.N.F. at the time the accused did, he could stay away from the job and "generally report to the flight surgeon regularly" (R. 25), and that the accused had no other duties than flying duty.

Sergeant Corti of the Flight Surgeon's Office testified that the record or sick card of the Flight Surgeon's Office showed the accused had nasal pharyngitis on the 6th of March (R. 29), disposition D.N.I.F. By special orders the accused was grounded, which was customary procedure (R. 30), and the grounding order was lifted by special orders on 30 March 1945. The sick card also showed that the accused was reported in an automobile accident on 6 April and laid up at home (R. 31). On 18 March and on the 25th of March this sergeant put a message through the message center to be put in the accused's mail box at the post office (on the field) to report to the Flight Surgeon's Office. Accused did not report (R. 31).

Men on D.N.I.F. status are supposed to report to the Flight Surgeon's Office daily (R. 34) except Sunday (R. 35) but sometimes "they go along for several days and we don't see them" (R. 36). Although accused was present to collect his pay check on 5 April 1945, and then informed he was wanted by his commanding officer (R. 38), he could not be found on the field by Captain Albright, who made a search for the accused starting 6 April 1945 (R. 39). The captain then put a note in the accused's mail box. The captain saw the accused on 17 April at which time he had the captain's note in his hand.

There was considerable testimony regarding the morning report which showed the accused absent without leave from 6 March to 14 March; from the 16th of March to the 5th of April; and that the entries were made on 18 April according to the testimony of Captain Stockton, the accused's commanding officer, who did not finish his testimony on this point. On motion of defense, the testimony was stricken, i.e., the court was admonished by the law member not to consider the testimony (R. 8).

b. For the defense.

Captain Daly, a medical officer, testified that he examined the accused the day before the trial and found him to be suffering from operational fatigue, moderately severe, due to the necessity of readjusting himself on his comparatively recent return from overseas. In the opinion of Captain Daly the accused should be hospitalized in a convalescent

hospital or rehabilitation center. Operational fatigue is a loose term to cover all forms of psychoneurosis as a result of anxiety state in battle, this officer testified (R. 42-43).

4. The evidence of the accused's commanding officer, Captain Stockton, that he searched for the accused from 31 March to 17 April and was unable to find him, together with the testimony of Major Cole that he did not present himself for duty during that period, plus the admission of the accused that he was not present, is sufficient evidence to support the findings of guilty of Specifications 2 and 3.

As to Specification 1 (AWOL from 7 March 1945 to 14 March 1945) the evidence of Major Cole that his being put on D.N.I.F. did not excuse the accused from all duties, but only flying duty, and that he was not present for any duty with Radar Group V, his place of duty, during that period is sufficient to establish not only the corpus delicti, but the entire offense. Being absent from duty is tantamount to being absent from command. However, in any event, with the corpus delicti established, the accused's admission to Captain Stockton that he was absent during this period makes out a complete case as to this Specification.

The accused was charged in three separate Specifications of absence without leave, instead of one covering the entire period from 7 March to 16 April, probably because he was present at the Victorville Army Air Field on two intervening days, i.e., on 15 March 1945 (to sign his pay voucher) and on 6 April 1945 (to collect his pay check). His presence on the Air Field for these purposes does not constitute being present for duty with his command. Where one is not present for duty he is, in effect, absent without leave. However, since the allegations in the Specifications do not cover these dates of absence, and the accused has not been found guilty of absence without leave for these two dates, no harm to the substantial rights of the accused resulted.

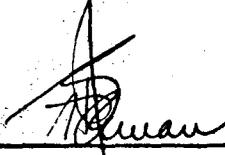
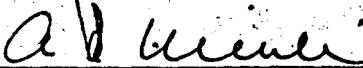
The law member properly ruled that the original entries of absence without leave on the morning report, having been proven to have been made long after the alleged event took place, were inadmissible as entries made at a time so remote from the time they occurred as to be hearsay evidence. The prosecution properly joined the defense in asking the court to so rule.

While the accused may have conceived the idea that putting him on D.N.I.F. relieved him from reporting to anyone until he was well (and there is some indication that he could have arrived at that conclusion) there is no legal justification or excuse for going absent without leave.

It is peculiar that the accused would be absent without leave and yet return to his field or station on two separate days for personal purposes. From the record of trial there is no indication that these actions were the result of a careless disregard of discipline and authority. Rather, in this case, it appears to be the result of a misbegotten idea as to the rights and duties of a flying officer relieved of flying. The only explanation of such conduct is the uncontradicted evidence of the medical officer that the accused was suffering from operational fatigue. This is a matter relating to mitigation, not guilt.

5. The records of the War Department show the accused to be 27 years old. He entered the service as an enlisted man on 25 May 1942 and served in that capacity until the 30th of August 1943, on which date he was commissioned a second lieutenant, AUS. He was promoted to first lieutenant, AUS (A.C.) on 15 July 1944 while serving in the field with the 8th Air Force. He was awarded the Air Medal with 3 oak leaf clusters, the Distinguished Flying Cross and is entitled to wear the European-African-Middle Eastern Theatre ribbon with 2 bronze stars. He is a rated pilot.

6. The court was legally constituted and had jurisdiction of the person and the subject matter. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 61st Article of War.

, Judge Advocate
, Judge Advocate
On Leave, Judge Advocate

(298) SPJGV-CM 280665

1st Ind

21 JUN 1945

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

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Ernest S. Matheron (O-691401), Air Corps.

2. Upon trial by general court-martial this officer was found guilty in three Specifications of absenting himself without leave for a total period of 36 days, in violation of Article of War 61. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority might direct, for one year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

This officer, after his return from overseas, was assigned to the Victorville Army Air Field, California, and there detailed for duty with Radar Group V. He reported to the Flight Surgeon who grounded the accused and marked him D.N.I.F. (duty not involving flying) which excused accused from flying duty only. The accused left the field on 7 March 1945 and was absent without leave until 17 April 1945, excepting two occasions; the first, when he came back, on 15 March 1945, to sign the payroll, and the second when he returned to pick up his pay check on 6 April 1945. A medical officer testified the accused was suffering from operational fatigue, moderately severe.

A summary of the evidence may be found in the accompanying opinion of the Board of Review. 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.

3. I recommend that the sentence be confirmed but due to the fine overseas record of the accused, his personal decorations, which include the Air Medal with three oak leaf clusters and the Distinguished Flying Cross, and the fact that he had been suffering from operational fatigue at the time of the commission of these offenses, I further recommend that the forfeitures and confinement be remitted and that the execution of the sentence as thus modified be suspended during good behavior.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.

2 Incls
1 Rec of Trial
2 Form of Action



MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed forfeitures and confinement remitted and execution of sentence as modified suspended during good behavior. GCMO 326, 9 July 1945).

(300)

looking for some count sheets", where he was informed they had already been picked up. A guard on duty at the gate noticed accused's face was very flushed and his feet were wobbly (R. 8). Another enlisted man present observed accused "fumbling" with some papers and "his knees were wobbly and he was staggering about." Witness would not say he was drunk - "he might have been sick." (R.9)

First Lieutenant Donald E. Miller, Adjutant, in pursuance to a telephone call, proceeded to the main stockade gate, where he found accused was drunk. Accused's body was completely limp and he was "slouched" against the wall in the guard shed. Accused could hardly walk, so Lieutenant Miller "helped" him to the station-hospital (R. 7,8,9).

The medical officer of the day (a veterinarian) at the station hospital testified that about 1845 hours 23 April 1945 Lieutenant Miller "brought" accused into the hospital. He noticed that "his face was redder and more flushed than it normally was and his eyes were red." Witness refused to say whether accused was drunk or sick (R. 10).

At about 1915 hours on 23 April 1945, Second Lieutenant Harold N. Jaffe, Laboratory Officer at the Station Hospital, conducted an ethyl alcohol test on blood drawn from accused, which test indicated 2.75 mg ethyl alcohol per 100 cc, which he stated was a high concentration of alcohol in the blood, and added further that "anything above 1.5 mg ethyl alcohol per 100 cc indicated intoxication." (R. 11)

4. For the defense.

Accused, after being apprised of his rights as a witness, elected to take the stand and testify under oath (R. 12). He stated in part as follows:

"I was feeling sick all day of the 23d of April 1945. In order to settle my stomach I took a few drinks of liquor at about 1500. I mounted guard as Officer of the Day at 1600. At that time I still felt sick but did not feel drunk. I then went back to the officers' quarters and laid down on my bunk until count time, which was about 1730. I then went to the Main Stockade to pick up the count slips of the other compounds. It was then that Lt. Miller came over to me and told me that I was relieved of my guard and took me to the Station Hospital. After that I don't remember anything happening until the following morning at about 0730." (R. 12-13)

In reply to questions by the court he stated that at 1730 hours he counted the prisoners by himself and he knew that medical facilities were available for individuals who were sick. He had no reason for not using this service "except that I felt I should go ahead and do my job" (R. 13).

5. The accused has been convicted of being drunk while on duty in violation of the 85th Article of War. Under this Article it is necessary to prove that the accused was on duty and that he was found drunk while on such duty. Any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties is drunkenness within the meaning of the Article (MCM, 1928, par. 145, pp. 159-160). The evidence clearly shows, and the pleas of guilty admit, that at the time and place alleged the accused was found drunk while on duty as officer of the day.

The sole question which requires discussion arises from the law member's explanation to the accused of the effect of his plea of guilty. In stating the maximum punishment he told accused the court "may" impose a sentence of dismissal. After the explanation the accused was asked whether he still wished to plead guilty, the reply being, "Yes, Sir." Accused should have been advised by the law member that upon a finding of guilty of the offense alleged a sentence of dismissal was mandatory and in addition the court could impose such other punishment it deemed fitting and proper.

It is to be noted, however, that prior to the explanation by the law member the counsel for the defense stated the meaning and effect of the plea of guilty had been explained to the accused. In addition, the evidence presented by the prosecution aliunde the plea of guilty clearly establishes and sustains the charge.

When the law member, explaining to an accused the effect of his plea of guilty, erroneously states the maximum punishment that may be adjudged to be less than the maximum punishment authorized and the accused is convicted upon his plea of guilty, no evidence being introduced, the punishment imposed may not exceed that so stated by the court in its explanation (Dig. Op. JAG, 1912-1940, sec. 378(2), p. 188, CM 144220 (1921)).

Where, however, the prosecution introduced substantial competent evidence to establish accused's plea of guilty no substantial right of the accused was violated where the punishment imposed exceeds that stated by the court in its explanation (CM ETO 3507, Goldstein).

It is thus clear that in the present case where the sentence by the court did not exceed the maximum erroneously stated by the law member the accused was not prejudiced by the law member's failure to state that upon conviction of the alleged offense dismissal was mandatory and the court could in addition impose such other punishment it might direct.

6. All of the members of the court participating in the trial recommended, in view of the accused's military service of over 25 years and his eight discharges rating his character as excellent, that the sentence of the accused be suspended during good behavior.

SPJGK-CM 280680

1st Ind

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

JUN 15 1945

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Melvin L. Madison (O-491531), Corps of Military Police.

2. Upon trial by general court-martial this officer pleaded guilty to, and was found guilty of, being drunk while on duty as officer of the day at Prisoner of War Camp, Douglas, Wyoming, in violation of Article of War 85. No evidence was introduced of any previous conviction. He was sentenced to be dismissed the service. The reviewing authority approved the sentence, but recommended that the execution thereof be suspended during the pleasure of the President and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence.

Accused, showing no signs of intoxication, entered upon his duties as officer of the day at a prisoner of war camp, and two hours later was found drunk. He offered no excuse except that he had been feeling sick, and, thinking he should "go ahead and do his job", took a few drinks to settle his stomach.

The accused has been convicted of a serious military offense. War Department records show that prior to receiving his commission the accused had completed 22 years of honorable service as an enlisted man in the regular Army. Each of his eight honorable discharges shows a character rating of excellent. Lieutenant Colonel Van L. Prather, in recommending accused and four other sergeants for commissions, stated:

"It is superfluous to add that I would be grateful to have all these men serve under me, in a little or big job. I am not given to loud, unwarranted praise of anyone, including myself. I have no sympathy for drones, intellectual or otherwise."

and later stated specifically of accused:

"The undersigned has great respect for the honorable, efficient and generally superior type of Sergeant and is pleased with the opportunity to express such feelings in the case of Madison with whom he has been associated for the past ten years or more. It is not difficult to visualize Madison as an officer rendering excellent service in some very responsible position."

(304)

All members of the court participating in the trial have recommended that the sentence to dismissal be suspended. The reviewing authority in his action recommended the suspension of the dismissal during the pleasure of the President. Despite the serious nature of the offense and the fact he has had punishment under Article of War 104 for being drunk, in view of the long and honorable military record of the accused, and of the recommendations for clemency by the court and reviewing authority, I recommend that the sentence be confirmed but that the execution of the sentence be suspended during good behavior.

4. Consideration has been given to a plea for clemency filed by defense counsel.

5. Inclosed is a form of action designed to carry into execution the foregoing recommendation should it meet with your approval.



2 Incls

1. Record of Trial
2. Form of action

MYRON C. CRAMER

Major General

The Judge Advocate General

(Sentence confirmed but execution is suspended. GCMO 325, 9 July 1945).

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

SPJGN-CM 280747

UNITED STATES	)	SEVENTH SERVICE COMMAND
	)	ARMY SERVICE FORCES
v.	)	Trial by G.C.M., convened at
	)	Fort Francis E. Warren, Wyoming,
Second Lieutenant CHARLES	)	1, 2 May 1945. Dismissal and
H. DUNCAN (O-1896265),	)	confinement for two (2) years.
Quartermaster Corps.)	

OPINION of the BOARD OF REVIEW
LIPSCOMB, O'CONNOR and MORGAN, 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 Charles H. Duncan, QMC, Training Company No. 9, Army Service Forces Training Center, Fort Francis E. Warren, Wyoming, did, at Denver, Colorado, on or about 7 November 1944, with intent to deceive and injure, wrongfully and unlawfully make and utter to Hotel Brown Palace, a certain check, in words and figures as follows, to wit:

The Brown Palace Hotel
Denver

7 Nov 19 44

The Bridgeport National Bank
(Name of Bank
Bridgeport, Ohio
Town and State where Bank is located

(306)

Pay to the Order of Hotel Brown Palace \$35.00

Thirty five and xx/100 Dollars

(For value received and for the purpose of getting this check cashed, I represent that the above amount is on deposit in said bank subject to this check and is hereby assigned to payee, and I guarantee payment with exchange and costs in collecting.)

/s/ Charles H. Duncan

3070 Q. M. Co.
Ft. Warren, Wyo.
0-1896265

and by means thereof, did fraudulently obtain from the said Hotel Brown Palace, Denver, Colorado, \$1.59, lawful money of the United States, and payment of a hotel bill in the amount of \$33.41, all of a total sum of \$35.00, he the said Second Lieutenant Charles H. Duncan, QMC, then well knowing that he did not have and not intending that he should have any account with The Bridgeport National Bank, Bridgeport, Ohio, for the payment of said check.

Specification 2: Similar to Specification 1 but alleges making and uttering a check in the sum of \$10 at Chicago, Illinois on 16 November 1944, to Hotel Maryland and fraudulently obtaining thereby \$10 in cash.

Specification 3: Similar to Specification 1 but alleges making and uttering a check in the sum of \$10 at Chicago, Illinois on 17 November 1944, to Hotel Maryland and fraudulently obtaining thereby \$10 in cash.

Specification 4: Similar to Specification 1 but alleges making and uttering a check in the sum of \$10 at Chicago, Illinois on 18 November 1944, to Hotel Maryland and fraudulently obtaining thereby \$10 in cash.

Specification 5: Similar to Specification 1 but alleges making and uttering a check in the sum of \$40 at Chicago, Illinois on 18 November 1944, to Hotel Maryland and fraudulently obtaining thereby \$13.44 in cash and payment of hotel bill in the sum of \$26.56.

Specification 6: In that Second Lieutenant Charles H. Duncan, QMC, Training Company No. 9, Army Service Forces Training Center, Fort Francis E. Warren, Wyoming, did, at Fort Francis E. Warren, Wyoming, on or about 25 January 1945, with intent to deceive and injure, wrongfully and unlawfully make and

utter to Post Officers Mess, Fort Francis E. Warren, Wyoming, a certain check, in words and figures as follows, to wit:

25 Jan. 19 45 .

The Half Dollar Savings & Trust Co.
Wheeling, W. Va.

PAY TO THE ORDER OF Ft. Warren Officers Club \$10.00

Ten and no/100 -----DOLLARS

I hereby claim that I have the above amount in this bank at this time, and will leave same on deposit there subject to this check upon presentation.

/s/ Charles H. Duncan
0-1896265 - Tng. Co. 9

and by means thereof, did fraudulently obtain from the said Post Officers Mess, Fort Francis E. Warren, Wyoming, \$10.00, lawful money of the United States, he the said Second Lieutenant Charles H. Duncan, QMC, then well knowing that he did not have and not intending that he should have sufficient funds in Half Dollar Trust & Savings Bank, Wheeling, West Virginia, for the payment of said check.

Specification 7: Similar to Specification 6 but alleges making and uttering a check in the sum of \$35 on 31 January 1945, to Hotel Brown Palace, Denver, Colorado, in payment of returned check; and omits allegation of intent to injure and deceive.

Specification 8: Similar to Specification 6 but alleges making and uttering a check in the sum of \$70 on 31 January 1945, to Hotel Maryland, Chicago, Illinois, in payment of returned checks; and omits allegation of intent to injure and deceive.

Specification 9: Similar to Specification 6 but alleges making and uttering a check in the sum of \$15 on 7 February 1945, to Fort Warren Post Exchange and fraudulently obtaining thereby \$15 in cash.

Specification 10: Similar to Specification 6 but alleges making and uttering a check in the sum of \$15 on 17 February 1945, to Fort Warren Post Exchange and fraudulently obtaining thereby \$15 in cash.

Specification 11: Similar to Specification 6 but alleges making and uttering a check in the sum of \$15 on 20 February 1945,

to Fort Warren Post Exchange and fraudulently obtaining thereby \$15 in cash.

Specification 12: Similar to Specification 6 but alleges making and uttering a check in the sum of \$15, on 23 February 1945, to Fort Warren Post Exchange and fraudulently obtaining thereby \$15 in cash.

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

Specification 1: Similar to Specification 6, the Charge, but alleges making and uttering a check in the sum of \$5, on 16 March 1945, to Officer's Mess Fund and fraudulently obtaining thereby \$.30 in merchandise and \$4.70 in cash.

Specification 2: Similar to Specification 6, the Charge, but alleges making and uttering a check in the sum of \$10, on 18 March 1945, to Officer's Mess Fund and fraudulently obtaining thereby \$5.10 in merchandise and \$4.90 in cash.

Specification 3: Similar to Specification 6, the Charge, but alleges making and uttering a check in the sum of \$5, on 26 March 1945, to Officer's Mess Fund and fraudulently obtaining thereby \$5 in cash.

The accused pleaded not guilty to, and was found guilty of, all Charges and Specifications. Evidence of one previous conviction by general court-martial on 15 December 1944 for making and uttering six worthless checks was considered by the court. Accused was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for ten years. The reviewing authority approved only so much of the sentence as involved dismissal and confinement at hard labor for two years and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution: On 7 November 1944 accused paid his hotel bill of \$33.41 at the Brown Palace Hotel in Denver, Colorado, and received \$1.49 in cash for his check in the sum of \$35, drawn on the Bridgeport National Bank, Bridgeport, Ohio. The instrument was deposited for collection and was returned marked "No Account" (R. 20, 22; Pros. Ex. 2). Between 16 and 18 November 1944 accused wrote and cashed three checks for \$10 each and one for \$40 at the Hotel Maryland in Chicago, Illinois, receiving cash in the aggregate amount of \$43.44 and credit on his hotel bill for \$26.56. These checks, also drawn on the Bridgeport National Bank, were deposited for collection and were returned with the same notation, "No Account" (R. 20, 23-25; Pros. Exs. 3 to 6). Accused never had an account in the Bridgeport National Bank at any time (R. 21).

During the period between 25 January 1945 and 26 March 1945 ac-

cused wrote a number of checks on the Half Dollar Trust and Savings Bank, Wheeling, West Virginia, which were dishonored by reason of "insufficient funds" (R. 22; Pros. Ex. 17). Accused cashed one of these in the sum of \$10 on 25 January 1945 in the bar room of the Post Officers' Club or Mess at his station, Fort Warren, Wyoming, and received \$3.25 in merchandise and \$6.75 in cash (R. 26-28; Pros. Ex. 7). When the check was returned unpaid on 9 February 1945, the cashier immediately called the accused who redeemed it several days later. Previously, on 6 February 1945, another of accused's checks (not covered by the present charges) drawn on the same bank, had been returned dishonored to the Officers' Club and brought to his attention (R. 30, 37). Another two checks were written by him on 31 January 1945. He mailed one in the sum of \$35 to the Brown Palace Hotel in Denver in payment of his dishonored check of 7 November 1944 and the other in the sum of \$70 to the Hotel Maryland in Chicago in payment of his dishonored checks of 16-18 November 1944. Like their predecessors these checks proved to be worthless (R. 22-23, 25; Pros. Exs. 8, 9). The Post Exchange at Fort Warren cashed four of accused's checks for \$15 each on the 7th, 17th, 20th, and 23rd of February 1945, respectively. They were all deposited for collection and were returned unpaid (R. 38-40, 41-42, 46-47; Pros. Exs. 10-13). Accused made and cashed three more checks on the Half Dollar Trust and Savings Bank at the Bachelor Officers' Mess on 16, 18, and 26 March 1945 in the respective sums of \$5, \$10, and \$5. In each instance he received cash and merchandise for the amount of the check (R. 50-53; Pros. Exs. 14, 15, 16). The instruments were deposited for collection and were dishonored (R. 54-58).

An official of the Half Dollar Trust and Savings Bank testified that on 7 September 1944 accused's mother, Mrs. Eva N. Duncan, opened a checking account in the joint names of accused and herself. Approximately \$200 was deposited in the account between 7 September 1944 and 17 February 1945 when a final deposit was made. There were sufficient funds in the account on 25 January and on 7 and 17 February 1945 to pay the checks issued on those dates but not at the time that they were presented for payment. As to the other checks there were insufficient funds in the account to pay them both on the dates they were issued and on the dates they were presented for payment. Accused never made any inquiry of the bank concerning the account and never received a bank statement (R. 22; Pros. Ex. 17).

After being warned of his rights by the investigating officer, accused gave a signed statement concerning the checks listed under the original Charge. He admitted that he wrote each of them and received the face amount thereof. He alleged that he had arranged with his mother to open an account in the Eridgeport National Bank and believed he had an account there when he wrote checks on that bank. Because of a misunderstanding his mother opened an account in the Half Dollar Trust and Savings Bank. He thought there were sufficient funds in this account when he wrote checks on it (R. 59-61; Pros. Ex. 18).

It was brought out on cross-examination of witnesses for the

prosecution that on 26 February 1945 accused paid the Post Exchange \$15 for his returned check on 17 February 1945, and that on the day of trial, 1 May 1945, he paid the Post Exchange \$45 for other returned checks and the Post Officers' Mess \$10 for his returned check of 25 January 1945 (R. 34-35, 43; Def. Exs. A, B, C).

4. Evidence for the defense: Accused, cognizant of his rights as a witness, elected to remain silent (R. 93-94).

Accused's mother testified that in September or October 1944 accused requested that she open a joint account in the Bridgeport National Bank, Bridgeport, Ohio. She wrote him that it was unnecessary because she had already opened a joint account in the Half Dollar Trust and Savings Bank on 7 September 1944. Accused did not acknowledge receipt of her letter. She never advised accused of the balance in this account or sent him bank statements but she did write him that the account was low and requested him to curtail his expenses. In December 1944, following her return from the hospital, she again wrote him that because of heavy medical expenses she would have to use her income principally for herself. Her personal financial situation was never revealed to him. She admitted that in September 1944 she informed him that checks which he had written in August and September 1944 on a previous joint account had been dishonored, that her financial condition did not permit a checking account, and that, if he wrote any more checks relying on her for payment, he would be "walking straight into tragedy". However, she had continued to maintain a checking account (R. 82; Def. Ex. E).

Accused's company commander testified that accused had done "a very good job" as a supply officer (R. 64). The regimental commander stated that he "had never found occasion to take [accused] to task for any dereliction of duty" (R. 66).

It was stipulated that named officials of the Brown Palace Hotel in Denver and Hotel Maryland in Chicago would testify that accused's dishonored checks to those institutions had been redeemed on 14 April 1945 (R. 83-84). It was also stipulated that an officer of the Bridgeport National Bank would testify that each month between September 1944 and March 1945 the bank received from the Finance Office at Fort Warren a \$25 Series E War Savings Bond payable to accused and Miss Diana Duncan. Since he had given no instructions as to their disposition, accused was requested on 14 November 1944 to apprise the bank of his wishes. At the same time the bank advised accused that a number of his checks had been dishonored and asked that he desist from writing any more (R. 82-83).

Counsel for accused in his previous general court-martial of 15 December 1944 testified that following the trial he had requested that accused be permitted to go "downtown" for the purpose of redeeming his dishonored checks or in lieu thereof that counsel be permitted to take care of these obligations. Major James J. Cooke, Headquarters Adjutant, denied

both requests and said he would handle the matter himself. The accused was restricted to the post at the time by reason of the sentence of the court-martial (R. 88).

5. Rebuttal Evidence for Prosecution: Major Cooke testified that accused was refused permission to leave the post because he was under restriction by sentence of court-martial and only the reviewing authority could allow any deviation from the sentence. According to Major Cooke, accused's counsel was told that arrangements would be made for the settlement of accused's obligations. Later accused gave Major Cooke money to pay "the Officers' Club and the two stores downtown". Accused's checks to the Brown Palace Hotel and the Hotel Maryland were discussed on several occasions. Around 29 November 1944 a telegram from the Hotel Maryland concerning the checks was brought to his attention, and he promised to take care of them. Five subsequent letters from the Hotel were received, and each time accused promised to pay his debt. Finally, after accused was threatened with court-martial proceedings, he sent the Hotel a check, dated 31 January 1945, which was drawn on another bank, and which also was dishonored (R. 95-96).

6a. Specifications 1 to 5, the Charge, allege that, with intent to deceive and injure, accused, between 7 and 18 November 1944, made and uttered to the Hotel Brown Palace in Denver and Hotel Maryland in Chicago, five checks aggregating \$105, drawn on the Bridgeport National Bank, Bridgeport, Ohio, he then knowing that he did not have and not intending that he would have an account in said bank, and thereby fraudulently obtained from the payees sums of money or services in the said aggregate amount. The Specifications are laid under the 96th Article of War.

It is undisputed that accused wrote and cashed the checks described in the Specifications and that he obtained their face amount in cash or services. It is also undisputed that accused never had an account in the Bridgeport National Bank at any time and that the checks were accordingly dishonored. The only question presented is whether the evidence sustains the allegations of the Specifications that accused cashed the checks "with intent to deceive and injure" and obtained the proceeds "fraudulently", "knowing that he did not have and not intending that he should have an account" in that bank.

In CM 245507, Payne, 29 BR 189, the Board of Review said:

"* * * The act of delivering a check, presently payable, in exchange for cash is in itself a representation that the check will be honored when presented for payment at the bank upon which it is drawn. If the check is dishonored because of the lack of funds on deposit belonging to the maker of the check, fraud may be implied from these facts alone. This implication or presumption however may be overcome by an explanation of the circumstances which, if believed, may explain the otherwise fraudulent act * * *".

In the present case accused denied any deceitful or fraudulent intent and asserted that he had previously arranged with his mother to establish an account in the Bridgeport bank and believed at the time he executed the checks that the account was in existence. The testimony of accused's mother, however, shows that this alleged arrangement consisted merely of his request, in September or October 1944, that she open a joint account in the Bridgeport bank. She did nothing to give accused cause to believe that his wish had been complied with but, on the contrary, informed him that such an account was unnecessary because she had already opened a joint account in a bank at Wheeling, West Virginia. In her testimony she indicated doubt that he ever received her reply, but, without any confirmation from her, he was wholly unjustified in proceeding to issue checks against the proposed account. The circumstances indicate how really tenuous were his grounds for expecting the account to be opened. Early in September she had advised him that certain checks he had drawn in August on another account had been dishonored. She pointedly warned him that, if he wrote any more checks relying on her for payment, he would be "walking into tragedy". Although she receded from her position and opened a small joint account on 7 September 1944, the existing conditions should have impressed upon accused the grave likelihood that she would not comply with his request. His action in writing checks under these circumstances denoted an indifference to the consequences which amounts to bad faith and warrants the imputation of an intent to deceive and defraud the payees. Accused's subsequent conduct in failing to redeem the checks, issued in November 1944, until April 1945, serves to confirm this conclusion. The Specifications are accordingly sustained.

b. Specifications 7 and 8, the Charge, allege that in payment of previously returned checks, accused wrongfully and unlawfully made and uttered on 31 January 1945 to the Hotel Brown Palace and the Hotel Maryland two checks, aggregating \$105. Specifications 6 and 9 to 12, the Charge, and Specifications 1 to 3, the Additional Charge, allege that, with intent to deceive and injure, accused made and uttered to the Fort Warren Post Exchange and the Officers' Mess between 25 January and 26 March 1945, eight checks, aggregating \$90, and fraudulently obtained from the payees the amount of the checks in cash or merchandise. Accused is alleged to have drawn all of the foregoing checks on the Half Dollar Trust and Savings Bank, Wheeling, West Virginia, knowing that he did not have and not intending that he should have sufficient funds for their payment. These Specifications are also laid under the 96th Article of War.

It has been shown that accused made and uttered these ten checks as alleged in the Specifications. He received cash or the equivalent value in merchandise for the face amount of each check except two which were given to redeem his previously dishonored checks. There is a slight variance in one or two instances between the amounts of cash or merchandise obtained and that alleged, but the discrepancies are inconsequential. The checks were all drawn on a joint account maintained by accused and his

mother in the Half Dollar Trust and Savings Bank, Wheeling, West Virginia, and, although there were sufficient funds in the account to pay three of the checks at the time they were written, the funds were insufficient to pay any of the checks upon presentation. The timeliness of the presentation is not disputed.

Although accused asserted that at the time he wrote the checks he was under the impression that there were sufficient funds in the account, the record discloses no basis for his alleged belief. The testimony shows that he never made any inquiry of the bank as to the status of the account, and that his mother furnished no such information. His mother had reported that the joint account was open, but he was certainly not entitled to assume from this fact alone that he was given carte blanche to write checks, particularly in view of her warning that her financial condition was precarious and that he should be very circumspect in his expenditures.

The total deposits in the account were \$200. The amount of accused's checks which were honored is not shown, but the aggregate amount of the ten dishonored checks declared upon in these Specifications is \$195 and the evidence discloses other dishonored checks upon which no charges were predicated. It is probable that his mother's own checks contributed to the depletion of the account, but this circumstance does not improve his position. In the analogous case of 32 BR 397, CM 250484, Hebb, the Board of Review remarked:

"* * * When the accused chose to open a joint account, subject to the checks of another as well as his own, he was under the responsibility of making some reasonable and practicable arrangement to prevent his checks from being returned unpaid on account of the withdrawal of funds by his mother
* * *".

Accused wrote at least four checks against this account after he had received notice that an earlier check had been dishonored. Such conduct does not speak well for his supposed good faith. Furthermore, he allowed his checks for the most part to remain dishonored for considerable periods of time. It was only on the day of his trial that he redeemed the last of them. His failure to redeem them promptly indicates his irresponsibility. In the light of these facts the Board concludes that the evidence is sufficient to charge accused with the knowledge that he did not have sufficient funds in the bank to pay his checks upon their presentation and that there is no showing of any bona fide intent on his part to have such funds. The Specifications are sustained.

7. The accused is approximately 32 years and 5 months of age, having been born 30 January 1913. War Department records show that he attended Washington and Lee University for two years and is married. He has been employed in the following capacities: sales manager and later manager

of a laundry and dry cleaning company from 1932 to 1936; salesman for a wholesale tobacco company from 1936 to 1937; statistical clerk for a public utility from 1937 to 1941; and credit manager for a coal and real estate brokerage firm from 1941 to 1942. After entering the Army as an enlisted man in June 1942, he was promoted to corporal and entered Ordnance Officers' Candidate School but was relieved therefrom and was reclassified from general to limited service because of spinal curvature. He subsequently attended an Army Administration Officers' Candidate School and received a temporary appointment as a second lieutenant in the Army of the United States on 30 June 1943, entering upon active duty on that date.

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

Abner E. Lifecord, Judge Advocate.

Robert J. Harmon, Judge Advocate.

Samuel Morgan, Judge Advocate.

SPJGN-CM 280747

1st Ind

Hq ASF, JAGO, Washington 25, D. C. 1 JUL 1945
TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Charles H. Duncan (O-1896265), Quartermaster Corps.

2. Upon trial by general court-martial this officer was found guilty of making and uttering, with intent to deceive and injure, five checks, aggregating \$105, on a bank in which he did not have, and did not intend to have, an account, thereby fraudulently obtaining the amount of the checks in cash or services; of wrongfully making and uttering two checks, in the sum of \$105, in payment of his previously dishonored checks, and, with intent to deceive and injure, of making and uttering eight checks, aggregating \$90, thereby fraudulently obtaining that amount in cash or merchandise, knowing that he did not have, and not intending that he should have, sufficient funds in the bank for payment. All Specifications were laid under 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 for ten years. The reviewing authority approved only so much of the sentence as involved dismissal and confinement at hard labor for two years and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence as approved by the reviewing authority and to warrant confirmation thereof.

Between 7 and 18 November 1944, accused gave five checks, totalling \$105, to two hotels in Chicago and Denver in payment of hotel bills or for cash. The checks were written on a bank in which he had no account. He had requested his mother to open a joint account in this bank but she did not comply with his request and he had no valid reason to believe that she had done so.

Between 25 January and 26 March 1945, ten checks, which accused had written on a bank in which he and his mother had a joint account, were dishonored by reason of insufficient funds. Two of these checks were given to the hotels to redeem his previously dishonored checks and the remaining checks, totalling \$90, were given to the Post Exchange and the Officers' Mess at his station, Fort Warren, Wyoming, for cash or merchandise. Accused wrote them after his mother had warned him that the account, in which she alone made deposits, was limited, and without any inquiry as to the balance on deposit. Some of the checks were written

(316)

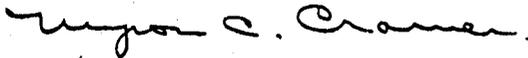
after he had received notice that previous ones were dishonored.

This is the second time the accused has been tried by general court-martial on charges of writing worthless checks. The Staff Judge Advocate states:

"Accused has been passing 'no fund' and 'insufficient fund' checks for a period that goes back beyond July 1944, the date that he was transferred to Fort Warren from Larned Quartermaster Laundry, Larned, Kansas. He has been reprimanded, given punishment under Article of War 104, and tried by General Courts-Martial for this practice."

Although the checks in the instant case were eventually redeemed, it is apparent that accused's financial irresponsibility renders him unfit for retention in the service as an officer. I recommend that the sentence, as approved by the reviewing authority, be confirmed and ordered executed. I further recommend that an appropriate United States Disciplinary Barracks be designated as the place of confinement.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.



2 Incls
Incl 1 - Record of trial
Incl 2 - Form of Action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence as approved by reviewing authority confirmed and ordered executed).
CCMO 348, 21 July 1945).

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

SPJGQ - CM 280789

UNITED STATES

v.

Second Lieutenant DWIGHT
E. HUGHES (O-748985), Air
Corps.

ARMY AIR FORCES CENTRAL
FLYING TRAINING COMMAND

Trial by G.C.M., convened at
Pampa Army Air Field, Pampa,
Texas, 30 April 1945 and 9
May 1945. Dismissal, total
forfeitures and confinement
for one (1) year.

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

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

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

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

Specification 1: In that Second Lieutenant Dwight E. Hughes, Air Corps, did, at Pampa Army Air Field, on or about 24 October 1944, wrongfully and unlawfully make and utter to the Pampa Army Air Field Officers' Mess, a certain check, in words and figures as follows, to wit:

PAMPA ARMY AIR FIELD

OFFICERS' MESS

Pampa Army Air Field, Texas October 24, 1944

Name of Bank National Bank of Ft. Sam Houston

City San Antonio, Texas

Pay to the order of _____ \$ 15.00

Fifteen and no/100-----Dollars

Signature /s/ Dwight E. Hughes

Organization _____ Serial No. O-748985

(318)

and by means thereof, did obtain from the said Pampa Army Air Field Officers' Mess, \$15.00, lawful money of the United States, he, the said Dwight E. Hughes, then well knowing that he did not have and not intending that he should have sufficient funds in the National Bank of Ft. Sam Houston for the payment of said check.

Specifications 2 through 12: These are identical in substance with Specification 1, except for dates, amounts, and other details, which exceptions are as follows in the Specifications indicated:

<u>Specifi- cation</u>	<u>Date (1944)</u>	<u>Amount</u>	<u>Drawee Bank</u>	<u>To Whom Uttered</u>
2	29 October	\$10.00	Valley National Bank; Phoenix, Arizona	
3	12 November	\$15.00		
4*	19 November (Place of making: "Pampa, Texas")	\$10.00	("88-2191" is added to the name of the bank.)	
5	20 November	\$ 5.00		
6	21 November	\$ 5.00		
7	23 November	\$10.00		
8	25 November	\$15.00		
9	29 November	\$10.00		
10	2 December	\$20.00		
11	10 December	\$20.00		
12*	15 December (Place of making: "Pampa, Texas")	\$20.00	(same except that address of bank is omitted)	Hugh M. Ellis and W. M. McWright, doing business as "Paul and Mack Barber Shop"

(* The words "Pampa Army Air Field - Officers' Mess" are omitted from the checks set forth in Specifications 4 and 12.)

Specification 13: (Nolle prosequi.)

Specification 14: (Nolle prosequi.)

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

Specification: In that Second Lieutenant Dwight E. Hughes, Air Corps, did, at Pampa, Texas, on or about 20 January 1945, with intent to defraud, wrongfully and unlawfully make and utter to Mr. George Wright, a certain check, in words and figures as follows, to wit:

Pampa, Texas January 20 1944 No.

National Bank of Ft. Sam Houston

Pay to the
Order of _____

\$30.00

Eighty and no/100

Dollars

/s/ Dwight E. Hughes

0-748985

and by means thereof, did fraudulently obtain from the said Mr. George Wright \$30.00 cash, lawful money of the United States, he the said Dwight E. Hughes, then well knowing that he did not have and not intending that he should have sufficient funds in the National Bank of Ft. Sam Houston for the payment of said check.

The accused pleaded guilty to all Specifications and Charges but upon explanation of the significance of his pleas, he stated that he wished his pleas of guilty to Charge I and its Specifications to stand but desired to change his pleas to Charge II and its Specification to not guilty. He was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for one year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

The accused is in the military service of the United States as a member of Squadron B, 2531st Army Air Forces Base Unit, Pampa Army Air Field, Pampa, Texas, and was so at the time of the commission of the alleged offenses (R. 12, 13).

He had an account with the National Bank of Fort Sam Houston, San Antonio, Texas at the time of the giving of the checks in question which were drawn on said bank (R. 34, 37, 38; Pros. Ex. 15, 16, 17). He also had opened an account with the Valley National Bank of Phoenix, Arizona on 6 July 1944, but said account had been continuously over-drawn since 2 September 1944 (R. 34; Pros. Ex. 14).

During the months of October, November and December 1944, the accused presented a series of checks to various employees of the Officers' Club, Pampa Army Air Field. The date, amounts, and banks upon which drawn are as follows:

(320)

<u>Date</u>	<u>Amount</u>	<u>Drawee Bank</u>	
24 October	\$15.00	National Bank of Fort Sam Houston, San Antonio, Texas	(R. 31; Pros. Ex. 12)
29 October	\$10.00	Valley National Bank Phoenix, Arizona	(R. 32; Pros. Ex. 13)
12 November	\$15.00	National Bank of Fort Sam Houston, San Antonio, Texas	(R. 15; Pros. Ex. 1)
19 November	\$10.00	" "	(R. 22; Pros. Ex. 9)
20 November	\$ 5.00	" "	(R. 16; Pros. Ex. 2)
21 November	\$ 5.00	" "	(R. 16; Pros. Ex. 3)
23 November	\$10.00	" "	(R. 20; Pros. Ex. 8)
25 November	\$15.00	" "	(R. 17; Pros. Ex. 4)
29 November	\$10.00	" "	(R. 17; Pros. Ex. 5)
2 December	\$20.00	" "	(R. 18; Pros. Ex. 6)
10 December	\$20.00	" "	(R. 18; Pros. Ex. 7)

All of these checks were presented for payment in due course and were returned dishonored due to insufficient funds in the accused's account (R. 32, 33).

On 15 December 1944 at the "Paul and Mack Barber Shop" the accused also cashed a check in the sum of \$20.00 drawn upon the National Bank of Fort Sam Houston. The barber shop was owned and operated by W. M. McWright and Hugh M. Ellis. This check was also dishonored and returned to the payees who made good the amount of the bad check at their bank. They were later reimbursed by the accused (R. 29-30; Pros. Ex. 11).

On 20 January 1945 the accused cashed a check for \$80.00 (Charge II and Specification) drawn upon the National Bank of Fort Sam Houston at the K and C Waffle Shop, operated by George Wright. This check was erroneously dated "January 20, 1944". It was returned unpaid because of insufficient funds. Mr. Wright was obliged to reimburse his bank. The accused redeemed the check later (R. 24-28; Pros. Ex. 10). The circumstances under which the check was cashed were that the accused, who had a slight acquaintance with Mr. Wright from one "honkey-tonking" party, came into the Waffle House just after bank closing hours and said "George, I need some money". Mr. Wright said, "How much?" The accused said, "\$80". Mr. Wright said, "Write me a check and I'll give it to you" (R. 26).

The balance status of the accused's account with the National Bank of Fort Sam Houston on the pertinent dates was as follows:

1944

24 and 29 October	\$.92
12 November	10.53
19 and 20 November	10.08
21, 23 and 25 November	9.08
29 November	2.53
2 December	2.08
10 December	24.08
15 December	4.08

1945

20 January	1.58
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(R. 34; Pros. Ex. 15)

The accused's account with the Valley National Bank, Phoenix, Arizona was, as above stated, constantly overdrawn from 2 September 1944 which overdraft stood at \$78.08 on 29 October 1944 when he cashed a \$10.00 check on that account at the Officers' Club. The overdraft continued thereafter, and rose to \$80.78 by 5 December 1944 (R. 34; Pros. Ex. 14). The last deposit was made on 8 August 1944.

Three voluntary statements made by the accused in the course of investigation were introduced in evidence (R. 37, Pros. Ex. 16; R. 38, Pros. Ex. 17; R. 39, Pros. Ex. 18), wherein he admitted making and cashing the checks in question and that they were dishonored for insufficient funds in his bank accounts to cover them. In Exhibit 18, dated 15 December 1944, he admitted that, at the times when he cashed the checks therein mentioned, he did not know whether or not he had sufficient funds to cover them. In the statements, he attributed his difficulties to confused accounting on his part, arising from uncertainty as to the disposition of certain allotments made by him to the banks to pay loans which he had obtained from them. He had redeemed all the checks.

4. The accused testified on his own behalf (R. 51) that he enlisted in the Air Corps in 1941, made a good record as an air cadet in 1942, and graduated in 1943. He went to Central Instructors' School, Randolph Field, Texas, for instructor's training, then to Douglas, Arizona, as an advanced twin-engine instructor. There "everybody practically was flying double duty". He was on the flight line from 0630, frequently until 2130 or 2200. He asked for a transfer and went to Del Rio, Texas, for B-26 transition. He became nervous and "more or less disgusted with the life in general". His condition was noticed, and he was given a month rest treatment at Regional Hospital at San Antonio, followed by thirty days' sick leave and then three weeks more in the hospital (R. 52). Returning to Del Rio, he then went into combat pilots' pool at San Antonio Aviation Cadet Center, where he remained through 1944 until October with no duties, just sitting around, twiddling his thumbs and getting on everybody's nerves. He "started chasing around a little bit". He was transferred to Pampa 20 October, and, after two weeks without flying, flew with the cadets until "this trouble started" about the middle of December. Thereafter he did "nothing in

general" except three hours' pilot training a week, and was grounded six or seven weeks before his trial and restricted since his trial began (R. 52). His hospitalization was for "occupational fatigue" (R. 53). He thought he had \$100 in the bank when he cashed the \$80 check (Specification, Charge II). He had received a deposit slip for \$100 from the bank (R. 63; Def. Ex. 1), dated 8 January 1945 and his note was supposed to have been paid, leaving him \$100 balance, against which he drew the \$80 check to KC Steak House (R. 53, 55) and a \$20 check. He made and cashed the checks, Pros. Ex. 1 through 13, each of which bears his signature (R. 53, 54, 55). He kept a record "up to a certain extent", doing his own bookkeeping in a notebook and relying on his memory to enter checks he had made (R. 54). He thought that he borrowed \$300 from the bank in San Antonio (National Bank of Fort Sam Houston), but it might have been \$350 (R. 52, 55-56). He was examined by a psychiatrist while in the hospital at San Antonio early in 1944 and was before a Flying Evaluation Board in May 1944, which put him back on flying status (R. 57).

5. The evidence fully supports the findings of guilty, entered upon pleas of guilty, of Charge I and the twelve Specifications laid thereunder. In each instance the accused officer made and uttered his check to the payee specified, at the times and places, in the amounts, and under the circumstances specified, aggregating \$155, in amounts from \$5 to \$20, over a period from 24 October 1944 to 15 December 1944. Eleven of these checks were cashed by the accused at the Officers' Club, from 24 October to 10 December. One, for \$20, was cashed on 15 December at a barber shop. Of these, one, for \$10, to the Officers' Club on 29 October, was drawn on a bank where accused's account was overdrawn at the time to the extent of \$78.08 and had been overdrawn for 57 days, with no deposit after 8 August (Specification 2, Charge I). The other eleven were drawn on the National Bank of Fort Sam Houston, Texas, where the accused's balance varied from a \$1.42 overdraft to a credit of \$24.08. There deposits of \$100 were being made monthly by allotment from the accused's pay, but absorbed by monthly payments of \$78 on loans made by the bank to the accused, bank service charges, and other checks. All of the checks specified were dishonored for insufficient funds.

The offense stated in each of the twelve Specifications of Charge I is not predicated upon fraud. Intent to defraud was not, in terms, alleged. As to these twelve checks, the case is not presented as a fraud case. As a matter of necessary logical conclusion from the premises of stated facts, the mind can scarcely be free of fraudulent intent when bank checks are issued, for the purpose of obtaining value, against an account known to be insufficient for their payment and without intention that it will be made sufficient, but the fraud so involved is not an element of the case as here presented. The offense stated and proved is something less than that of obtaining

money or property by fraud and something more than mere careless failure to maintain a sufficient bank account. It involves the affirmative element of guilty knowledge of the insufficiency of the account and the negative element of the absence of intent to remedy that insufficiency so that the check will be entitled to payment on presentation. These factors involve common problems of proof.

As a matter of military law, the utterance of worthless checks, without maintaining sufficient funds to provide for their payment upon presentation in due course, in itself constitutes conduct discreditable to the military service, in violation of Article of War 96, regardless of intent to defraud or guilty knowledge. A member of the military establishment is under a particular duty not to issue a check without maintaining a bank balance or credit sufficient to meet it, and proof that a check given by him for value is returned for insufficient funds imposes on him, when charged with failure to maintain his account sufficiently to meet his checks, the burden of going forward with evidence to show that his action was the result of an honest mistake not caused by his own carelessness or neglect (CM 249232, Norren, 32 BR 95, 102-103, 3 Bull. JAG 290. Accord, CM 202027 (1934) McElroy, Dig. Op. JAG 1912-40, Sec. 453 (22); CM 224286, Hightower, 14 BR 97, 101; CM 249006, Vergara, 32 BR 5, 12, 3 Bull. JAG 289; CM 249993, Yates, 32 BR 255, 261; CM 250484, Hebb, 32 BR 397, 402; CM 241451, 4 Bull. JAG 5).

However, the proof here involved is not limited in its effect to establishing the offense of wrongful failure to maintain the account. The facts that the accused issued checks against an insufficient bank account which was not made sufficient, that the condition of the account was the result of his own acts, he being the person active in using the account, and that the checks were returned on presentation for want of sufficient funds, creates an evidentiary situation where, in the absence of adequate explanation or countervailing proof, the inference of fact is fully justified, from common human experience, that the accused knew that his account was insufficient and did not intend that it should be sufficient. If there be evidence of extenuation or excuse, the accused is the person to furnish it. This rule is well established, often stated in the language that the accused, under such circumstances, is "chargeable" with knowledge of the condition of his own account (CM 202601, Sperti, 6 BR 171, 214; CM 236070, Wanner, 22 BR 279; CM 257069, Bishop, 37 BR 7, 13; CM 257417, Sims, 37 BR 111, 117; CM 258314, Reeser, 37 BR 367, 378; CM 259005, Poteet, 38 BR 197, 206), and that the "burden" (of going forward with proof in his defense to dispel the ordinary inferences from established facts) in such an evidentiary situation is on the accused (CM 249232, Norren, 32 BR 95, 103; CM 249993, Yates, 32 BR 255, 261; CM 250484, Hebb, 32 BR 397, 402).

Accordingly, the evidence is sufficient to sustain the findings of guilty of the Specifications of Charge I as alleged, including the knowledge and intent specified.

(324)

On 20 January 1945, the accused cashed his check for \$80, also worthless, to the proprietor of a waffle shop, with whom he had a slight acquaintance. In this instance, intent to defraud was specified and the offense laid, as Charge II, under the 95th Article of War. The fact of the increased amount of the check over the accused's previous practice and its imposition upon a new victim, at a time when the accused was already deeply in trouble for his previous bad checks and had twice faced the investigating officer, lends a considerable measure of support to the court's findings of guilty of that Charge and Specification. However, upon the whole record, it appears more likely that this item, like the others, is attributable to irresponsibility and disregard of obligations, rather than intentional fraud in its more sinister sense. The accused had received notice of a deposit of \$100 to his credit in the drawee bank and claims to have believed that the amount of the check stood to his credit there, failing to allow for other withdrawals to pay a loan which he claims to have thought was paid. That hypothesis is consistent with the extent of the accused's financial dependability as demonstrated in his other transactions in the case. Accordingly, that item should fall with the others into the intermediate class of checks issued with knowledge of the insufficiency of his account and without intention that it should be sufficient, in violation of Article of War 96.

The accused made full restitution and redeemed his checks before his trial.

The court's denial of a request by the defense for a further continuance pending trial, for additional time for a psychiatric examination of the accused, was well within its discretion upon the showing made.

6. The accused is 21 10/12 years of age, unmarried, a native citizen of Illinois. He has a high school education. He enlisted in the Air Corps in October, 1941, at 18 years of age, and served in enlisted status and as an air cadet until commissioned a second lieutenant 22 June 1943 at Williams Field, Arizona. His entire service appears to have been either training or instructing. His resignation for the good of the service was not favorably considered in connection with the charges in this case.

7. The court was legally constituted and had jurisdiction of the person and subject matter. Except as noted, no errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings of guilty of the Specifications of Charge I and of Charge I, legally sufficient to support only so much of the findings of guilty of the Specification of Charge II and of Charge II as involves findings that the accused did commit the acts specified at the time, place and under the circumstances

alleged except the words "with intent to defraud" and "fraudulently", in violation of Article of War 96, and legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 96.

Fletcher R. Andrews, Judge Advocate

[Signature], Judge Advocate

[Signature], Judge Advocate

SPJGQ - CM 280789

1st Ind

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

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Dwight E. Hughes (O-748985), Air Corps.

2. Upon trial by general court-martial this officer pleaded guilty to, and was found guilty of, twelve Specifications of passing worthless checks, in the aggregate amount of \$155, in violation of Article of War 96 (Charge I and Specifications). He was found guilty, upon a plea of not guilty, of fraudulently making and uttering one worthless check for \$80, in violation of Article of War 95 (Charge II and Specification). He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for one year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty of the Specifications of Charge I and of Charge I, legally sufficient to support only so much of the findings of guilty of the Specification of Charge II and of Charge II as involves findings that the accused did commit the acts specified at the time, place and under the circumstances specified except the words "with intent to defraud" and "fraudulently", in violation of Article of War 96, and legally sufficient to support the sentence and to warrant confirmation thereof. I concur in that opinion.

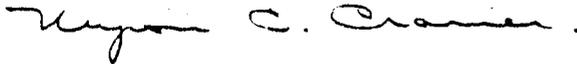
At Pampa Army Air Field and at Pampa, Texas, from 24 October 1944 to 15 December 1944, the accused officer made and cashed eleven worthless checks to the Officers' Club and one to a barber shop, in amounts varying from \$5 to \$20, aggregating \$155. One was on a bank where his account had then been overdrawn for 57 days, the others on the National Bank of Fort Sam Houston, Texas, where he had an account with balances varying from \$1.42 overdraft to \$24.08 credit, but insufficient at all times to pay his checks on presentation, so those here involved were all dishonored. On 20 January 1945, being then under investigation for his past worthless checks and having submitted his resignation for the good of the service, later rejected, he made and cashed another worthless check for \$80 to the proprietor of a small cafe, with whom he had some acquaintance. The accused contends that his failure to maintain his

bank account to meet his checks was due to deficiencies in his book-keeping and confusion arising from the application of certain allotments to the installment payment of loans at his bank. The record reveals generally an immature and irresponsible lack of appreciation of his obligations and careless disregard for his credit, rather than intentional fraud in its more sinister sense. Ultimately, he made full restitution.

I recommend that the sentence be confirmed but that the confinement and forfeitures be remitted, and that the sentence as thus modified be ordered executed.

4. Consideration has been given to a letter from the accused's mother, Mrs. John W. Hughes, of Table Grove, Illinois, dated 5 June 1945, addressed to the President, recommending clemency in behalf of the accused.

5. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.



3 Incls

- 1 - Rec of trial
- 2 - Form of action
- 3 - Ltr fr Mrs. John W. Hughes to the President, dated 5 June 45

MYRON C. CRAMER
Major General
The Judge Advocate General

(Findings approved in part. Sentence confirmed but confinement and forfeitures remitted. GCMO 369, 25 July 1945).



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

(329)

6 JUN 1945

SPJGV-CM 280795

UNITED STATES)

v.)

Second Lieutenant STANLEY)
C. SHERMAN (O-117376),)
Field Artillery. 1173076)

FOURTH SERVICE COMMAND
ARMY SERVICE FORCES

Trial by G.C.M., convened at
Atlanta, Georgia, 15 May 1945.
Dismissal, total forfeitures
and confinement for three (3)
years.

OPINION of the BOARD OF REVIEW
SEMAN, MICELI and BEARDSLEY, Judge Advocates.

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

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

Specification: In that Second Lieutenant Stanley C. Sherman, Field Artillery Unassigned, a patient in Lawson General Hospital, Atlanta, Georgia, did, without proper leave, absent himself from his station at Lawson General Hospital, Atlanta, Georgia, from on or about 2 February 1945 to on or about 12 April 1945.

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

Specification 1: In that Second Lieutenant Stanley C. Sherman, Field Artillery Unassigned, a patient in Lawson General Hospital, Atlanta, Georgia, did, at Daytona Beach, Florida, from on or about 28 November 1944 to 2 December 1944, wrongfully make sign and utter the following checks without maintaining sufficient funds to cover the same when presented within a reasonable time for payment, to wit:

Check dated 28 November 1944, drawn on McLachlen Banking Corporation, Washington, D.C. and payable to the order of cash in the amount of \$20.00.

Check dated 28 November 1944, drawn on McLachlen Banking Corporation, Washington, D.C. and payable to the order of cash in the amount of \$20.00.

Check dated 2 December 1944, drawn on McLachlen Banking Corporation, Washington, D.C. and payable to the order of Officers' Club in the amount of \$35.00.

Specification 2: In that Second Lieutenant Stanley C. Sherman, Field Artillery Unassigned, a patient in Lawson General Hospital, Atlanta, Georgia, did, at Lawson General Hospital, Atlanta, Georgia, from on or about 30 January 1945 to 1 February 1945, wrongfully make sign and utter the following checks without maintaining sufficient funds to cover the same when presented within a reasonable time for payment, to wit:

Check dated 30 January 1945, drawn on McLachlen Banking Corporation, Washington, D.C. and payable to the order of cash in the amount of \$49.50.

Check dated 1 February 1945, drawn on McLachlen Banking Corporation, Washington, D.C. and payable to the order of cash in the amount of \$45.00.

He pleaded guilty to and was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. Accused was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for three years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that accused was a member of Detachment of Patients, Lawson General Hospital, Atlanta, Georgia, on 2 February 1945 (R. 6). He absented himself without authority from his station on that date (R. 6; Pros. Ex. "A") and returned to military control on 13 April 1945 at La Garde General Hospital, New Orleans, Louisiana (R. 7; Pros. Ex. "B"). He was returned to his original station on 17 April 1945 (R. 7).

It was agreed between the prosecution, defense and accused that if C. L. Potter, manager of Officers' Club at Daytona Beach, Florida, were present in court he would testify that on or about 28 November 1944 he had cashed one of accused's checks drawn on McLachlen Banking Corporation, Washington, D.C., in the sum of \$20. Accused received cash and merchandise in exchange for the check. Prosecution's Exhibit "C" is the check cashed by witness. The check was returned by the bank unpaid. On the same date another check (Pros. Ex. "D") for the same amount and on the same bank was cashed by accused. He received cash and merchandise for it. This check was also returned unpaid. On 2 December 1944, a third check

for \$35 (Pros. Ex. "E") was cashed by accused drawn on the same bank. This check also was returned unpaid by the bank.

William J. Lynch, Jr., a teller for the Fulton National Bank, Lawson General Hospital, identified Prosecution's Exhibit "F" as a check which was cashed by witness on 30 January 1945, for which accused received \$49.50 in cash. This check was drawn on McLachlen Banking Corporation and was returned unpaid (R. 8, 9). Prosecution's Exhibit "G" was identified by witness as another check cashed by witness on or about 1 February 1945 for accused, who received \$45 in cash. The check was returned unpaid. The deposition of Archibald McLachlen, vice president and treasurer of McLachlen Banking Corporation was introduced in evidence (Pros. Ex. "H"). He stated therein that accused had a checking account with McLachlen Banking Corporation, that in his official position in that banking institution he is able to determine whether a check has not been honored by the bank and why it was not honored, that Exhibits C, D, E, F, G, are photographic copies of checks drawn by accused on the McLachlen Banking Corporation, and that these five checks were not honored for payment because accused did not have sufficient funds on deposit to cover the checks. The defense called no witnesses. Accused did not desire to make any statement.

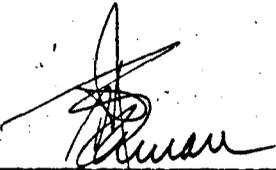
4. Accused pleaded guilty to all Charges and Specifications. There is nothing in the record inconsistent with his pleas. There is competent proof of the initial unauthorized absence on 2 February 1945. The return to military control on 13 April 1945 is properly evidenced. The record contains full proof that all the checks issued by accused and listed in the Specifications were not honored and were returned by the bank, on which they were drawn, for lack of sufficient funds in accused's account.

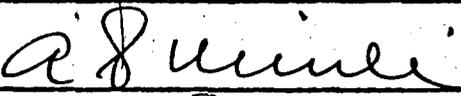
5. The issuance of a check without sufficient funds to honor it, is an offense of conduct of a nature to bring discredit upon the military service in violation of Article of War 96 and it is not necessary that an intent to defraud should be shown. The payment of worthless checks without intent to defraud is sufficient (CM 251451 (1944) IV Bull. JAG 5; CM 249006 (1944) III Bull. JAG 290).

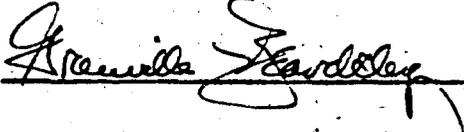
6. The records of the War Department show that accused is 25 years old. He was born in Lumpkin, Georgia, and graduated from Blakely High School, Georgia, in 1937 and attended Alabama Polytechnic Institute for one year. He was inducted into the Army on 8 November 1941 and was

appointed a second lieutenant in the Army of the United States (F.A.) on 5 November 1942 after having attended the Officer Candidate School at Fort Sill, Oklahoma. Accused was awarded the Purple Heart for wounds received in action on 6 June 1944 in the European Theater of Operations and was also awarded the Combat Infantryman's Badge for exemplary action against the enemy. Accused is single. In civil life he was a truck driver.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. A sentence of dismissal is authorized upon conviction of violations of Articles of War 61 and 96.


_____, Judge Advocate


_____, Judge Advocate


_____, Judge Advocate

SPJGV-CM 280795

1st Ind

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

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Stanley C. Sherman (O-117376), Field Artillery.

2. Upon trial by general court-martial this officer pleaded guilty to and was found guilty of being absent without leave from his station from on or about 2 February 1945 to on or about 12 April 1945, in violation of Article of War 61, of wrongfully making and uttering five checks in the total amount of \$169.50, 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 for three years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence.

Accused absented himself without authority from Lawson General Hospital, Atlanta, Georgia, for a period of 70 days. He cashed three checks at the Officers' Club, Daytona Beach, Florida, for a total of \$75. All three checks were returned dishonored. He cashed two other checks at Fulton National Bank, Atlanta, Georgia, for a total of \$94.50. These two other checks were also returned unpaid for lack of sufficient funds. Accused was wounded in France on 6 June 1944 and was awarded the Purple Heart. The combat infantryman's badge for exemplary action against the enemy was also awarded to him.

In view of accused's war record, I recommend that the sentence be confirmed but that the forfeitures and confinement be remitted and that the sentence as thus modified be ordered executed.

4. Consideration has been given to a letter from Mrs. Leila Sherman, Atlanta, Georgia, dated 4 June 1945.

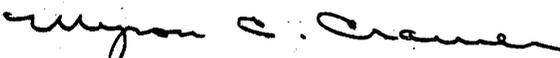
5. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.

3 Incls

1 Rec of Trial

2 Form of Action

3 Ltr fr Mrs. Sherman, 4 June 45


 MYRON C. CRAMER

Major General

The Judge Advocate General

(Sentence confirmed but forfeitures and confinement remitted. GCMO 311, 7 July 1945).

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

(335)

SPJGK - CM 280802

12 JUL 1945

UNITED STATES

v.

Technical Sergeant LYLE B.
EASTERLY (14014730), Squadron
C, 3009th Army Air Forces Base
Unit, Carlsbad Army Air Field,
Carlsbad, New Mexico.

ARMY AIR FORCES
CENTRAL FLYING TRAINING COMMAND

Trial by G.C.M., convened at
Carlsbad Army Air Field,
Carlsbad, New Mexico, 16 and
17 April 1945. Dishonorable
discharge (suspended) and con-
finement for three (3) years.
Rehabilitation Center.

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

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

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

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

Specification 1: In that Technical Sergeant Lyle B. Easterly, Squadron C, 3009th Army Air Forces Base Unit, did, at or near Carlsbad, New Mexico, on or about 15 January 1944, wrongfully and knowingly sell to Compton Tucker a tool kit including approximately one hundred and seven (107) tools, having a total value of about sixty-five dollars and fourteen cents (\$65.14), property of the United States, intended for the military service thereof.

Specification 2: In that Technical Sergeant Lyle B. Easterly, * * *, did, at Carlsbad Army Air Field, Carlsbad, New Mexico, on or about 15 October 1944, knowingly and without proper authority dispose of, by giving to Sergeant Samuel J. Earnst, one (1) A-2 jacket of the value of about eight dollars and twelve cents (\$8.12), property of the United States, intended for the military service thereof.

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

Specifications: In that Technical Sergeant Lyle B. Easterly, * * *, did, at or near Carlsbad Army Air Field, Carlsbad, New Mexico, on or about 28 October 1944, wrongfully and unlawfully have in his possession one (1) tool kit, including approximately one hundred and sixty-three (163) tools, having a value of about eighty dollars and forty-four cents (\$80.44); one (1) tool kit, including approximately seventy-seven (77) tools, having a value of about thirty-eight dollars and fifty-four cents (\$38.54); two (2) type D-1 mechanic's jackets, each having a value of about eighteen dollars and ninety-five cents (\$18.95); one (1) A-2 jacket, having a value of about eight dollars and twelve cents (\$8.12); two (2) B-4 bags, each having a value of about twelve dollars and thirty cents (\$12.30); one (1) gasoline can, having a value of about two dollars and sixty cents (\$2.60); and one (1) A-11 type clock, having a value of about eleven dollars and twenty-five cents (\$11.25), all of said items having a total value of about two hundred and three dollars and forty-five cents (\$203.45), property of the United States, intended for the military service thereof.

He pleaded not guilty to all charges and specifications and was found guilty of Charge I and its specifications and guilty of Charge II and its specification, except the words and figures "two (2) type D-1 mechanic's jackets, each having a value of about eighteen dollars and ninety-five cents (\$18.95)" and except the words and figures "all of said items having a total value of about two hundred and three dollars and forty-five cents (\$203.45)," substituting for the words and figures last mentioned and excepted the words and figures "all of said items having a total value of about one hundred sixty-five dollars and fifty-five cents (\$165.55)." There was no evidence of previous convictions. 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 four years. The reviewing authority approved only so much of the findings of guilty of Specification 2 of Charge I as involves a finding that the accused knowingly and without authority disposed of an A-2 jacket of some value to the person, of the ownership, at the time and place and in the manner alleged. The sentence was approved but one year of the confinement imposed was remitted. As thus modified, the reviewing authority ordered the sentence executed, suspended that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the Rehabilitation Center, Camp Bowie, Texas, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 149, Headquarters Army Air Forces Central Flying Training Command, Randolph Field, Texas, 17 May 1945.

2. Accused is charged in three specifications with (1) wrongfully selling Government property to Mr. Compton J. Tucker, (2) wrongfully giving away a type A-2 jacket, Government property, in violation of Article of War 94, and (3) wrongfully possessing Government property in violation of Article

of War 96. At all times alleged in the specifications the accused was the noncommissioned officer in charge of supply at Local Issue No. 2 at Carlsbad Army Air Field, Carlsbad, New Mexico (R.64). Local Issue No. 2 stocked airplane and engine parts, tools for maintenance equipment, and some flying clothes (R. 65) but did not stock A-2 jackets or B-4 bags (R. 67). Accused had complete access to the building housing Local Issue No. 2 and also had authority to draw A-2 jackets and B-4 bags from other agencies at Carlsbad field and take such items to Local Issue No. 2 for issue to the maintenance section (R. 65). Accused, after being warned of his rights under the 24th Article of War, made confessions on 27 October and 30 October 1944 (to be later discussed) in which he admitted his guilt of the matters charged.

3. The evidence relating to Specification 1 of Charge I is substantially as follows:

On Tuesday, 31 October 1944, Captain Allen R. Kyle, Provost Marshal of Carlsbad Field, and other officers and men from Carlsbad Field went to the Ace of the Hi-Way Station No. 2, which was a garage and service station operated by Mr. Compton J. Tucker and located in Carlsbad, New Mexico. They there received from Mr. Tucker a tool kit and tools, received in evidence as Prosecution's Exhibit 1 (R. 92-94). There were 108 tools in the kit and, with the kit, were valued at approximately \$65.00. The tools and kit were identical with similar items which are issued through Air Corps supply (R.15) but could not be positively identified as being Air Corps or Government property (R. 22,66). Ordinarily about 5% of the tools in tool kits at Carlsbad Field were marked or stamped "US" or "USA" or "AC" (R. 29,33). The tools received from Mr. Tucker were so marked in about the same proportion. The value of the tools received from Mr. Tucker bearing such markings was \$3.88 (R. 37). No witness could testify that the tools or kit were missing from Carlsbad Field. Accused made confessions in which he stated that one day, while at Mr. Tucker's garage, Tucker stated that he needed some tools and inquired whether accused could procure some for him. Accused replied that he did not know "but would see." Accused then went to the Air Field and obtained the tools which he then took to Mr. Tucker who paid accused the sum of \$50.00 for the tools and kit (Pros. Exs. 18 and 19).

4. The following is the substantial evidence relating to Specification 2 of Charge I:

During the month of September 1944, while accused was noncommissioned officer in charge of Local Issue No. 2, Sergeant Samuel J. Earnst asked accused whether he (accused) could get Earnst a "type A-2 jacket". Accused replied that he did not know but would try. Subsequently, "around the first part of October" 1944, Earnst again told accused that he would like to have "a type A-2 jacket" to give to a friend, and accused replied that he did not have any (R. 69). About two weeks later the accused gave Earnst "a Type A-2 jacket." Earnst did not sign any memorandum or hand receipt for the jacket (R. 70), nor did he pay or have any agreement to pay accused for the jacket

(R. 77). Earnst gave the jacket to his friend, telling the friend that he might have to recall it. The jacket was subsequently recalled and, apparently, returned to supply (R. 78). In his confessions accused admits that he gave a jacket to Earnst (Pros. Exs. 17 and 18).

5. The following evidence, in substance, was offered in support of Charge II and its Specification:

Sergeant Alexander Bradley, an investigator with the Provost Marshal's Office at Carlsbad Field, met the accused in the office of Air Corps Supply on or about 28 October 1944 and informed accused that he (Bradley) intended to search accused's apartment either with accused's consent or by getting a search warrant (R. 81). Accused replied that his mother who was visiting him was not well and he did not want her upset, but stated that he would go to the apartment and "bring out all the property that was not charged to him and give it to us" (R. 83). Bradley declined to accept that proposition but agreed to go along with accused and let accused collect the property and tell his mother whatever story he wished. Accused, Bradley, and a Sergeant Bell, also an investigator with the Provost Marshal's Office, then started for accused's quarters in accused's car. It was then discovered that accused had a gasoline can in his car which he admitted was "Air Corps property" (R. 83). Bradley took possession of the container and the group proceeded to accused's apartment. Upon arrival at the apartment Sergeant Bradley sat on a sofa with accused's mother while the accused, Sergeant Bell, and accused's wife went to other rooms in the apartment and collected all remaining property described in the specification, excepting the two type D-1 mechanic's jackets (possession of which accused was found not guilty) (R. 85). To identify the tools taken from the apartment as Government property, it was shown that approximately 5% of the tools bore such markings as "US", "USA", or "AAF" (R. 19,33). The A-2 jacket taken from accused's apartment was shown to have the following label stitched in its collar (R. 86, Pros. Ex. 4):

"Type A-2
Drawing No. 30-1415
A.C. No. 42-18776P
Property of
Air Force U.S. Army

I. Spiewak & Sons
North Bergen, N.J."

No witness could definitely state that any of the property taken from accused's apartment was Government property or that it was missing from Air Corps supply channels, but there was testimony to show that the gas container was "identical" to cans being used at Carlsbad Field (R. 20), that the tools could be "duplicated" at Air Corps Supply (R. 17), and that A-2 jackets and B-4 bags were "stocked" in Air Corps Supply (R. 19). It was also established that there

was no record of accused having been issued any of the items taken from his apartment (R. 38,40,53,58). The value of the items was shown to be as alleged (R. 18,19,37). Upon leaving accused's apartment and returning to the Air Corps Supply, accused was told that if he "knew of anything else that might be out *** he should let us know about it so we could try to get the property back and help (the accountable officer) get straightened up. And he said he had turned over everything that was not charged out to him." Accused then asked what "we thought the amount of the shortage would be, and I told him around about six or seven thousand dollars.*** He said he would be willing to pay that much to get things straightened out." (R. 88-89). In his confession accused admitted that he had "government property" at his home (Pros. Ex. 17).

6. After being advised of his rights relative to becoming a witness, the accused elected to remain silent.

7. From the foregoing, and for the additional reasons hereinafter set out, the following questions are presented by the record of trial for consideration by the Board of Review:

a. Were the confessions of the accused voluntary?

b. Did the evidence establish that the property described in the specifications was Government property intended for the military service thereof?

8. The defense vigorously objected to the receipt in evidence of the accused's confessions on the ground, among others, that they were not voluntarily given, but were obtained through coercion, direct and implied threats, and duress. The evidence indicates that on 27 October 1944 the accused and another sergeant, who was similarly involved, were being questioned in the office of the Air Corps Supply Officer of the base. Present at the questioning were Colonel Smith, the Supervisor of Supply; Major Moore, the Air Corps Supply Officer; Captain Kyle, Provost Marshal; Mrs. Stowell, the stenographer; and Sergeants Bradley and Bell, investigators with the Provost Marshal's Office. Bradley was a sheriff and Bell was a policeman in civil life. Though all military personnel present took part, Sergeant Bell did the major part of the questioning. The procedure followed by Sergeant Bell was to bring one of the subjects into the room and question him for a while, then release him and call in the other subject for questioning. Accused was questioned at least twice that day. Each period of questioning would last from about forty-five minutes to about two hours. In order to show the confessions of accused were not voluntary, defense counsel interrogated Captain Kyle on voir dire examination and, in the course of such examination, the following questions and answers were developed:

"Q. Why did you find it necessary in an effort to get a statement from Sergeant Easterly to threaten that his sister would

be investigated if he did not make a statement? (R. 121).

* * *

"A. Sergeant Easterly wasn't threatened by having his family brought into it in any adverse light.

"Q. What do you mean that it wasn't a threat when you suggested that if he didn't answer the questions or didn't come clean or didn't get the story from him that you would bring his sister into it?

"A. His sister had worked in the same department that he later went to work in, and if he couldn't give us the information possibly she could.

"Q. If that wasn't a threat how was it intended by you?

"A. Well, if the witness was withholding any information voluntarily that he didn't care to give, he had his rights to fail to answer the question. He answered the question and his answer didn't seem logical and we questioned him further.

"Q. And when his answer didn't seem logical to you gentlemen, you then suggested that his sister had worked at supply?

"A. No, after his sister had already been dismissed from the investigation, so far as the questioning was concerned.

"Q. When was his sister dismissed?

"A. There was only the one question. She was mentioned only that one instance, that she had worked in that Supply department and perhaps she could give us the information if he couldn't.

"Q. Well, now, you were taking a statement from the Sergeant, is that correct, now, and he was not answering the questions like you thought he ought to answer them?

"A. We were interested in obtaining a truthful answer to our questions.

"Q. Will you answer my question, please? You were engaged in the examination of the Sergeant, weren't you?

"A. That is right.

"Q. He had not at that time answered questions as you believed he should have answered questions, as you believed he should have answered them, is that right?

"A. I don't believe he gave us truthful answers.

"Q. All right. And after you didn't believe he gave you truthful answers, then you told him that unless you got the story from him you'd investigate his sister, didn't you, who had worked there?

"A. We told him if we couldn't get a true story from him that possibly we could get a true story from someone else.

"Q. Did you say his sister?

"A. His sister was mentioned as a possibility." (R. 123-125)

* * *

"Q. A sweat box was mentioned, a mention of one?

"A. It wasn't mentioned in this questioning.

"Q. When was it mentioned?

"A. It was mentioned as Sergeant Easterly was dismissed.

"Q. After the first statement was made?

"A. The statement was made by one of the investigators that had had considerable experience in civilian life, a sweat box or other means could be used." (R. 128)

* * *

"A. Sergeant Easterly should never have even heard that conversation, because it was merely a jest that was passed among the people that remained.

"Q. What do you mean he shouldn't have heard it?

"A. That wasn't directed towards him, and he was out of the room.

"Q. What do you mean by 'out of the room'?

"A. In the outer office of the Air Corps Supply.

"Q. Standing in the door between the two?

"A. I was standing in the doorway." (R. 129)

* * *

"Well, he possibly could have heard it, but it wasn't directed at him or there wasn't any --" (R. 130)

* * *

"Q. Didn't Bell, to refresh your memory, turn to you there at the time and ask you if you had a sweat box?

"A. Yes, he asked me that.

"Q. Why do you suppose he was asking you if you had a sweat box if he wasn't implying a threat that it might be used?

"A. Well, he may have asked whether I had one or not, but he asked me that, and I told him that we haven't a sweat box." (R. 131)

Defense counsel then called Major Moore who testified that Captain Kyle was in the room for only a few minutes during the questioning of accused. The Major then gave the following answers to the following questions:

"Q. *** Give us the full picture of what occurred there.

"A. What Sergeant Bell did was to bring one of the men in, question him a while and let him stay outside the office and question the other one a while, and then switch them back and forth during the entire time.

"Q. How would he conduct the examination of one after he had had the other one in there before that? Just explain how he would do it?

"A. Well, in what way do you mean?

"Q. What would he say, and what would his attitude be, and things of that nature with reference to these men.

"A. Well, he had a rather stiff attitude.

"Q. What was his attitude? Just tell the Court fully.

"A. He would get the boys in there and there was quite a bit of profanity and cursing used. If they didn't answer the way he wanted, he would call them liars and tell them to tell the truth, and if they didn't tell him what he wanted he'd storm around the room and call them a bunch of liars and tell them he knew they weren't telling the truth.

"Q. What did he instruct Miss Stowell who was taking the statements down to do with reference to that examination?

"A. Well, he told her to omit the cursing and there were some things, I don't remember what they were, that he told her to omit on the notes.

"Q. At that time and place did you hear Sergeant Bell say anything about a, in the presence of Sergeant Easterly, about a rubber hose?

"A. Yes, sir.

"Q. What did he say about using a rubber hose?

"A. He made the statement to Sergeant Easterly, I mean he used the exact words as well as I remember them, he'd better be damned glad that he was not being questioned by him if he were a civilian or he would be using a rubber hose on him to get the answers he wanted.

"Q. Now, you say Sergeant Bell was doing most of the examination?

"A. Practically all of them. Sergeant Bradley would occasionally ask questions, but not a great deal.

"Q. With reference to the notebook this young lady had did you have any conversation with Sergeant Bell later about that notebook?

"A. Yes, sir. He came down and asked where it was.

"Q. What did he say?

"A. He said he wanted the notebook because he didn't want the Defense Counsel to get ahold of it." (R. 139-140)

* * *

"Q. I wish you would go into detail and explain to the Court the whole situation as best you can get it so the Court can get the picture of what did occur.

"A. You mean as to the cursing and so forth?

"Q. Yes, sir, and his manner or demeanor when questioning this man.

"A. Well, the best I remember exactly how he went, if either of the boys didn't answer as he wanted them to or as he seemed to want them to, he would call them a damned liar and tell them he knew the answer and they better go ahead and start telling him what the answer was.

"Q. What statement, if any, did he make that you remember with reference to what would or would not happen to them unless they did?

"A. Well, let's see. At one time he made the statement that he was merely interested in trying to get the property back, to keep me from having to pay for it.

"Q. To keep you from having to pay for it?

"A. Yes. And there were several statements of that type made.

"Q. What statements were made, if any, that you recall to induce Mr. Easterly or Sergeant Easterly to finally make a statement with reference to it? What was said that might or might not happen to him if anything?

"A. Well, he made one statement that it would be better for him to be out of the guardhouse drawing his pay than in the guardhouse drawing no money.

"Q. And he made the statement that it would be better for him

to be out of the guardhouse drawing his pay than in the guardhouse not drawing pay?

"A. Yes, sir. And he did make one statement that it would be easier if they told the whole truth.

"Q. It would be easier on them if they told the whole truth?

"A. Yes, sir." (R. 141).

* * *

"Q. Now, Major, was any question of some civilian brought into the examination, the name of a civilian?

"A. Yes, sir, there was.

"Q. What was that and under what circumstances?

"A. At one time Sergeant Bell said that he knew that a certain civilian was disposing of these watches.

"Q. Did he mention his name?

"A. Mr. Potts, a jeweler in town, and that he wanted these boys' testimony against him." (R. 142).

* * *

"Q. Will the Major tell as best he can the language which was used in that regard?

"A. Well, to the best of my memory he just said he was after the boy's statement to be used against Mr. Potts who he knew was disposing of watches in town."

* * *

"Q. What was said or done and by whom with reference to his sister?

"A. Sergeant Bell asked Sergeant Easterly if his sister had not at one time worked in Supply, and at that time he hadn't gotten what he thought was the information from Sergeant Easterly, so it was something to the effect that, I can't remember the exact words, but something to the effect that if he couldn't get the information he wanted he'd have to assume that his sister was connected with it and at least investigate that point." (R. 143)

* * *

"Q. Well, was any force or duress used?

"A. There was no force used. Now, as to the word duress, the interpretation, the only thing I could say would be that there was certainly implied promises or threats which might be construed as implied promises or threats." (R. 148)

* * *

"Q. Major Moore, you would say that the questioning was quite vigorous, would you not?

"A. Quite." (R. 149)

* * *

On cross-examination by the trial judge advocate, Major Moore testified:

"Q. Were you Easterly's commanding officer at that time?

"A. I was.

(344)

"Q. And you were looking out for his interests, I presume, is that correct?

"A. As much as I knew.

"Q. Did you feel it was necessary to intercede at that time?

"A. Sergeant Bell was an investigator representing the Base Commander I felt and I didn't see that I had any right to try to put a stop to anything they were doing." (R. 149)

Defense counsel then called as a witness the reporter who took down the confessions in question and answer form. The following testimony was developed:

"Q. What other statements, if any, were made by Sergeant Bell with reference to whether or not Sergeant Easterly should make the statement?

"A. Well, he just said it would be better if he told the truth.

"Q. It would be better if he told the truth. What other language did he use along that line?

"A. Well, I don't know. It was something that meant just the same as that.

"Q. What was it? What was the word he used?

"A. Well, that it might go lighter on him." (R.157)

* * *

"Q. Miss Stowell, you say the questioning was quite vigorous. What do you mean by that, please?

"A. Well, Sergeant Bell would question him and if he wouldn't answer he'd question him again.

"Q. And what would be his attitude in questioning?

"A. Well, it was sort of overbearing.

"Q. What do you mean by 'overbearing'?

"A. Well I think it sort of went to scare the boys."

* * *

"Q. Did it scare you?

"A. Yes." (R. 165,166)

9. From the foregoing excerpts of the testimony it is rather evident that accused was "browbeaten" into giving a full confession. During the course of Sergeant Bell's questioning, which was sufficiently "vigorous" and "overbearing" to frighten the civilian stenographer, it appears that accused was cowed by being cursed; he was threatened by being told that, unless he confessed, his sister would be investigated as a possible thief; he was promised that, by confessing, things would be lighter on him, and told that it would be better to be outside the guardhouse drawing pay than inside with no pay; statements were made indicating that force in the form of a sweat box or rubber hose might be used on him; he was misled by being told at one time by Bell "that he was merely interested in trying to get the property back," and at another time that the statement was wanted for use against a civilian jeweler; he was under the influence of his military superiors, because the vigorous questioning took place in the presence of

a colonel, a captain who was the Provost Marshal, and a major who was accused's commanding officer. None of these officers interfered with Bell's overbearing questioning but, instead, assisted him by also propounding questions. Accused's commanding officer testified that he did not intercede because "Sergeant Bell was an investigator representing the Base Commander" and "I didn't see that I had any right to try to put a stop to anything they were doing."

10. Conceding arguendo that no one of the above incidents, standing alone, would cause the confessions to be involuntary, and further conceding that no force was used and no direct evidence of mistreatment of accused, nevertheless, the persistent questioning and the accumulation of incidents cannot but lead to the conclusion that accused's determination to remain silent was overcome against his will and that the confessions made on 27 October 1944 were inadmissible. It has been held that a confession taken by a sergeant from a private, after telling him, in substance, that he should "come clean" and tell the truth as he would be otherwise discovered and then the penalty would probably be more severe, should be considered as involuntary and inadmissible (CM 152444). The following confessions have likewise been held to be involuntary and inadmissible: where accused was told that "if he would tell the truth I might let him off easy." (CM 155818); where he confessed after being informed that if he remained silent he would be confined but that if he satisfactorily explained his actions he would be released (CM 210693); and where told that his confession was for the sole purpose of aiding in securing a conviction against a civilian (CM 153924). The general rule of law, upon which the foregoing decisions are based, stating that a confession is involuntary where made through threats or fear, or promise or hope, has been so often reiterated that it has become a fixed rule.

11. It next becomes necessary to determine whether the subsequent confession made by accused on 30 October 1944 to the Assistant Staff Judge Advocate at Carlsbad Field is likewise inadmissible. This second confession was obtained after a lapse of two days from the taking of the first confession and at a time when accused was confined in the post guardhouse. Before making the second confession, accused was told:

"This matter concerning some watches has been turned over to me for further work. I am Capt. Victor E. Williams, TJA. You have been warned of your rights on remaining silent or making a statement, if you desire. You understand if you do make any statements they can be used against you, do you? A. Yes."
(Pros. Ex. 19)

Accused thereupon reiterated some of the statements made in his first confession.

"Where a confession has been obtained from the accused by improper inducement, any statement made by him while under

that influence is inadmissible, but the question arises as to whether a confession made subsequently to such inadmissible confession is itself inadmissible. This question, as in the case of any other confession, is one for the judge to decide, and each case must be determined on its own facts. The presumption prevails that the influence of the prior improper inducement continues and that the subsequent confession is a result of the same influence which renders the prior confession inadmissible, and the burden of proof rests upon the prosecution to establish the contrary. Such proof must clearly show, to admit such subsequent confession in evidence, that the impression caused by the improper inducement had been removed before the subsequent confession was made. *** It has also been held, generally, that the influence of the improper inducement is removed where the accused is properly cautioned before the subsequent confession. The warning, however, so given should be explicit, and it ought to be full enough to apprise the accused: (1) that anything that he may say after such warning can be used against him; and (2) that his previous confession, made under improper inducement, cannot be used against him, for it has been well said that 'for want of this information, the accused might think that he could not make his case worse than he had already made it, and, under this impression, might have signed the confession before the magistrate.'" (Wharton's Criminal Evidence, Vol. 2, sec. 601, pp. 998-1002.) (Underscoring supplied.)

"A confession *** may be rendered involuntary by a prior involuntary confession." (Underhill's Criminal Evidence, 4th Edition, Sec. 266, p. 521).

"Once a confession made under improper influences is obtained, the presumption arises that a subsequent confession of the same crime flows from the same influences, even though made to a different person than the one to whom the first was made. *** The evidence to rebut the presumption must be presented by the prosecution ***. The evidence to rebut the presumption must be clear and convincing ***." (Evidence from American Jurisprudence, Civil and Criminal, sec. 487, pp. 424-425.) (Underscoring supplied.)

To the same effect is CM ETO 1486, MacDonald, Bull. JAG, Vol. III, June 1944, Section 395 (10).

The question thus arises whether the prosecution met its burden in showing that the improper influences which made the first confession inadmissible had been dispelled and the accused properly warned before making the second confession. It is noted that, to begin with, Captain Williams informed accused he was investigating a matter concerning watches and made no mention of the matters for which accused was here tried. Captain Williams did not give accused any advice concerning his rights, but merely reminded

accused that he had been previously "warned of your rights." On the witness stand, Captain Williams testified as follows on this subject:

"Q. Captain, at the time you took this statement you were aware that two previous statements had been taken from this man?

"A. I was.

"Q. Did you advise him at that time that the prior confessions may have been taken under circumstances which might not make them admissible in evidence or not?

"A. No, I didn't tell him that.

"Q. You didn't discuss with him the circumstances under which the prior statements were taken?

"A. I did not."

In view of the foregoing authorities and the circumstances under which accused's confessions were obtained, the Board is of the opinion that the prosecution failed to rebut, by clear and convincing evidence, the presumption that the influence of the improper inducement continued, and that the subsequent confession was a result thereof.

12. The next question to be determined is whether, in the absence of the confessions, the corpus delicti was independently shown and the accused's guilt established. Specification 1 of Charge I may be dismissed with the remark that, without accused's confession, there is no evidence to prove accused sold the tools and kit to Mr. Tucker. As for Specification 2 of Charge I, Sergeant Earnst testified that he obtained "a Type A-2 jacket" from accused while in Local Issue No. 2 and did not sign for it or otherwise pay for it. However, the jacket was not introduced into evidence and there was no testimony, even by inference, to show that such a jacket was Government property intended for the military service, nor was it shown that any such jacket was missing from the Government or any service thereof.

13. The Specification of Charge II presents a slightly more complicated issue. It was shown that some of the tools were marked with "US" or "USA" or "AAF"; it was also shown that, when accused was questioned concerning the gasoline container, he admitted it was "Air Corps property"; the jacket taken from his apartment contained the markings described in paragraph 5, supra, to-wit: "Property of Air Force U.S. Army." There was no showing that any of the specific property described in this specification was missing or had been stolen from the Air Field, and it is unnecessary to decide here whether such showing is required in order to find accused guilty. None of the tools or kits could be identified with any certainty as being Government property. The senior noncommissioned officer in Air Corps Supply, who was the supply inspector, testified with reference to the tools and kits as follows:

"Q. You say you have had some tool kits on the Field of the type of this?

"A. We have.

"Q. This tool kit has nothing on it to identify it as Government property, has it?

"A. Not that I know of.

"Q. Are you able to say that it is the property of the United States or ever was?

"A. No, I can not, sir.

"Q. Or that any of the tools were?

"A. I can not say they are."

Regarding the gas can which accused admitted was Air Corps property, it was discovered in accused's car while the car was on the Air Base and its possession was not shown to be wrongful in any manner. The possession of a Government gasoline container while on the Air Base is as consistent with innocence as it is with guilt.

The jacket found at accused's apartment and bearing markings indicating it to be property of the U.S. Army Air Forces, was not shown to be Government property, nor was it shown that such jacket could not be obtained through civilian or Post Exchange channels. There was no testimony concerning the ownership of the jacket and the only evidence in that regard comes from the label sewed into the collar of the jacket. Such is insufficient to prove beyond a reasonable doubt that the jacket was "property of the United States, intended for the military service thereof," as alleged.

"There is no evidence in the record that the shirt was the property of the United States, or had been issued for use in the military service, as charged. The fact that the shirt was the type used in the military service does not justify an inference that it was government property, for it is a matter of common knowledge that uniform articles of this kind may be privately purchased and personally owned by soldiers. The failure to prove the ownership of the shirt, as charged, was fatal to the conviction." (CM 215881, 11 B.R. 65)

"Accused was found guilty of the larceny of certain O.D. woolen shirts and certain woolen underwear, the property of the United States, furnished and intended for the military service thereof. The goods were found in his possession under suspicious circumstances, and they were of a kind similar to goods stored in salvage warehouses at accused's station. It was not proven, however, that any shirts or underwear had been lost by the government, and no other proof that a larceny had been committed was adduced. The evidence is not legally sufficient to prove the corpus delicti and not sufficient, therefore, to support the findings of guilty of larceny. CM 150828, 150100, 150298." (Dig Op. JAG, 1912-1940, Sec. 452 (12).)

"Accused was charged with the larceny of Government oats, in violation of A. W. 94. It was proved that on the date alleged he was in possession of, and sold, two sacks of oats (which he stated had been given him by two soldiers) of the type and kind issued at the post and sold commercially in the locality. There was no direct evidence of a shortage or theft of Government oats, or that accused had access to Government oats, or took them from the post. Held, That the oats having no characteristics peculiar to Government ownership, the mere fact that the oats shown to have been in possession of accused were similar in type and kind to those regularly issued at the post, standing alone, and the suspicion raised by such possession, are not legally sufficient to support a finding of Government ownership or of larceny from the Government. CM 208895." (Dig. Op. JAG, 1912-1940, Sec. 452 (10).)

"It is a well settled rule of law that 'where circumstances are relied on entirely to justify a conviction, the circumstances must not only be consistent with guilt, but inconsistent with innocence.' (U.S. v. Hart, 162 Fed. 192; Romano v. U.S., 9 F. (2d) 522; CM 195705, Tyson.)

"In the instant case the circumstances of the finding in the possession of the three accused of certain canned goods similar to certain canned goods that appear to have disappeared from the storeroom about the time accused absented themselves, but which might readily have been purchased from almost any grocery store, together with other items of food, including canned goods which were not missing from the storeroom are not such as to give rise to a presumption that any of the articles found in the possession of the accused had been in the storeroom. It fails to preclude every reasonable theory except that of the guilt of the accused." (CM 196619, 3 B.R. 27)

Lacking evidence that any Government property was missing, or that any of the property found in the possession of the accused was actually Government property, and in view of the foregoing authorities, it cannot be said that the record contains any proof of a corpus delicti.

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

W. G. [Signature], Judge Advocate

Charles A. Luckie, Judge Advocate

Admanu Meyer, Judge Advocate

(350).

SPJGK - CM 280802

1st Ind

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

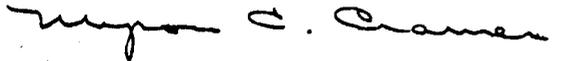
13 JUL 1945

TO: The Secretary of War

1. Herewith transmitted for your action under Article of War 50¹/₂, as amended by the act of 20 August 1937 (50 Stat. 724; 10 U.S.C. 1522) and the act of 1 August 1942 (56 Stat. 732), is the record of trial in the case of Technical Sergeant Lyle B. Easterly (14014730), Squadron C, 3009th Army Air Forces Base Unit, Carlsbad Army Air Field, Carlsbad, New Mexico.

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

3. Inclosed is a form of action designed to carry into effect this recommendation should such action meet with your approval.



2 Incls

1. Record of trial
2. Form of action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Findings and sentence vacated. GCMO 382, 26 July 1945).

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

SPJGH-CM 280803

17 JUN 1945

UNITED STATES)

THE INFANTRY SCHOOL

v.)

Second Lieutenant SHERMAN
T. MORELAND (O-1289298),
Infantry.)

Trial by G.C.M., convened at
Fort Benning, Georgia, 11 May
1945. Dismissal and total
forfeitures.

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 61st Article of War

Specification: In that Second Lieutenant Sherman T. Moreland, Officer Replacement Pool, The Infantry School, Fort Benning, Georgia, did, without proper leave, while enroute from Army Ground and Service Forces Redistribution Station, Atlantic City, New Jersey, to Fort Benning, Georgia, absent himself from his organization and station at Fort Benning, Georgia, from about 13 April 1945 to about 20 April 1945.

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

3. The prosecution offered in evidence without objection a duly authenticated extract copy of Special Orders No. 92, Headquarters 1214 SCU,

Army Ground and Service Forces Redistribution Station, Hotel Dennis, Atlantic City, New Jersey, dated 10 April 1945. Paragraph 10 of this order relieved accused from his status of attached unassigned to the 1st Casual Company at that Headquarters, assigned him to The Infantry School, Fort Benning, Georgia, on temporary limited military service only, and directed him to proceed to that station on or about 11 April 1945 (R. 6; Pros. Ex. 1). It was stipulated by and between the prosecution, defense and accused that accused received a copy of this order on or about 11 April 1945, and, pursuant thereto, left Atlantic City for Fort Benning, Georgia, on 11 April 1945 (R. 6). At the suggestion of the prosecution the court, without objection, took judicial notice of the fact that the traveling time from Atlantic City to Fort Benning as revealed by the Railway Computation Tables, is approximately two days (R. 6). The prosecution then introduced in evidence, without objection, three duly authenticated extract copies of the morning reports of the Officer Replacement Pool, The Infantry School, Fort Benning, Georgia. The first, dated 13 April 1945, carried accused as "atcd unasgd not yet jd (TDY enr to jn)" and referred to the special order mentioned above and to paragraph 9, Special Orders No. 89, The Infantry School (R. 7; Pros. Ex. 2). The second, dated 20 April 1945 was corrected by an entry on the extract copy dated 22 April 1945 and will not for that reason be set out here. The latter carried accused as "(Atcd unasgd) fr TDY enr to jn fr 1st Casual Co AG&SF Redistribution sta Atlantic City NJ to AWOL 0001 13 Apr 45." The entry of 20 April 1945 was corrected from "(Atcd unasgd) not yet jd (TDY enr to jn) to jd" to "(Atcd unasgd) fr AWOL to dy 1200."

4. Accused, after being fully advised as to his rights, elected to be sworn and testify. He stated that due to economic conditions he left high school in the middle of his first year. He supplemented his education, however, by attending night school. He had planned to finish high school, attend college, and then enter a theological seminary for the purpose of becoming a minister. As to his career in the Army, accused stated that he was commissioned on 4 August 1942 and assigned to the 93d Division, where he served as an Anti-Tank officer. On its departure for overseas service, he was transferred to the 92d Division. Two months later he was sent to the South Pacific where he rejoined the 93d Division. He contracted "Jungle Fungus" in a "punctured ear drum" and after seven months service he was sent back to the United States. In August 1942, when he was commissioned, accused was forced to ride in a "Jim Crow" car from Atlanta, Georgia, to Washington, D. C. This car was overcrowded, there were no seats, and due to the screen windows it was "one of the dirtiest things I had ever seen." The moment accused entered this car both civilians and enlisted personnel stared at him. Accused felt that they lost their respect for him because he had to travel under such conditions. Accordingly, while as a civilian he would consent

to ride in a "Jim Crow" car, yet in order to uphold the dignity of an officer in the Army of the United States he would refuse to do so. With this in mind, on receiving orders on 11 April 1945 transferring him to Fort Benning, accused proceeded to Washington and endeavored to procure a reservation for a seat in a Pullman or for a drawing room. He finally secured a drawing room reservation which cost \$47 - more than the plane fare - and as a result of this delay he reported to Fort Benning eight days late (R. 8-11).

On cross-examination accused identified Prosecution's Exhibit 1 as a copy of the orders he received when he was stationed at the Army Ground and Service Forces Redistribution Center, Atlantic City, and he admitted that, pursuant to those orders, he left Atlantic City on 11 April 1945 en route to Fort Benning, Georgia. It did not occur to him to obtain a transportation request at Atlantic City for the reason that he did not know that such a request would entitle him to a priority. He arrived in Washington at 2:45 p.m. on the 11th and stayed at the Carver Hall while waiting for his reservation. On 14 April he sent a telegram to The Infantry School notifying them of his inability to get a reservation and advising that he would be late. Although he was aware that due to present traveling conditions it might take some time to get a reservation, he did not think it would take him as long as it did, but he would have waited a month if necessary. He objected to traveling in a Jim Crow railroad car because it detracted from the dignity of his office and also because it constituted traveling under "extremely dirty and uncomfortable circumstances in which I am made the object of the staring of others." He arrived at Fort Benning, Georgia, on 20 April and his absence was not authorized (R. 11-17).

On examination by the court accused stated that he had no conversation with the transportation officer at Atlantic City about transportation difficulties. He was aware that busses ran from Washington, D.C. to Atlanta, Georgia, but so far as accommodations for colored people are concerned they are worse than trains. He made no attempt to travel by air because he did not have a priority and he had already paid for his reservation on the train. There was no point in inquiring into the ordinary train accommodations available to him in Washington because "all of those cars are alike". Due to his color he could not get a reservation when he talked with the clerk at the station and he was successful only when he used the telephone. His primary consideration in waiting for a reservation was to uphold the dignity of an officer in the Army of the United States.

5. It would be pointless repetition to recite again the evidence in this case. There is no doubt that accused was AWOL from 13 April 1945 to 20 April 1945 and there is likewise no doubt that his concern for the dignity of an officer of the Army of the United States is no excuse for his failure to report to Fort Benning as ordered. The existence of

(35h)

separate coaches for negroes on trains in the southern section of this country is a matter of common knowledge and doubtless not unknown to the Army authorities who issued accused's orders and who are not entirely without concern for the dignity of an officer. There is no doubt that numerous of accused's race, officers and enlisted men alike, have, in performance of their duty, ridden in coaches similar to the one of which accused complained. In so doing they acknowledged, whatever their personal feelings, that their supreme duty and one which they took a solemn oath to discharge, was to obey the lawful orders of superior military authority. That, too, was accused's duty and his feeling that he was not upholding the dignity of an officer in the United States Army is not a sufficient excuse for not performing it and reporting when ordered. The record, accordingly, is legally sufficient to support the finding of guilty of that Specification.

6. War Department records show that accused is 28 years of age and single. He is a high school graduate and a welder by trade. He enlisted in the Army on 19 February 1941 and was commissioned a second lieutenant, Army of the United States, on 4 August 1942. A disposition board convened at Army Service Forces Convalescent Hospital (ZI), Camp Upton, New York, on 22 February 1945 recommended that accused be placed in a limited service status for three months and thereafter be returned to full military duty. A "clinical summary" accompanying the recommendations of the board state that accused was in the Pacific Theater for 6½ months and "spent his entire time there in hospitals, with a multiplicity of somatic complaints for which no organic cause could be found." A diagnosis of "Psychoneurosis, mixed, moderate" was made.

7. The court was legally constituted and had jurisdiction of the accused and the subject matter. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 61.

Francis N. Tappay, Judge Advocate

William H. Dambrell, Judge Advocate

Robert E. Trevethen, Judge Advocate

SPJGH-CM 280803

1st Ind

Hq ASF, JAGO, Washington 25, D. C. JUN 27 1945

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Sherman T. Moreland (O-1289298), Infantry.

2. Upon trial by general court-martial this officer was found guilty of absenting himself without leave for a period of 8 days in violation of Article of War 61. He was sentenced to dismissal and total forfeitures. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

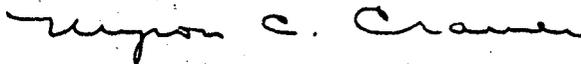
3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. I concur in that opinion. On 10 April 1945 accused, a colored officer, was relieved from his organization and station at Atlantic City, New Jersey; assigned to The Infantry School, Fort Benning, Georgia, and ordered to proceed to Fort Benning, Georgia, on or about 11 April 1945. He left Atlantic City, New Jersey, by train 11 April 1945 and arrived in Washington, D. C. at 2:45 o'clock in the afternoon of the same date. Although the travel time from Atlantic City, New Jersey, to Fort Benning, Georgia, is two days, accused did not arrive there until 20 April 1945. The reason given by accused for his delay was that he had difficulty in obtaining accommodations befitting an Army officer from Washington, D. C., to Fort Benning, Georgia. He refused to ride in a day coach as it was beneath the dignity of an officer of the United States Army, and remained in Washington until he finally obtained a drawing room, for which he paid the sum of \$47.00. He was aware that passenger busses ran from Washington to Fort Benning, but they were objectionable for the same reasons, and the accommodations for colored people were worse than the trains.

It is indicated in the Staff Judge Advocate's Review and other papers accompanying the record that on 15 May 1945, following his trial on the 11th, accused was notified by his Commanding Officer in writing that he would be required to attend all classes of The Infantry School including those scheduled for Saturdays and that no excuses would be accepted other than for sickness. On the same date, accused acknowledged receipt of this notice by 1st Indorsement and stated that he would "not be available for duty or classes on Saturdays." Accordingly, on 19 May 1945, which was Saturday, accused did not attend classes, but instead, absented himself without leave from his organization at approximately 0820 hours, and did not return until 1630 hours. In April 1945, while stationed at Atlantic City, New Jersey, accused was administered a reprimand under Article of War 104 for 2 days unauthorized absence.

(356)

I recommend that the sentence be confirmed but that the forfeitures be remitted, and that the sentence as thus modified be carried into execution.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.



2 Incls.

1. Record of trial
2. Form of action

MYRON C. CRAMER
Major General
The Judge Advocate General

(, Sentence confirmed but forfeitures remitted. GCMO 306, 7 July 1945).

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

(357)

SPJGK - CM 280805

30 MAY 1945

UNITED STATES)

THIRD AIR FORCE

v.)

Private JAMES A. WHITE
(34203717), Squadron CR,
attached to Squadron CV, 316th
AAF Base Unit (EAUTC), MacDill
Field, Tampa, Florida.)

Trial by G.C.M., convened at
MacDill Field, Florida, 9 May
1945. Dishonorable discharge
and confinement for two (2)
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 record discloses that the accused has been found guilty of the larceny of a watch of the value of \$25.00 (Specification 1), a pair of eye glasses of the value of \$10.00 (Specification 2), and a pair of coveralls of the value of \$3.20 (Specification 3), all in violation of Article of War 93.

3. The evidence is legally sufficient to support the findings of guilty of the Charge and all Specifications. The only question requiring consideration is the legality of the sentence of confinement for a period of two years.

The undisputed evidence shows that the larceny of the watch and the eye glasses was committed from the same room at the same time, to-wit, 13 April 1945, and constitutes substantially one transaction (R. 19). The larceny of the coveralls was committed on 14 April 1945.

The Manual for Courts-Martial, 1928, states:

"Where the larceny of several articles is substantially one transaction, it is a single larceny even though the articles belong to different persons. Thus, where a thief steals a suitcase containing the property of several individuals, or goes into a room and takes property belonging to various persons, there is but one larceny, which should be alleged in but one specification" (par. 149g, M.C.M., 1928).

Applying this principle of law to the undisputed evidence in this case, it is obvious that the acts alleged in Specifications 1 and 2 constitute but a single larceny for which a single penalty may be assessed (CM 232424, Smith, B.R. 19, p. 81; CM 266484, Jones). It therefore follows that the maximum punishment by confinement authorized by paragraph 104c, Manual for Courts-Martial, 1928, is as follows: for larceny of the watch and pair of eye glasses (Specifications 1 and 2) - one year; for larceny of the coveralls (Specification 3) - six months, making a total maximum authorized confinement of eighteen months.

4. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year and six months.

Lawrence E. Jones, Judge Advocate.
Charles H. Butler, Judge Advocate.
William M. Meyer, Judge Advocate.

(359)

SPJGK - CM 280805

1st Ind

JUN 1 1945

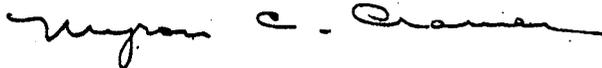
Hq ASF, JAGO, Washington 25, 1945

TO: Commanding General
Third Air Force
Tampa, Florida

1. In the case of Private James A. White (34203717), Squadron CR, attached to Squadron CV, 318th AAF Base Unit (EAUTC), MacDill Field, Tampa, Florida, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year and six months, which holding is hereby approved. Upon reduction of the term of confinement to one year and six months, 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 280805).



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.

(361)

SPJGK - CM 280840

13 JUN 1945

UNITED STATES

v.

Captain GLENN W. FISCHER
(O-559101), Air Corps.

MIAMI AIR TECHNICAL SERVICE COMMAND

Trial by G.C.M., convened at
Miami Beach, Florida, 4,6,16,
17 and 18 April 1945. Dismissal,
total forfeitures and confine-
ment for five (5) 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 I: Violation of the 93rd Article of War.

Specifications: In that Captain Glenn W. Fischer, Air Corps, Squadron A, 4130th AAF Base Unit, did, at Miami Beach, Florida, from about 1 December 1944 to about 20 March 1945, feloniously embezzle by fraudulently converting to his own use about one thousand and forty (1040) Supplemental Gasoline Ration Coupons of some value, the property of the Government of the United States, entrusted to him by the said Government of the United States.

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

Specification 1: In that Captain Glenn W. Fischer, * * *, did at Miami Beach, Florida, on or about 1 January 1945, with intent to deceive the Dade County War Price and Rationing Board 42-1-1, officially report to the said Dade County War Price and Rationing Board 42-1-1 that he did, on or about 1 January 1945, issue to R. V. Hove, thirty-eight (38) "C-6" Supplemental Gasoline Ration Coupons, which report was known by the said Captain Glenn W. Fischer to be untrue, in that the said R. V. Hove did not apply for, nor was he issued, on or about 1 January 1945, thirty-eight (38) "C-6" Supplemental Gasoline Ration Coupons by the said Captain Glenn W. Fischer.

NOTE: Specifications 2, 3 and 4 are identical with Specification 1 except as to dates, names and number of coupons issued.

These differences are as follows:

<u>Spec.</u>	<u>Date</u>	<u>Recipient</u>	<u>Number of Coupons</u>
2	1 Feb 1945	Pfc. J. C. West	37
3	9 Feb 1945	Corp. R. J. Davis	35
		Pfc. D. Hughes	39
4	16 Feb 1945	Sgt. J. Park	27
		Sgt. E. D. Rice	34

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

Specification 1: In that Captain Glenn W. Fischer, Air Corps, * * *, did, at Miami Beach, Florida, on or about 17 February 1945, with intent to deceive the Dade County War Price and Rationing Board 42-1-1, officially report to the said Dade County War Price and Rationing Board 42-1-1 that he did, on or about 17 February 1945, issue to Emmet J. Hansen, eleven (11) "B-6" Supplemental Gasoline Ration Coupons, and issue to S/Sgt Robt D. Feldman, thirty-seven (37) "C-6" Supplemental Gasoline Ration Coupons, and issue to Pvt. M. Spring, Jr., twelve (12) "B-6" Supplemental Gasoline Ration Coupons, which report was known by the said Captain Glenn W. Fischer to be untrue, in that the said Emmet J. Hansen did not apply for, nor was he issued eleven (11) "B-6" Supplemental Gasoline Ration Coupons, and said S/Sgt Robt D. Feldman did not apply for, nor was he issued thirty-seven (37) "C-6" Supplemental Gasoline Ration Coupons, and said Pvt. M. Spring, Jr. did not apply for, nor was he issued twelve (12) "B-6" Supplemental Gasoline Ration Coupons by the said Captain Glenn W. Fischer on or about 17 February 1945.

NOTE: Specifications 2, 3 and 4 are identical with Specification 1 except as to dates, names and number and type of coupons issued. These differences are as follows:

<u>Spec.</u>	<u>Date</u>	<u>Recipient</u>	<u>Number of Coupons</u>
2	22 Feb 1945	Lieut. C. A. Finley	44 "C-6"
		Charles F. Haley	37 "C-6"
		Sgt. John Johnson	41 "C-6"
3	24 Feb 1945	John W. Ahearn	13 "B-6"
		Sgt. C. E. Miller	12 "B-6"
4	27 Feb 1945	Bernard G. Allmaras	11 "B-6"
		D. D. Alwood	36 "C-6"

Defense moved for and was granted two continuances, one for two days and one for ten days, the latter being obtained on the grounds that accused's individual civilian counsel required additional time for the prepara-

tion of the case. Upon the reconvening of the court, defense moved as a special plea to strike out the Specification of Charge I on the grounds (1) that Congress had failed to define the crime of "embezzlement"; (2) that no crime or offense was stated in the Specification; and (3) that accused was not fully apprised of the offense intended to be charged. This motion was denied. Defense then moved, as a special plea, to strike out the Specifications of Charges II and III on the grounds, in substance, (1) that there was an unreasonable and improper multiplication of charges; (2) that no offenses were charged; and (3) that the specifications were vague and indefinite, did not sufficiently apprise accused of the offense intended to be charged, and, if accused was prosecuted thereunder, would subject him to the danger of being twice put in jeopardy for the same offense. This motion was likewise denied. Accused then pleaded not guilty to all Charges and Specifications. When the prosecution rested, defense counsel moved for a finding of not guilty as to the Specification of Charge I. This motion was denied. Accused 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. Nine of the ten members of the court and the assistant trial judge advocate recommended to the reviewing authority that the period of confinement be reduced to two and one-half years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48 with a recommendation that the period of confinement be commuted to two and one-half years.

3. For the Prosecution.

Accused, a captain in the Air Corps, assigned to Squadron A, 4130th Army Air Forces Base Unit, Miami Beach Service Base, Miami, Florida, was duly appointed in Special Orders by the Commanding Officer of that Base as "Asst. Mileage Administrator (Rationing O)" on 26 July 1944 (Pros. Ex.1), and as rationing officer on 27 October 1944 (Pros. Ex. 2), and served as "Army Rationing Officer" for the Base under this latter appointment during the entire period covered by the Specifications, namely, 1 December 1944 to 20 March 1945 (R. 128). At some time in 1944, the Assistant Director of the Office of Price Administration OPA for the State of Florida introduced accused, who had succeeded Warrant Officer Rothfus as rationing officer, to Mr. H. L. Littledale, Chairman of the Dade County War Price and Rationing Board (hereinafter, for convenience, referred to as the Dade County Board) and later Government Mileage Coordinator, as "the new man that was to take over the work of his predecessor" (R. 88,89). With regard to accused's duties, Mr. Littledale testified:

"As far as we were concerned, as far as I have in mind, it was the work of certifying the applications - - to the applications that were made, certifying agent for the certification of the mileage and the identity of the applicant as being entitled to gasoline rations" (R. 89).

(364)

These duties were to be performed for the "Army at Miami Beach" (R. 90). With reference to the practical handling of applications by military personnel, Mr. Littledale stated:

"* * * There was quite - - within the last three or four months, a kind of pact or agreement, that we would handle no Army rations whatever on the Dade County Rationing Board, we would not handle rations for Army Officers over there. That is all up to Captain Fischer, and by the same token, all Navy is handled by Byerly or Pier there, and quite recently, we have taken away the civilian rationing from Captain Fischer's Department" (R. 107).

During the period in which accused served as Rationing Officer for the Miami Beach Service Base he received from the Dade County Board through the Custodian of the Board, Mrs. Eleanor G. Mitchell, large numbers of gasoline coupons, either in person or through agents specifically designated by him in writing. These were receipted for by the accused or his designated agent on the form prescribed by the Office of Price Administration, officially described as "OPA Form R-117, Custodian's Record" (Pros. Exs. 4 and 5, R. 68, 73-86, 110, 111, 121-128, 130-133). Accused was required to account for the disposition of these coupons to the Dade County Board through its custodian on OPA Form R-523 (originally R-181), an official form issued by the Office of Price Administration, known as "Gasoline Document Register". This form has special spaces for information as to the name of the applicant for gasoline coupons or for gasoline, the serial numbers of the coupons actually issued to the applicant, the number of gallons or coupons issued, the date of issuance, and other information not pertinent to the present case. Each sheet has space for the signature of the official rendering the report. The execution of the register by the official to whom gasoline coupons have been issued in bulk for issuance by him to approved applicants is necessary in order to "have enough credits to offset the debits" against such officer, as shown on the Custodian's Record (OPA Form R-117), which he was required to sign when he procured the coupons (Pros. Ex. 6, R. 111, 112).

As explained by the Custodian, Mrs. Eleanor G. Mitchell, the Custodian's Record was used "as a record for issuing coupons to clerks of Sub-Boards" (R. 115), and in so far as the custodian was concerned there was no necessity for them to file with her the applications on which coupons thus procured in bulk were later issued by them, they being required merely to furnish her with a "Gasoline Document Register," showing the disposition of these coupons in the manner prescribed on the form (R. 117). During the period from 1 December 1944 to 20 March 1945 supplemental ration coupons were issued by the Custodian of the Dade County Board to accused as follows (R. 114):

"B" Coupons:

December 1944	600
January 1945	1600
February 1945	1800

March 1945 2000

"C" Coupons

December 1944	3850
January 1945	6220
February 1945	7000
March 1945	6000

Gasoline Document Registers, duly submitted by accused to the Dade County Board through its custodian, show entries of issuances by accused of supplemental gasoline ration coupons to the military personnel named in the Specifications of Charges II and III, in the amounts and on the dates therein designated (Pros. Ex. 6). No applications for such coupons were filed in accused's office and no such coupons were issued by him or his office to the persons described in these specifications. Each individual described in the Specifications had made application to accused's office at some other time for other coupons and had received them from accused or his office (R. 142-164,207,208,213,218,221,222,226,228-235).

Under the plan adopted by the Rationing Office at Miami Beach Service Base prior to accused's appointment and continued by him upon receipt of a request for supplemental gasoline coupons the application was prepared by one of the enlisted men, who served as clerks, and was signed by the applicant. It was then normally processed by Sergeant Walter Wines, unofficially recognized as Chief Clerk, who would then submit the application for final approval to the officer in charge. If the application received the officer's approval, the approved number of coupons would be "trimmed" from the sheets that had previously been procured from the Dade County Board and stapled between two printed covers furnished for that purpose, thus forming a book which was delivered to the applicant. The whole process required about two days. All applications had to be approved by the officer in charge and were approved by accused during the period in which he served as Rationing Officer. After the issuance of the book, the application was filed away in the office (R. 164,165,166,171). Applications from members of the Army were kept separate from those for civilians. "That is the reason, because the Army gasoline is issued directly from our office on coupons drawn from the Board in bulk, which we signed for at the time" (R. 172).

Mr. Charles H. Keeney, District Enforcement Coordinator, Office of Price Administration (R. 175), testified that he was familiar with the operations of what was known in the Miami Area as "sub-rationing boards" and that "we have Miami Beach Service Base sub-Board***there is another *** in the DuPont Building which serves the Navy in Miami *** another at the Opa Locka Air Base, serving military personnel. *** another at the Richmond Air Base, serving personnel there." (R. 175,176). Enlarging upon the testimony previously given relative to the handling of gasoline coupons, Mr. Keeney

testified that the Rationing Officer procures the coupons in bulk from the Custodian of the Dade County Board, and signs for them in person or through the individuals designated by him, on the OPA Document Register.

"*** That Document Register shows the lowest and the highest number of the coupons received at the time, also the type of coupons. They are then brought to the Board. Applications are received by the Rationing Officer. There are some persons designated by the Army as Certifying Officers, that is, in Redistribution Center, Ground Forces Services -- they have a Certifying Officer who certifies the application of the need for the gasoline by the particular man in service in their commands. ***" (R. 178,177).

Referring specifically to the Miami Beach Service Base "sub-Board," witness stated:

"*** These applications are then presented to the Rationing Officer of the Board, *** Sub-Board, who issues the coupons. He has what is known as a Document Register. Upon entering these coupons, he enters the date the coupons are issued, the name of the applicant, the total number of coupons issued, the lowest and the highest serial number of the coupons issued, the command under which the man is serving. In the case of the Service Base, the application remains in the files of the Rationing Board at the Town House /the building in which the Miami Beach Service Base Rationing Office is located/. In Redistribution and Ground Forces, the applications are returned to those commands and kept in the files of the Certifying Officer" (R. 177,178).

After issuance of coupons to an individual, witness stated, they -

"*** are first endorsed by the recipient with his license tag number and State of registration. He then transfers those coupons to his service station in exchange for gasoline, with money, of course. The service station or dealer, as we call them, attaches those coupons to what is known as a 'Bingo' sheet or 'Gum' sheet. They have spaces providing for 50 coupons. The service station operator endorses this 'Bingo' sheet with his name and address, trade name, and total number of coupons on the sheet, value of each coupon and total number of each coupon. They are turned over to his supplier or distributor or immediate distributor to replenish his stock. The distributor endorses on the back of these 'Bingo' sheets and deposits them in his rations bank account in one of the local banks. After they have been credited to the account of the distributor, they are then forwarded to the Verification Center of the Office of Price Administration in Atlanta, where they are determined to be counterfeits, stolen, or improperly endorsed. If they are found OK, after they have

passed the Verification Center, they are then destroyed" (R. 177,178).

Witness was called upon to investigate the "Miami Beach Service Base Sub-Board" as a result of a report that a Miami Beach service station was selling gasoline without coupons (R. 179). He discovered that the Document Registers signed by accused contained entries showing issuances of both "B" and "C" coupons to the same individuals in several instances. A full investigation disclosed forty instances in which there were no applications made for supplemental coupons by individuals whose names had been thus duplicated (R. 180, 181,188). Witness then procured certain "Bingo" sheets for dates between 10 March and 26 March 1945, which had been prepared and submitted to the distributor by one "Ed. Dornbush," operator of a service station at Miami Beach (Pros. Ex. 7). All earlier "Bingo" sheets, submitted by this operator, had previously been destroyed at the Verification Center (R. 182,183). Of the total of 554 coupons on these "Bingo" sheets, 413 were issued by the Dade County Board to "Miami Beach Service Base sub-Rationing Board" (R. 187). No applications could be found on which many of these 413 coupons had supposedly been issued (Pros. Ex. 9). Witness could not point out any specific rule or regulation of the Office of Price Administration which authorized the Dade County Board to set up a "sub-Rationing Board" at Miami Beach Service Bases or to issue coupons in bulk to accused for issuance by him to applicants without prior approval of their applications by the Board; nor had he found any documentary evidence of any official action of the Dade County Board creating a "sub-Rationing Board" at Miami Beach Service Base, with authority to issue Supplemental Gasoline Ration Coupons without prior approval by the Dade County Board. These matters, accused stated, did not come within the scope of his "investigation or authority" (R. 189,190).

Thirty-seven witnesses testified, or it was stipulated that they would so testify if they were present, that they neither applied for nor received the coupons, totaling one thousand and fifty, which accused reported on the official forms to the Dade County Board he had issued to them. Among these were the sixteen officers and enlisted men named in the Specifications of Charges II and III. The remaining twenty-one whose testimony was thus adduced were likewise members of the military establishment, not named in the specifications (R. 201-235, Pros. Ex. 9).

Dr. James S. Thomas, District Director of the "OPA" for Southern Florida, met accused in December, 1944. He was aware at the time and "ever since" has been aware of "the operations being conducted by the accused at the Miami Beach Service Base in the issuance of gasoline ration coupons" (R. 224-225).

As a result of a prior conversation, Major Joseph B. Wallace, Provost Marshal of the Miami Beach Service, "Major Adler," "Mr. Keeney of the OPA," and "Mr. Calhoun, an investigator of the Fourth Service Command" interviewed accused in his office (R. 236,237). Mr. Keeney requested accused to furnish him certain applications which indicated that both "B"

and "C" gasoline ration "stamps" had been issued to the same individuals, stating that "it was illegal to issue both 'B' and 'C' coupons to one person." In each instance in which there had been dual issuances, only one application was found (R. 237,238,239,241). Mr. Keeney and Mr. Calhoun later withdrew, and Major Wallace then "warned" accused of his rights under the 24th Article of War (R. 242).

*** I explained to him that he didn't have to make a statement. In the event he did make a statement, it could be used against him, and that on the face of things we found in his office, it appeared that something very seriously wrong had happened there. I told him that the OPA were very much interested, naturally, in this violation, and that they were going to investigate and prosecute fully. That it was not our desire to bring in the FBI on the case, inasmuch as he was a member of the Armed Forces, and so forth. We would much rather handle it in our own channels, and I asked that he make a statement or tell me what had occurred. He thought for a short time and stated that he would accept responsibility for what had happened.***"

After further conversation along the same lines with Major Adler, accused repeated his acceptance of responsibility. Major Wallace testified that the following then occurred:

*** I asked him several questions and then I asked him again, I said, 'When you accept full responsibility for this, do you mean that you have been illegally issuing gasoline coupons here for a good long period of time?', and he said, 'Yes.' I asked him if he had any idea how many he had illegally issued. He said he didn't know, he didn't recall, but it had been going on since November, and about that point, he said he'd rather not talk any more about it until he talked to someone on the outside. ***" (R. 242,243).

After still further conversation, in which accused stated that he would like to straighten out some things in the office before the OPA continued its investigation and was advised by Major Adler that this was impossible as he was to be relieved at once, Major Wallace left (R. 244). At a subsequent conference at which accused, his adviser, Lieutenant Davis, Colonel Christian, Major Parsons and Major Wallace were present, Colonel Christian again advised accused of his rights under the 24th Article of War. Major Wallace testified that after this explanation accused stated -

*** that he understood that and made a brief statement in which he stated that about two years prior to this time, he had met a man who operated a service station on the south end of Miami Beach named Ed. Dornbush. That at this time he went there with another

officer friend who purchased some black market gasoline. He became acquainted with Dornbush and knew him from that time on. There were no details given, as I recall, and he became Rationing Officer sometime in the later part of the summer of 1944 for the Miami Beach Service Base, and at some time during the month of November - - he was a little bit hesitant about the date - - he said he couldn't recall the exact day - - he began to deliver to Mr. Dornbush gasoline coupons. That he carried them down there in his own car. I think I asked him, but I am not sure, one of us asked him why he carried them down there, and he said, 'For reimbursement', and Lieutenant Davis then objected to any further questions, and I stated that I wanted to ask him one more question, and that he needn't answer it unless Lieutenant Davis agreed, and I asked him if he was entirely responsible for all the coupons having gone out of his office illegally or whether any other party, either military or civilian, was in any way connected with anything about it or had anything to do with it. Lieutenant Davis said it would be all right for him to answer that question, and he answered it and said he was entirely responsible and anything in that nature that happened, he was the one who had done it." (R. 245-246).

While Lieutenant Davis was in the room alone, Colonel Christian stated in substance "unless the matter were cleared up sufficiently, that he knew where the Service Base stood, that he would be obliged to confine Captain Fischer until he could learn", and someone, probably, Major Parsons, stated that it would be necessary to prefer charges against accused within twenty-four hours. In the presence of accused Major Wallace "mentioned bringing in the FBI."

The prosecution requested the court to take judicial cognizance of the "Executive Orders of the President of the United States creating the Office of Price Administration and the defining of the powers of the Price Administrator" and of Section 1394.8104 of Ration Orders 5C, issued by the Price Administrator and published in 7 Federal Register 9135 which stipulates that all coupon books and bulk coupons are and "when issued shall remain" the property of the Office of Price Administration. The court was also requested to take judicial notice of Section 47 of the Criminal Code, Section 100, Title 18, United States Code, fixing a maximum confinement of five years for anyone convicted of embezzlement of "moneys, goods, chattels, records, or property of the United States" (R. 62,63).

4. For the Defense.

The defense introduced in evidence as its Exhibits "A" and "B" OPA Forms R-535 and R-552, being the forms used by applicants for "Supplemental and Occupational Mileage Ration" and "Special Mileage Ration,"

(370)

respectively. Both forms contain spaces for the signature of a "Board Member," attesting to the "Board Action" and for the signature of the "Issuing Officer," attesting to the actual issuance of coupons to the applicant. Defense requested the court to take judicial notice of the Emergency Price Control Act of 1942, as amended, and of the various regulations issued pursuant thereto (R. 253).

Major William A. Adler, Administrative Executive of Miami Beach Service Base, was present at and participated in the interview with accused on 20 March 1945, previously described by Major Wallace (R. 256). He testified that the following occurred after the withdrawal of Mr. Keeney, Mr. Calhoun and Sergeant Lange:

"Major Wallace apprized Captain Fischer of his rights, and then suggested to Captain Fischer that he tell the whole story, anything that he might have done, about some of the facts that Mr. Keeney had found at that time. We told Captain Fischer that we thought it best to let us have anything that he did have or anything he knew about it in his own interests. Captain Fischer stated that apparently there were certain discrepancies. He didn't know how they happened, but he said that they had happened apparently in that office, and therefore, he was responsible. We told Captain Fischer that we thought it to his best interests because the OPA was definitely in on it and at the same time, possibly the FBI would be interested in the case, and we were hoping to keep it a military matter in so far as we could. That is substantially the story." (R. 257).

Witness had not heard the word "illegally" or the words, "illegality" used during this conversation, but shortly before Mr. Keeney's withdrawal, Mr. Keeney had characterized as "illegal" the issuance of two types of coupons to the same person (R. 259,260). Witness was not present at any later conference with accused in witness' office or Colonel Christian's office (R. 260).

Technical Sergeant Walter Wines, who had served in the Rationing Office at Miami Beach Service Base since August 1942 (R. 262), testified that the Dade County Board sent over to accused's office a number of applicants for supplemental gasoline coupons, including persons "in uniform", civilian members of families of Army personnel, and some individuals engaged in entertaining at Army camps. Mr. Pels, a member of the Dade County Board, referred his son-in-law, an Army officer, to accused's office (R. 263-266).

Accused, after having been duly advised of his rights, elected to make an unsworn oral statement through his counsel, substantially as follows:

Accused was appointed Assistant Mileage Administrator and Rationing Officer by Special Order, and the only authority which he had in so far as

gasoline rationing was concerned was as a result of the issuance of such orders by Colonel Christian. There is no War Department Circular or any other official orders of which he is aware that prescribed the duties of a Rationing Officer, and he was guided largely by his own discretion and the practices and customs that had been followed by his predecessors. His exercise of discretion was subject to "the influence and advice of members of the Dade County War Price and Rationing Board 42-1-1, because that Board had exclusive jurisdiction of the issuance of gasoline coupons in this area." He was not a clerk or employee of the Board, was never appointed as an Issuing Officer by the board or other agency, and was not subject to removal by the Board. During the late summer or early fall of 1944, the Board or individual members of the Board began sending to him applicants whom the Board was unable to accommodate. He hesitated at first to issue coupons to them, and by at least two members was advised to accommodate the applicants, despite the lack of regulations authorizing the issuance. He was further told that if the applicants were unable to sign the regular application forms "to issue the coupons nevertheless and not to send to the Board at Miami any of the applications." He was further advised that the only accounting that would be required of him was the submission of the Document Register, and that he would not only not have to submit the applications to accompany the Register, but should retain the applications in his files. He was told that there was little likelihood of a check being made of his records. He named five of the individuals who were referred to him by the Board, the manager of the Muzak Corporation, Mr. W. Finley Jones, and "another member of the Shriner's", the son-in-law of Mr. Pels, and Mr. Douglas P. Hall. All of these were accommodated by him. There were numerous instances where "such referred applicants were unable or unwilling to sign applications on the prescribed form" and in those instances, in order to accommodate the applicants, he did not require them to sign applications, but nevertheless issued coupons to them. Through weakness and lack of firmness he issued coupons without requiring the signature of a member of the Board as provided for by regulations. As a result of following this unauthorized practice "which arose and grew and magnified as time passed" he found it necessary to find some method of "accounting by the Document Register for the disposition *** of the gasoline coupons which had been issued to him and for which he had receipted on the Form R-117, called the Custodian's Record Sheets." Accordingly he adopted "the expedient of adding to the allotment to certain applicants certain 'C' coupons, although the applicant had not applied for or received any 'C' coupons whatever." In this way there would at least be some "apparent accounting" in the Custodian's Office of the Board at Miami. In most instances the applicants, thus accommodated, would be directed to obtain their gasoline from Mr. Ed. Dornbush, whom he had known for some time. He would then communicate with Mr. Dornbush, usually by telephone, and at some later date he would "deliver to Ed. Dornbush the gasoline coupons in payment of the gasoline delivered by Dornbush to the applicant." He would usually put the license number of the applicant to whom "he had issued coupons on the first of the series of coupons in his own handwriting, and presumably Mr. Dornbush, or

someone in his employ, would, in a different handwriting, put the number of the license on the other coupons delivered." In this manner "Dornbush would be reimbursed for the gasoline which he had previously given to these applicants whose accommodation was requested by these Board members." He never converted and never intended to convert to his own use any of these gasoline coupons, they being devoted to the use of the applicants whom the Board members wished to accommodate, nor did he intend in any way to deceive the Board through his reports on the Document Registers, since the whole practice was adopted as a result of requests by members of the Board. He did not in any way benefit financially from any of his acts (R. 267-275).

Rebuttal for the prosecution.

Sergeant Wines, recalled as a witness for the prosecution, testified that after accused's appointment there was no change in the procedure with respect to forwarding applications for Supplemental Gas Ration Coupons to the Dade County Board (R. 278). When Mr. Pel's son-in-law, an Army officer, requested supplemental gasoline, an application was signed by him and duly approved by accused. Thereafter an entry of the issuance was duly made on the Document Register (R. 277-278). Applications, signed by military personnel, were never forwarded to the Dade County Board but were retained in the files of the Rationing Officer at the Base (R. 281). Sergeant Wines recalled no case in which coupons were issued without an application therefor having been signed by the recipient (R. 282). The persons referred to by him in his testimony as a defense witness as having been sent by the Board for accommodation had all signed applications, which thereafter had been duly filed (R. 282). Sergeant John H. Lange testified that he had been in the Base Rationing Office for two years. He had located and presented to the court applications for gasoline, with accused's signature as "Issuing Officer," made by W. Finley Jones and Douglas P. Bell, two of the parties who accused had testified were sent to him by members of the Board. It had not been the custom for any officer or official to sign in the box on the application, designated as "Board Action." The space under the line "Signature of Board Member" was left blank, and it was decided that the appropriate place for the signature by the Issuing Officer was on the line designated "Issuing Officer" (R. 284, 285; Pros. Exs. 11 and 12). As a result of a subsequent investigation and search conducted by direction of the court, Sergeant Lange presented fifteen applications that had been made during the period in which accused's predecessor, "Mr. Rothfus" served as Rationing Officer, and testified that, contrary to his previous testimony, on them and all other applications made during Mr. Rothfus' incumbency, the latter had signed as Board Member in the block designated "Board Action" and had signed none as "Issuing Officer" (R. 301-303). Mr. Edward R. Gegenschatz, representative of the company holding the franchise for "Muzak" in Miami, referred to by accused as one of the parties sent by the Board to accused for accommodation, testified that he had received no coupons from accused, and

that he had never bought any gasoline from the Dornbush Service Station (R. 287-294). The Custodian's Document Registers showed entries thereon of issuances by accused of gas coupons to Harry Richman, suggested by accused, and W. Finley Jones, named by accused, as persons sent to him by members of the Board for accommodation (R. 298). A compilation made by Mr. Keeney (Pros. Ex. 9) showed that between 1 December 1944 and 20 March 1945, accused had entered on Document Register sheets issuances by him to 98 applicants of 2,319 coupons, having a value of 11,595 gallons of gasoline, for which there were no applications (R. 295).

Sur-Rebuttal for the Defense.

It was stipulated that if Lieutenant Edward D. Luedtke were present he would testify that he was the Army Rationing Officer of the Miami Beach Service Base, and that on 17 April 1945 he was appointed to and sworn in as a member of the Dade County War Price and Rationing Board 42-1-1 (R. 304). Warrant Officer H. F. Rothfus, accused's predecessor as Rationing Officer at the Base testified that he had similarly been appointed as a member of the Dade County Board during the period he served as Army Rationing Officer, and that in passing on applications he signed as a Board member (R. 306,307,310,311).

5. While the record is voluminous, due in large part to the careful, able and painstaking manner in which the trial was conducted by both the prosecution and the defense, the facts are comparatively simple. Accused was duly appointed Rationing Officer of the Miami Beach Service Base by order of the Commanding Officer on 27 October 1944, after having previously been appointed as Assistant Mileage Administrator, Rationing Officer, for the Base on 26 July 1944. Accused succeeded Warrant Officer H. F. Rothfus, who, during his incumbency of the office, had been appointed a member of the Dade County War Price and Rationing Board 42-1-1. Mr. Rothfus approved all applications for supplemental gasoline ration coupons as a Board Member in the box on the application forms ruled off for "Board Action," and issued the approved number of coupons to the applicants without any action by the Dade County Board. Accused was not named a member of the Board, but continued the practice of approving applications for and issuing coupons without consulting with the members of the Board and without obtaining any specific approval from any of them. While there was no proof that any official action pertaining to its establishment had been taken, the Rationing Office at the Miami Beach Service Base was considered by the Board and by responsible representatives of the War Price Administration in Florida as a "sub-Rationing" Board. By reason of this fact, supplemental gasoline coupons were issued by the Custodian of the Dade County Board to the Base Rationing Officer, who was not required to submit to the Board applications by military personnel for supplemental coupons, but was allowed to issue the number of coupons approved by him directly to the applicant. The sole obligation placed on him was to receipt for the coupons on the prescribed OPA form, known as "Custodian's Record" and to account for their disposition

on another prescribed OPA form, known as "Gasoline Document Register." The applications themselves were retained in the office of the Base Rationing Officer.

In pursuance with this established practice, between 1 December 1944 and 20 March 1945, the period during which it is alleged that he committed the various offenses described in the various Specifications, accused procured and receipted for many thousands of gasoline coupons (each coupon giving the holder the right to purchase five gallons of gasoline). He reported to the Board that he had properly issued these coupons to the applicants that he named. It was clearly established by the evidence that he did not receive any applications for the issuance of 2319 of the coupons that he claimed he had issued. Certainly he had no right to use these coupons for his own personal purposes. A portion of these coupons were found on the "Bingo" sheets, submitted by one Ed Dornbush, the operator of a filling station in Miami Beach, to his distributor. Only a limited number of these sheets could be located, because, in accordance with the OPA rules, previous "Bingo" sheets had been destroyed at the Verification Center in Atlanta, after being checked to determine whether the coupons attached thereto were "counterfeits, stolen, or improperly endorsed." Of the total of 554 coupons found on the "Bingo" sheets submitted by Mr. Dornbush on various dates between 10 March and 26 March 1945, 441 were found to have been procured by accused from the Custodian of the Dade County Board. A full and complete search failed to reveal any applications to support the issuance of many of these coupons.

The system adopted by accused, after receipting for the coupons from the Custodian of the Dade County Board, was to enter on the Gasoline Document Register, which he signed and submitted to the Custodian, the name of some individual to whom he reported in the prescribed manner he had issued a designated number of coupons. In at least forty instances between 1 December 1944 and 20 March 1945 he falsely used the name of some member of the military establishment who had previously made application for and had already received other coupons. The total number of coupons which he falsely reported he had issued in these forty instances was 1050. A search of all records failed to disclose any applications on which their issuance was based. Included in the issuances so falsified were those described in the Specifications of Charges II and III. Each of the members of the military establishment whose names were used by accused in the forty instances of false reports referred to denied that he had made an application for the coupons, which accused reported he had issued to him, and that he had received any of the described coupons.

In the face of this overwhelming accumulation of facts, accused's protest that there was nothing dishonest in his actions, that the large shortage was due to the fact that he had "through weakness and lack of firmness" issued coupons to individuals, suggested by members of the Board, whom the Board could not accommodate, and that he had not converted any of

the coupons to his own use, not only finds no support but is clearly without any foundation whatsoever. Accused's acknowledgment of friendship with Mr. Dornbush, the fact that many of the coupons which had been illegally issued by accused were subsequently found on the "Bingo" sheets submitted by the latter, accused's description of his practice of taking coupons around to Mr. Dornbush "for reimbursement," his admission of irregularities in his office and his assumption of responsibility for these irregularities, added to the positive evidence that there were no applications to support the issuance of more than 2300 coupons, including those described in the Specifications of Charges II and III, establish beyond any reasonable doubt that accused fraudulently converted to his own use 1040 coupons as charged in the Specification of Charge I, and that in falsely rendering the reports to the Dade County Board, as described in the Specifications of Charges II and III, it was his deliberate intention to deceive the Board by covering up his embezzlements of the coupons therein referred to.

Numerous questions of law were presented by counsel for the defense, both in connection with the special pleas and on the merits of the charges and specifications. A part of these pertain to the charge of embezzlement and a part to the charges of officially making false statements to the Dade County Board. They will, accordingly, be considered separately. It is to be noted, however, that the motion to strike out accused's admissions or confession to the investigating officer on the grounds that the corpus delicti had not been established, applies to all Charges and Specifications. In view of the conclusions reached by the Board, as already set forth and as will be discussed more fully hereinafter, the Board is of the opinion that the corpus delicti was fully established and that the motion to strike out was properly denied. While defense counsel at no time directly contended that the admissions made by accused were not voluntary, questions asked by defense counsel at least indicated an attempt to show that undue pressure was brought to bear upon accused to admit his allegedly illegal conduct and that he may have been induced to make his statement to the investigating officers through the suggestion that he would benefit by such action. The record does not support any such reflection upon the voluntary nature of accused's statement.

6. a. Embezzlement - Charge I and its Specification.

Embezzlement is thus defined in paragraph 149h of the Manual for Courts-Martial, 1928:

"Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted or into whose hands it has lawfully come. (Moore v. U.S., 160 U.S. 268.)

"The gist of the offense is a breach of trust. The trust is one arising from some fiduciary relationship existing between the owner and the person converting the property, and springing from an agreement, expressed or implied, or arising by operation

of law. The offense exists only where the property has been taken or received by virtue of such relationship.

"Property includes not only things possessing intrinsic value, but also bank notes and other forms of paper money and commercial paper and other writings which represent value.***."

The defense's first legal contention is that Congress, in enacting the Articles of War, failed to define the crime of "embezzlement," denounced by the 93rd Article. This identical question was considered by the Board of Review in CM ETO 1302, Splain. As pointed out by the Board, it is a well recognized principle that when Congress uses words in a statute which have acquired a well understood meaning it is presumed that they were used in the same sense unless the contrary appears (The Abbotsford v. Johnson, 98 U.S. 440, 25 L. Ed., 168):

"The use of a word which has generally received a certain construction raises a presumption that Congress used it *** with that meaning, and it devolves on the one claiming any other construction to show sufficient reasons for ascribing to Congress an intent to use it in such sense" (Northern Pacific Railroad Company v. Musser-Sauntry Land, Logging and Mfg. Co., 168 U.S. 604, 608, 42 L. Ed. 596, 598).

After giving a detailed history of congressional legislation pertaining to the crime of embezzlement, the Board reached conclusions that are succinctly summarized at page 189, III Bull. JAG, May 1944, as follows:

"Embezzlement is not an offense at common law, being solely of statutory origin and existence. The crime of embezzlement contained in the 93rd Article of War is not defined therein. Prior to the enactment thereof, however, Congress, in legislating for the District of Columbia, has defined 'embezzlement' as the wrongful conversion by an agent 'to his own use *** of anything of value which shall come into his possession or under his care by virtue of his employment or office, whether the thing so converted be the property of his master or employer, or that of any other person ***.' It may properly be assumed that Congress adopted such meaning when it denounced the crime of embezzlement in the 93rd Article of War."

The Board of Review concurs in the views so expressed. It is true that by special legislative enactments Congress has provided that certain acts, not included within the ordinary significance of the term, shall be deemed "embezzlements," but the statutes so enacted cover special situations, none of which is described in the Specification under consideration. It is clear that there was no intention to charge accused with the commission of "embezzlement" under any such special congressional act, and that no such

artificial definition was intended by Congress in denouncing "embezzlement" in Article of War 93. The Board is, therefore, of the opinion that defense's contention as to lack of definition of the crime is not well founded.

The two remaining items of the special plea to strike out this Specification are, in substance, that it did not set forth a crime or offense and that it did not sufficiently apprise the accused of the alleged offense with which he was charged. The Specification specifically charges that between certain dates accused did "feloniously embezzle by fraudulently converting to his own use about one thousand and forty (1040) Supplemental Gasoline Ration Coupons of some value, the property of the Government of the United States, entrusted to him by the said Government of the United States." It, therefore, contains every essential element of the offense of "embezzlement" as recognized by Congress and in the Manual for Courts-Martial (par. 149h, *supra*), namely, fraudulent conversion by accused to his own use of certain specifically described property of some value, belonging to and entrusted to him by a third person. The Board, consequently, considers without merit defense's contention that no offense is stated. Likewise, the Board is unable to agree with the contention by defense that the specification is vague and indefinite. In the final analysis, to insert additional allegations would merely be to include evidentiary facts, which it is improper or at least undesirable to plead (CM 227793, *Anderson*, 15 B.R. 363, 373). A specification should set forth in "simple and concise language *** the facts constituting the offense" (MCM, par. 129). It is not to be measured by the strict rules applicable to indictments, but it must adequately apprise the accused of the offense with which he is charged and must contain "by direct averment or reasonable implication from facts alleged all elements of the offense sought to be charged" (CM 154185, 428 (8), Dig. Op. JAG 1912-40). The Board is of the opinion that the Specification fully meets these requirements.

The Board is also of the opinion that the record of trial fully supports the findings of guilty of Charge I and its Specification, and that the court properly denied the motion for a finding of not guilty. In his official capacity as Rationing Officer of the Miami Beach Service Base, accused, a captain in the Army of the United States, was entrusted by the Dade County War Price and Rationing Board 42-1-1, with several thousand gasoline ration coupons of some small material, but of considerable potential value, which were to be issued by him to military personnel on applications submitted to and approved by him. The Board is one of the numerous agencies set up by the United States Government to carry out the myriad functions that must be performed by the Government in the conduct of global warfare. The Office of Price Administration was created by Congressional Act (act of Jan. 30, 1942, C. 26, 56 Stat. 23, 50 U.S.C. 921), and under the authority vested in him by law the Price Administrator in behalf and in the name of the Office of Price Administration issued and caused to be promulgated the basic rules and regulations pertaining to the rationing of

(378)

gasoline and the establishment of local boards to handle the issuance of ration coupons for this vital product (7 Fed. Register 9135, et seq., 6 Nov. 1942). The Board has no separate legal entity - it is a part of the machinery of the United States Government and functions as such. Section 1394.8104 of Ration Orders 5C, issued by the Price Administrator, under the authority vested in him (7 Fed. Reg. 9151) specifically provides that "all coupon books, bulk coupons, inventory coupons, other evidences and tire inspection records are, and when issued shall remain the property of the Office of Price Administration." Inasmuch as the Office of Price Administration is purely an arm of the United States Government, title to all coupons vests in the United States Government. It is clear, therefore, that the coupons received by accused were the property of the United States Government and were entrusted to him by the United States Government.

Accused, however, takes the position that since there was no official authority on the part of the Dade County Board to create a sub-board at the Base, and since the Board had no legal authority to entrust him with the coupons, he was not guilty of embezzlement if he converted them to his own use. Pretermitting the principle enunciated by Colonel Winthrop that "an officer or soldier of the Army is always in a fiduciary relation to the United States as an agent or employee of the government" (Winthrop's Military Law and Precedents, 2d Ed., p. 705), it is a well-recognized principle that no express or formal appointment of an agent is necessary (Underhill, Criminal Law, p. 1011), and that "whether or not a public officer who is accused of embezzlement was, or was not, lawfully appointed is immaterial" (*idem*, p. 1012).

In the case of embezzlement it is of no importance whether or not the unfaithful agent personally benefited by his fraudulent conversion of the property entrusted to him (CM 237265, Fowler, 23 B.R. 541, 20 C.J. 427-429). Even were this not so, however, the record contains ample established facts from which the court was justified in finding that accused was one of the beneficiaries of the "black market" transactions in which he participated by supplying coupons which he had unlawfully converted. The sole remaining question, whether or not there was a fraudulent conversion, finds its answer in the overwhelming proof that accused received more than 2300 coupons for which he rendered no legal accounting, that he falsely reported to the Dade County Board that he had issued the coupons in connection with applications which had never been made, and that a number of these coupons were later discovered on the so-called "Bingo" sheets submitted by a Miami Beach service station operator, to whom accused admitted he had from time to time turned over coupons improperly issued by him, according to his disproved contention, "through weakness and lack of firmness," to accommodate members of the Board.

b. Officially making false reports to Rationing Board - Charges II and III and their Specifications.

The prosecution charged under eight separate specifications that on eight different dates accused, a captain in the Air Corps, with intent to deceive the Dade County War Price and Rationing Board 42-1-1, officially reported to that Board that he had issued to various members of the military establishment certain "Supplemental Gasoline Ration Coupons," well knowing that the reports were not true, in that he had not issued such coupons to the designated individuals and these individuals had neither applied for nor received the specified coupons. Four of these specifications were laid under Article of War 95 and four under Article of War 96. Each specification described a separate and distinct offense.

The defense, in a special plea, moved to strike out all of these specifications on the grounds, in substance, (1) that there was an unreasonable and improper multiplication of charges; (2) that no offenses were charged; and (3) that the specifications were vague and indefinite, did not sufficiently apprise accused of the offense intended to be charged, and, if accused was prosecuted thereunder, would subject him to the danger of being twice placed in jeopardy for the same offense. The Board of Review is of the opinion that this motion was properly denied.

The offenses charged in these eight specifications are strictly military offenses. It is true that accused attempted to cover up his embezzlements by making the reports described in the specifications. However, the embezzlements were completely consummated without the rendition of the reports, the gist of the crime of embezzlement being the fraudulent conversion. The means used by the perpetrator to conceal his activities are in no way an element of the crime. On each occasion, therefore, on which accused made a false report to the Board he committed a separate offense which may properly and appropriately be designated as an act of fraud or gross falsity. There is nothing in the Manual for Courts-Martial (cf. par. 27) or in the opinions of the Board of Review which suggests nor is there any sound legal or equitable reason why it should be held that it is duplicitous to charge a member of the military establishment with embezzlement and to add separate specifications charging him with the rendition of false reports to prevent detection of his crime.

In the opinion of the Board the act described in each specification constitutes an offense under both the 95th and 96th Articles of War. In Military Law and Precedents, Second Edition, Colonel Winthrop cites as an example of conduct unbecoming to an officer and a gentleman in violation of Article of War 61 (now AW 95) "Acts of fraud or gross falsity, cheats, or other corrupt conduct not included under former heads" (p. 716), and as examples of disorders and neglects to the prejudice of good order and military discipline under Article of War 62 (now superseded by AW 96), "dishonesty, fraud or falsification" (p. 722). It is true that the several specifications do not charge false official statements made to a superior in the military establishment, but it is equally true that each does charge that under and by virtue of his official position accused, with intent to

deceive, made a false report to an agency of the United States Government. It cannot be seriously denied that such conduct violates the obligations of an officer and a gentleman and brings discredit upon the military establishment.

From a technical viewpoint it would probably have been desirable in wording the specifications to set forth in detail accused's official capacity. But as previously pointed out specifications need not follow the technical niceties of indictments. Accused must be properly apprised of the offense with which he is charged, all essential elements of the offense must be set forth, and the offense must be described with sufficient clarity to obviate the possibility of accused's being again placed in jeopardy for the same offense. It is the opinion of the Board that the eight specifications in question meet this test.

Accused was advised that by virtue of an office or position which he held he made the false reports described in the specifications to the Dade County Board, well knowing that the facts reported were false. He was well aware of the fact that he was the Rationing Officer of the Miami Beach Service Base, and that he held no other office by virtue of which he was required to render reports to the Board. At no time during the course of the trial was there the slightest contention or indication that he was surprised by any of the testimony adduced in support of the specifications. Therefore, even assuming, without so holding, that the specifications were lacking in complete details, it clearly appears that the absence of such details in no way injuriously affected his substantial rights and affords no reason for disapproving the findings (AW 37, CM 246591). It is apparent, too, that since accused held no other office which required the rendition of a report to the Board, there is no danger of his being placed in jeopardy for the second time for making false reports to it in an official capacity.

It was established by positive evidence that accused, as the Rationing Officer of Miami Beach Service Base, procured from the Dade County Board several thousand supplemental gasoline ration coupons. On the dates described in the eight specifications now under consideration he falsely reported to the Board, on the official form prescribed by the Office of Price Administration, that he had issued to military personnel described in the respective specifications the number of coupons therein respectively designated. These reports were required in order to furnish the Board with a record of the disposition made by the accused of the coupons delivered to him for issuance to members of the military establishment on applications approved by him. It is a natural inference from the testimony that such a report was necessary to permit accused to draw additional coupons. In making the reports he was acting in his official capacity as Rationing Officer. He was performing one of his military duties. The reports and the statements contained in them were therefore "official." In each instance accused knowingly falsified the records, and was guilty of

fraud and gross falsity. His intent to deceive the Board is too apparent to require discussion. For an officer of the Army of the United States, acting officially, to make a false report to the United States Government is clearly a violation of his obligation as an officer and a gentleman, and his actions bring discredit upon the military. The Board of Review, therefore, holds the record of trial legally sufficient to support the findings of guilty of the four Specifications of Charge II laid under Article of War 95, the four Specifications of Charge III laid under Article of War 96, and both Charges.

7. Legality of the sentence.

Accused thus stands properly convicted of the embezzlement of 1040 coupons of "some value" in violation of Article of War 93, and of making eight false statements in an official capacity to an agency of the United States Government, four in violation of Article of War 95, and four in violation of Article of War 96. The court has imposed upon the accused a sentence of dismissal, total forfeitures, and confinement at hard labor for five years. The reviewing authority acting upon the recommendation of nine of the ten members of the court has recommended that the sentence of confinement be reduced to 2-1/2 years. As previously stated in this opinion, the embezzlement charged against accused is the offense as ordinarily defined and understood and not some act arbitrarily or artificially so designated by special legislative enactment. Consequently, if accused were an enlisted man, the maximum confinement that could be imposed upon him for his embezzlement of the coupons, described merely as having "some value," would be six months (Table of Maximum Punishments, MCM 1928, p. 99). The findings of guilty of Charge II and its four Specifications alleging that he officially made false statements legally support the sentence of dismissal but may not be considered as legally supporting any part of the sentence of confinement, because Article of War 95 may not legally support any greater sentence than dismissal. Accused, however, was also convicted of violating the 96th Article of War under four separate specifications alleging that he officially made false statements. Research of the reported cases in the Office of The Judge Advocate General fails to disclose any case in which a sentence of confinement was ordered executed for the commission of such an offense by an officer. Accused's actions in making false reports knowingly to a public agency with intent to deceive most closely resemble the offense of "knowingly making a false report." A noncommissioned officer may receive a sentence of confinement of not more than three months for each such offense and "any other soldier" only one month (Table of Maximum Punishment, MCM 1928, p. 100). If four charges of making false reports to a governmental agency had been made against a noncommissioned officer the maximum punishment for the four offenses would have been one year, and if against "any other soldier," four months. At the most, the total sentence impossible against a noncommissioned officer for all the offenses charged in the

SPJGK - CM 280840

1st Ind.

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

JUN 27 1945

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain Glenn W. Fischer (O-559101), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of embezzlement of about 1040 gasoline ration coupons, the property of the United States Government, of some value, in violation of Article of War 93 (Charge I), and of officially making eight separate false reports to the Dade County War Price and Rationing Board 42-1-1, concerning the issuance of coupons, with intent to deceive the Board, well knowing that the reports were false; four of these reports are alleged as violations of Article of War 95 (Charge II), and four as violations of Article of War 96 (Charge III). 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. Nine of the ten members of the trial court and the assistant trial judge advocate recommended to the reviewing authority that the period of confinement be reduced to 2-1/2 years. The reviewing authority approved the sentence, but recommended that the sentence of confinement be commuted to 2-1/2 years, and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board that the record of trial is legally sufficient to support the findings and sentence as approved by the reviewing authority and to warrant confirmation thereof.

Accused, a captain in the Air Corps, was appointed Rationing Officer for the Miami Beach Service Base and as such received supplemental gasoline ration coupons from the Dade County War Price and Rationing Board 42-1-1 to distribute to such military personnel as might apply for and be entitled to receive them. During the period from 1 December 1944 to 20 March 1945 he fraudulently converted at least 1040 of these coupons to his own use (Charge I and its Specification), and falsely reported on the official OPA forms to the Board on at least eight different occasions that he had issued them to various members of the military establishment, whereas in fact none of them had been so issued and no applications had been made therefor (Charges II and III and their Specifications). A number of the coupons thus fraudulently used were later found on the sheets of cancelled coupons turned in to the OPA authorities by a Miami Beach service station operator, suspected of engaging in "black market" activities. Accused, in a pretrial statement admitted that he had had dealings with this operator, that he had delivered coupons to him

"for reimbursement," and that he was responsible for all irregularities in the office of the Base Rationing Officer. Various technical defenses were unsuccessfully urged by accused. On the merits his sole attempted defense, which was in no way substantiated or supported, was that he had issued the coupons with the knowledge of the Board, at the request of members of the Board who had sent to him applicants for gas who could not be accommodated by the Board itself.

While accused has been guilty of serious misconduct, the offenses charged, and of which he was found guilty, do not justify his confinement for five years. The coupons which accused illegally converted to his own use were described as merely having "some value." The maximum imposable period of confinement in the case of an enlisted man for such an offense would be only six months. The maximum punishment for making a false official statement by a noncommissioned officer is three months and by "any other soldier" one month. Dismissal alone has been the customary punishment imposed upon a commissioned officer found guilty of making a false official statement, and an examination of the reported cases during the past sixteen years discloses no instance in which a sentence of confinement has been ordered executed for such an offense. If accused had been a noncommissioned officer the maximum confinement that could be imposed on him for the embezzlement and rendition of the four separate false statements punishable by confinement would be 1-1/2 years; if he had been "any other soldier" it would be 10 months. His conviction of the present charges will not act as a bar to further possible prosecution for violation of Federal statutes regulating the issuance of gasoline ration coupons. The recommendation for a reduction in the sentence to 2-1/2 years by nine of the ten members of the court-martial which tried accused and the assistant trial judge advocate was based on accused's excellent military record, the absence of any previous conviction, his youth and immaturity, and the hardship upon his family, consisting of his wife and fourteen-month old child, which would result from so long a period of confinement. Because the sentence is far in excess of that which should be imposed for the offenses set forth in the Specifications, and for the reasons given in the request for clemency, 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; 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.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.

Myron C. Cramer

2 Incls

1. Record of trial
2. Form of action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed, forfeitures remitted and confinement reduced to one year. GCMO 296, 7 July 1945).

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

SPJGN-CM 280875

20 JUN 1945

UNITED STATES

v.

Private JAMES E. BECHARD
 (36468019), 789th Ordnance
 Light Maintenance Company.

) 12TH HEADQUARTERS & HEADQUARTERS DE-
) TACHMENT SPECIAL TROOPS, 2ND ARMY

) Trial by G.C.M., convened at Fort
) Jackson, South Carolina, 14 May
) 1945. Dishonorable discharge (sus-
) pended) and confinement for five (5)
) years. Army Service Forces, Fourth
) Service Command Rehabilitation Center,
) Fort Jackson, South Carolina.

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

1. The record of trial in the case of the soldier named above, which has been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings but legally sufficient to support the sentence, has been examined by the Board of Review, and the Board submits this, its opinion, to The Judge Advocate General.

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private James E. Bechard, 789th Ordnance Light Maintenance Company, did, at Fort Jackson, South Carolina, on or about 29 January 1945, desert the service of the United States and did remain absent in desertion until he was apprehended at Detroit, Michigan, on or about 28 March 1945.

The accused pleaded guilty to the Specification excepting the words "desert" and "in desertion" and substituting therefor, respectively, the words,

"absent himself without leave from" and "without leave". He pleaded not guilty to the Charge but guilty of a violation of Article of War 61. He was found guilty of both the Charge and the Specification thereunder. 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 such place as the reviewing authority might direct, for five years. The reviewing authority approved the sentence, but suspended that portion thereof adjudging dishonorable discharge until the soldier's release from confinement; designated the Army Service Forces Fourth Service Command Rehabilitation Center, Fort Jackson, South Carolina, as the place of confinement; and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution shows that the accused was absent without leave from his station for 60 days and that his absence was terminated in Detroit, Michigan, a distance of approximately 1,000 miles from the accused's station at Fort Jackson, South Carolina (R. 7-8). In an effort to refute the charge of desertion and to support his plea of guilty to the lesser included offense of absence without leave, the accused testified that he had never intended to remain absent permanently. He explained that he had left his station under the authority of a pass and had gone to Durham, North Carolina, to see his wife. After a short stay in Durham, he had gone to Detroit, Michigan, to see his father about certain derogatory remarks which the matter had made concerning the accused's wife. After arriving in Detroit, the accused had failed, over a period of six weeks, to locate his father. He testified that he had stayed for two of the six weeks with a Mrs. Stockdale and had confided in her that he was absent without leave. He admitted that he was apprehended by the military police, but contended that at the time of the apprehension he was on his way to surrender. During his stay in Detroit he had avoided his mother who, he stated, was divorced from his father. (R. 9-22).

Prior to the trial the defense counsel had procured the deposition of Mrs. Stockdale, but, after reading the answers to the various interrogatories and cross-interrogatories, he decided not to use it. At the trial, however, it was introduced in rebuttal by the prosecution for the apparent purpose of impeaching the accused's testimony and his explanation concerning his stay in Detroit (R. 22-23). The clear effect of the deposition was to contradict the accused in the following particulars:

(1) The length of time the accused stayed in the home of Mrs. Stockdale was reported by the accused as having been from two to two and one-half weeks, whereas Mrs. Stockdale fixed the period at three days.

(2) He asserted that he had revealed to Mrs. Stockdale that he was absent without leave, whereas Mrs. Stockdale maintained that he had told her that he was in Detroit to take a prisoner back to Fort Jackson, South Carolina.

(3) He testified that he had not seen his mother, but Mrs. Stockdale stated that he had and that his mother had declared that "she was all washed up with him".

The logical effect of these contradictions to the testimony of the accused was to impeach the explanations offered by him for his absence and to strengthen the inference that he had intended to avoid further service. Without the deposition before it the court might reasonably have concluded that the accused had not intended to desert the service and might have found him only guilty of absence without leave.

In view of this inescapable conclusion, the question arises whether the use of this deposition prejudiced the substantial rights of the accused. Article of War 25 provides in part, as follows:

"A duly authenticated deposition taken upon reasonable notice to the opposite party may be read in evidence before any military court or commission in any case not capital
* * * (Underscoring supplied).

The Manual provides that a case is "'not capital' within the meaning of Article of War 25 if none of the crimes or offenses alleged is legally punishable by death". MCM, 1928, par. 119. Since Article of War 58 expressly makes desertion in time of war a capital offense, the present case was, at the time of trial, a capital case within the meaning of Article of War 25. In discussing the use of depositions, the Manual states, "If the party at whose instance a deposition has been taken decides not to offer it, it may be offered by the other party". MCM, 1928, par. 119. This provision cannot, however, nullify, and was never intended to nullify, the unambiguous limitation placed in Article of War 25 upon the use of depositions in a capital case. Since the deposition in this case was introduced into evidence in violation of Article of War 25, and since such action probably resulted in the accused's being found guilty of desertion rather than the lesser included offense of absence without leave, the substantial rights of the accused were clearly prejudiced. This erroneous reception of the deposition did not, however, affect the findings involved in the lesser included offense of absence without leave which is sustained both by the evidence and the accused's plea of guilty.

4. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of the Charge and the Specification thereunder as involve findings that the accused, at the time and place alleged, absented himself without leave from his station on or about 29

(388)

January 1945 and remained absent without leave therefrom until on or about 28 March 1945, in violation of Article of War 61; and legally sufficient to support the sentence.

Abner E. Lipscomb, Judge Advocate.

Robert J. Lamm, Judge Advocate.

Samuel Morgan, Judge Advocate.

(389)

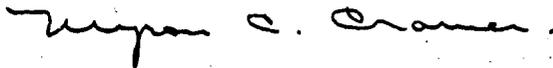
SPJGN-CM 280875 . 1st Ind
Hq ASF, JAGO, Washington 25, D.C.

TO: Commanding Officer, 12th Headquarters & Headquarters Detachment,
Special Troops, 2nd Army, Fort Jackson, South Carolina.

1. In the case of Private James E. Bechard (36468019), 789th Ordnance Light Maintenance Company, I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty of the Charge and Specification thereunder as involves findings that the accused, at the time and place alleged, absented himself without leave from his station on or about 29 January 1945, and remained absent without leave therefrom until on or about 28 March 1945, in violation of Article of War 61; and legally sufficient to support the sentence. Under the provisions of Article of War 50 $\frac{1}{2}$ you 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 280875).



MYRON C. CRAMER
Major General
The Judge Advocate General

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

SPJGN-CM 280882

UNITED STATES

v.

First Lieutenant ADOLPH
HOFFERBER (O-818523),
Air Corps.

) ARMY AIR FORCES WESTERN
) FLYING TRAINING COMMAND

) Trial by G.C.M., convened at
) Victorville, California, 2 May
) 1945. Dismissal, total for-
) feitures and confinement for
) three (3) years.

OPINION of the BOARD OF REVIEW
LIPSCOMB, O'CONNOR and MORGAN, 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 First Lieutenant Adolph Hofferber, Air Corps, Squadron B, 3035th AAF Base Unit, did, without proper leave, absent himself from his command at Victorville Army Air Field, Victorville, California, from about 1 March 1945 to about 11 March 1945.

Specification 2: In that First Lieutenant Adolph Hofferber, Air Corps, Squadron B, 3035th AAF Base Unit, did, without proper leave, absent himself from his command at Victorville Army Air Field, Victorville, California, from about 12 March 1945 until he was apprehended on or about 20 March 1945.

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

Specification 1: (Disapproved by reviewing authority).

Specification 2: In that First Lieutenant Adolph Hofferber, Air Corps, Squadron B, 3035th AAF Base Unit, did, at Victorville Army Air Field, Victorville, California, on or about 28 February 1945, with intent to defraud the Officers' Mess Fund, Victorville Army Air Field, Victorville, California, wrongfully and unlawfully make, and utter to said Officers' Mess Fund, Victorville Army Air Field, Victorville, California, a certain check drawn on the Bank of America, Victorville, California, branch, in the sum of Ten (\$10.00) Dollars, and by means thereof did fraudulently obtain from the said Officers' Mess Fund the sum of Ten (\$10.00) Dollars, then well knowing that he did not have sufficient funds in said bank for the payment of said check.

Specification 3: Same as Specification 2 but alleging check drawn on same bank, in the amount of \$20, made and uttered to David H. Stie and D. W. Wilcox, at Lodi, California, 7 March 1945.

Specification 4: Identical to Specification 3.

Specification 5: Identical to Specification 3 but alleging check in the amount of \$25.

Specification 6: Identical to Specification 3 but alleging check in the amount of \$25.

Specification 7: Identical to Specification 3 but alleging check in the amount of \$25.

Specification 8: Identical to Specification 3 but alleging check made and uttered on 6 March 1945.

Specification 9: (Motion for finding of not guilty granted).

Specification 10: Same as Specification 2 but alleging check drawn on same bank, in the amount of \$20, made and uttered to Hotel Senator, at Sacramento, California, 2 March 1945.

Specification 11: Identical to Specification 10 but alleging check made and uttered on 3 March 1945.

Specification 12: Identical to Specification 10 but alleging check in the amount of \$25, made and uttered on 4 March 1945.

Specification 13: (Finding of not guilty).

The accused pleaded not guilty to all Charges and Specifications. The motion for a finding of not guilty was granted as to Specification 9 of

Charge II and the accused was found not guilty of Specification 13 of Charge II. He was found guilty of all other Specifications and the Charges and was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for five years. The reviewing authority disapproved the findings of guilty of Specification 1 of Charge II; approved only so much of the sentence as provided for dismissal, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for three years; and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that in January, 1945, the accused was assigned to Flying Group 4 at the Victorville Army Air Field, Victorville, California, with primary duty as a "co-pilot on radar missions" (R. 19). At this time "B-24" type aircraft were being "modified" at McClellan Field, Sacramento, California, and certain members of his unit flew the planes to McClellan Field, returning after the repair work was completed to Victorville. According to Major James C. Langdon, Officer in Command of Group 4, the names of crew members were posted on the bulletin board several days in advance of the flight (R. 25, 26). Missions were generally carried out on verbal authority but formal orders were often issued, after the completion of a flight, to enable crew members to recover per diem allowances (R. 28). Because of the gasoline shortage and the fact that many of the men lived at a considerable distance from the post, they were required to report to Group Headquarters only when scheduled for a flight, but they were not excused from physical training and other duties at the "ground school" (R. 26). Since there was an "overage of co-pilots", there were periods of several successive days when some co-pilots were not scheduled to fly and, at such times, Major Langdon would grant them permission to travel as passengers by plane to Sacramento, provided they returned in time for scheduled flight duty. Such permission was granted by him personally and they were excused from flying duty only (R. 28-30). Captain Robert L. McKee, Group Operations Officer, was authorized to dispatch pilots and co-pilots on regular missions, but was not empowered to permit personnel to travel as passengers on aircraft (R. 23, 27). Leaves of absence in excess of twenty-four hours were approved but not granted by Major Langdon and were required to be authorized by special orders (R. 30).

The accused was not scheduled to participate in any flights during the first six or seven days of March, 1945. On the first day of that month, without requesting leave or permission from Major Langdon, he travelled as a passenger on a "B-24" from his station at Victorville to McClellan Field (R. 29, 30, 44, 45; Pros. Exs. 2, 5).

The accused was a guest at the Hotel Senator, Sacramento, California, on 2, 3, and 4 March 1945. During this period he executed and cashed at the hotel three checks, two for \$20.00 and one for \$25.00. All were drawn on the Bank of America, Victorville Branch, and were dis-

honored by the drawee bank because of insufficient funds (R. 65, 74-76, 97, 98; Pros. Exs. 1, 1-J, 1-K, 1-L, 7).

While in Lodi, California, the accused made and negotiated to the Spot Club one check for \$20.00, on 6 March 1945, and five checks, two for \$20.00 and three for \$25.00, on the following evening. These six checks were also drawn on the Bank of America, Victorville Branch, and were dishonored because of insufficient funds (R. 68-72, 95; Pros. Exs. 1, 1-C, 1-D, 1-E, 1-F, 1-G, 1-H, 7).

When the accused did not appear for scheduled flight duty on 8, 9, and 10 March 1945, a search was made for him at his station at Victorville (R. 20-22). On this last date he returned from McClellan Field as a passenger on a "B-24" (R. 48, 49, 59, 60; Pros. Exs. 3, 6). The next day an "immediate action" notice, directing the accused to report to his Group Commander, was posted on the bulletin board. There was no response to this notice and, after a search of the "B O Q" failed, an office memorandum was left, on 16 March 1945, in the post office to be placed in the accused's mail box (R. 40, 41, 43, 51). He failed to appear for scheduled flights on 17, 19, and 20 March 1945 and was not seen by Major Langdon between 1 March and 20 March 1945 (R. 20, 22). During that period no leave was granted by special orders to the accused, and, although officers who were absent from the post for more than twenty-four hours were required to "sign out", his name did not appear on the register (R. 54-55).

Prior to the events narrated he, on 28 February 1945, cashed a check for \$10.00 at the Victorville Army Air Field Officers' Mess. This instrument, which was signed in his name and drawn on the Bank of America, Victorville Branch, was also dishonored because of insufficient funds when presented for payment (R. 67, 92; Pros. Ex. 1-B). The accused's account in the drawee bank revealed a balance of \$15.80 on 28 February 1945, a balance of \$.30 on 1 March, and an overdraft on 2 March, which continued for several weeks (R. 65; Pros. Ex. 7).

4. Major Milton L. Miller who, as an expert in neuropsychiatry testified for the defense, stated that the accused's background revealed a long history of mental and emotional instability. Because the accused had never been physically strong, he had been labelled as a weakling throughout childhood and had suffered from overprotection by his family. His nervous condition was such that he was hardly able to complete his tour of combat duty and, since returning to this country, he suffered "from severe anxiety and a state of exhaustion such as to impair his judgment". He was not a "normal healthy person" and, as a result of his impaired judgment, was prone to commit an offense much more readily than "another person" (R. 83-84). Major Miller had learned that the accused was inebriated at the time of the alleged offenses and believed that accused's condition was partly attributable to an effort to relieve his "terrific emotional tension" and that a "heavy drinking spree" often resulted in amnesia and lack of discretion. With the qualifications suggested, Major Miller was of the

opinion that the accused was sane, could "probably" distinguish right from wrong, and could adhere to the right (R. 83-86). After a statement by the defense that, "We do not plead not guilty by reason of insanity", the court ruled that the accused's sanity was not in issue (R. 86)

The accused, after his rights relative to testifying or remaining silent had been explained, elected to take the stand in his own defense with respect to all Specifications except Specification 2 of Charge I. After being commissioned as an officer on 3 December 1943, he was stationed at Tucson, Arizona, until about 13 April 1944. In March, 1944, he authorized a monthly allotment of \$200.00 to the Valley National Bank at Tucson where he and his wife had a joint checking account (R. 103). From Tucson he was sent to Topeka, Kansas, and, after two weeks duty there, he and the other members of his crew ferried a "B-24" overseas. While on foreign service, he received credit for thirty-two combat missions and was awarded the Air Medal with three Oak Leaf Clusters and the Distinguished Flying Cross. He returned to this country on 20 September 1944 (R. 104).

Although his primary duty at Victorville was flying on radar missions, he often volunteered for, and participated in, flights to Sacramento. The "Operations Office" was anxious to have volunteers, for many of the Victorville officers were married, were living away from the post, and were glad to be relieved of the missions to McClellan Field (R. 126). On 1 March 1945 the accused conferred with Captain McKee, who was "usually at the briefing and carried out direct orders of Major Langdon". Since he was not scheduled for flight duty for six days, the accused obtained permission from Captain McKee to go as a passenger by plane to Sacramento. It was understood that, if he returned by the following Saturday, he would participate as crew member in a flight for which he had volunteered but, if still absent, "my schedule would continue as it had before, * * * I would probably be scheduled the 8th or 9th". He was confident that Captain McKee was authorized to make this arrangement (R. 105, 106).

While at Sacramento the accused, except when the weather made flying out of the question, reported daily to McClellan Field in an effort to procure passage back to Victorville and advised the authorities that his return by 5 March 1945 was imperative (R. 126). "Captain Velarde", whose duty was "to take care of Victorville crews", also knew of the accused's desire to return. On Saturday, 3 March 1945, the runways at McClellan Field were under ice, and the accused was advised that no flights would take place for "at least a day or two" (R. 107, 108). At the Hotel Senator in Sacramento and at the Spot Club, in nearby Lodi, he cashed the checks described in the Specifications (R. 110, 111, 122-124). He had no knowledge that his bank account was overdrawn but expected his allotment to the Bank of America, the drawee bank, to provide funds sufficient to honor the checks when presented. This allotment, in the sum of \$200.00 per month, was authorized in January, 1945, simultaneously with his action to terminate the then existing allotment in the same amount to the Valley National Bank in Tucson (R. 111). The

first payment reached the Bank of America on 13 February 1945 and he expected subsequent allotment checks to be received by the bank about the fifth of each month following (R. 117, 120; Pros. Ex. 7). The allotment to the Bank of America, however, was cancelled without his knowledge. This action was taken because the former allotment to the Tucson bank remained in effect, unknown to the accused, in spite of his efforts to have it cancelled. Since the total of both allotments, when coupled with a deduction of \$100.00 monthly by the "Finance Department", exceeded his earnings, the allotment to the Bank of America was terminated and the Maron payment, which he expected to cover the checks, never reached the drawee bank (R. 118, 119). He was acquainted with the proprietor and several of the employees at the Spot Club and, at the time of cashing the checks there and at the hotel, made no effort to conceal his identity or the post where he was stationed. He believed that there were sufficient funds in the drawee bank to pay the checks and, in cashing them, had no intent to defraud (R. 110, 111).

On 5 March 1945 the accused obtained permission from Captain Velarde to fly a plane back to Victorville but, due to a "malfunction", the ship was grounded. Because no other planes were leaving that day, the accused was not able to return to his station (R. 107, 108, 128). He made no effort to procure passage by train or bus (R. 128). On Saturday, 10 March 1945, in response to telephonic instructions from Major Langdon, the accused returned as a passenger on a "B-24" to Victorville (R. 108, 109). Immediately upon his arrival he examined the bulletin board, learned that he was scheduled for flight duty the following Friday, and found a notice directing him to report to the Victorville Bank. There he found a check written several weeks before, which "they had not returned", but he was not told that his account was overdrawn (R. 116-117). On 12 March 1945 he was paid for the months of January and February and used the money, totalling \$175.00 or \$180.00, for the support of his child (R. 118). He did not have a check book with him in Sacramento and was not certain as to the number of checks written on his account (R. 121). Not until he "returned" on 20 March 1945 did he receive notice that his account was overdrawn. The dishonored checks have not been redeemed (R. 123, 124).

5. Specification 1 of Charge I alleges that the accused "did, without proper leave, absent himself from his command at Victorville Army Air Field, Victorville, California, from about 1 March 1945 until about 11 March 1945". Specification 2 of Charge I alleges an additional period of unauthorized absence from "about 12 March 1945 until he was apprehended on or about 20 March 1945". These offenses are set forth as violations of Article of War 61. In order to sustain these allegations the proof must show:

"* * * (a) that the accused absented himself from his command * * * for a certain period, as alleged; and (b) that such absence was without authority from anyone competent to give him leave". Par. 132, MCM, 1928.

The first period of alleged absence from 1 March to 10 March 1945 was conclusively established by evidence for the prosecution and conceded by the accused. In an effort to prove that his absence was authorized the accused testified that he obtained permission to make the trip to Sacramento from Captain McKee, Group Operations Officer, who "carried out direct orders of Major Langdon". This defense is untenable in the face of Major Langdon's unquestioned assertion that he, alone, was empowered to authorize officers to leave the base by plane on a non-duty status, and that he had not consented to and had no knowledge of the accused's absence. In addition to three scheduled missions, the accused, by his absence, failed to appear for duty in connection with "orientation" and physical training.

As to the second period of alleged absence, the evidence shows that the accused left his station on 12 March 1945, that he failed to respond to written instructions placed on the bulletin board and in his mailbox directing him to report to his Squadron Commander, that he was not present for scheduled flights on 17, 19, and 20 March 1945, and that he was taken into custody on the last mentioned date by military policemen in San Bernardino, California. No authority for this absence had been granted by Major Langdon. It is believed that the two periods of unauthorized absence were established beyond any reasonable doubt and that the findings of guilty of Specifications 1 and 2 of Charge I should be sustained.

6. Specifications 2, 3, 4, 5, 6, 7, 8, 10, 11, and 12 of Charge II allege that the accused did, "with intent to defraud, * * * wrongfully and unlawfully make and utter * * * a certain check drawn on the Bank of America, Victorville, California, branch, * * * and by means thereof did fraudulently obtain" the amount of the check in cash, "well knowing that he did not have sufficient funds" in the drawee bank for the payment of said check. Specification 2 refers to a check for \$10.00 allegedly given on 28 February to the Officers' Mess Fund at the accused's station. Specifications 3, 4, 5, 6, 7, and 8 describe checks, aggregating \$135.00, allegedly uttered on 7 March 1945 at the Spot Club; and Specifications 10, 11, and 12 set out three checks, in the aggregate sum of \$65.00, allegedly made and cashed, on 2, 3, and 4 March 1945, respectively, at the Hotel Senator, in Sacramento. These offenses are laid under Article of War 96.

The accused readily acknowledged that he executed the checks, that he received their face value in cash, and that all were dishonored because of insufficient funds. He contended, however, that he had no knowledge of the insufficiency of his bank account to honor the checks and, consequently, was innocent of any intent to defraud.

With respect to Specification 2, the evidence shows that, on 28 February 1945, at the time of executing the check for \$10.00 to the Officers' Mess Fund, the accused had a balance of \$15.80 in the drawee

bank. On the following day the payment of outstanding checks reduced the account to 30 cents and, when the check in question was presented for payment on 3 March 1945, the account was overdrawn by \$1.36. Since the bank balance exceeded the amount of the check at the time it was negotiated the record raises a reasonable doubt as to whether the accused, in making and uttering the check described in Specification 2, acted "with intent to defraud" and "well knowing that he did not have sufficient funds" in the drawee bank to pay the check. It seems clear, however, that his conduct, in failing to make adequate provisions for the payment of the check, while lacking the elements of fraud and deceit, was wrongful and of a nature to discredit the military service, in violation of Article of War 96. The evidence is sufficient to support only so much of the finding of guilty of Specification 2 as involves a finding that the accused, at the time and place alleged, wrongfully failed to maintain sufficient funds in the drawee bank to pay the alleged check. See 32 BR 255, CM 249993, Yates.

With respect to the remaining Specifications, the evidence shows that, during the period of 2 March 1945 to 7 March 1945, the accused cashed a series of nine checks at a time when his account was overdrawn. He professed ignorance of the depleted state of his account which, he insisted, was to be explained by the unexpected and to him, unknown, termination of an allotment of \$200.00 monthly to the drawee bank. If it were established that the accused had, in fact, authorized such an allotment, credence should be given to his position that he expected an early March payment to the drawee bank to provide sufficient funds to honor the six checks, totalling \$135.00, which he cashed at the Spot Club, and the three checks, aggregating \$65.00, which he cashed at the Hotel Senator. The court was justified, however, in its apparent conclusion that the accused had not, in fact, made an allotment to the Bank of America. His testimony on this score is unconvincing and, indeed, inconsistent. He stated that, before leaving for Sacramento on 1 March 1945, he was notified that the first allotment payment had reached the Bank of America which "presumably" was represented by the deposit of \$250.00 appearing on the bank statement under date of 13 February 1945. He was unable, however, to produce other evidence of the allotment and made no effort to explain the variance between the amount of the allotment authorized and that of the deposit. It is also significant that, while attributing the termination of the Bank of America allotment to the continuation of the former allotment to Valley National Bank, he apparently conceded that no funds were reaching the latter institution to be placed to his credit. To contend, on the one hand, that the funds did not reach the drawee bank because they had been diverted to the Valley National Bank and, to admit, on the other hand, that the latter institution never received such funds was to indulge in an inconsistency which seriously reflected on the trustworthiness of the accused's testimony. When subjected to close scrutiny, such testimony fails to establish good faith and justifies the inference of criminal intent.

The reasonable inference to be drawn from the facts is that the accused made and negotiated the nine checks at a time when he was drinking excessively and giving little heed to the status of his bank account. He did not have a check book with him in Sacramento, kept no record of the number and amount of the checks he executed, and, in all respects, displayed complete carelessness and an utter lack of responsibility in the management of his financial affairs. When these facts are considered, together with the accused's failure to provide for the payment of the checks upon presentment or at any subsequent time, the wrongful and fraudulent character of his conduct becomes apparent. The allegations are sustained by the evidence and the record is legally sufficient to support the findings of guilty of Specifications 3, 4, 5, 6, 7, 8, 10, 11, and 12 of Charge II.

7. The records of the War Department show that the accused is approximately twenty-five years of age, having been born 9 June 1920. He graduated from high school and attended a commercial school for seven months. Thereafter he was employed as a clerk and bookkeeper. He enlisted in the service on 3 December 1941, was commissioned as a second lieutenant, Army of the United States, on 5 December 1943, and was thereafter promoted to the rank of first lieutenant, Army of the United States, on 29 June 1944. He has been awarded the Distinguished Flying Cross for extraordinary achievement in carrying out a bombing mission over enemy occupied continental Europe, and the Air Medal with three Oak Leaf Clusters for similar meritorious service. He was convicted on 13 February 1945 of absenting himself without leave for a period of sixteen days and sentenced to forfeit \$100 per month for five months.

8. The court was legally constituted. In the opinion of the Board of Review the record of trial is legally sufficient to support only so much of the findings of guilty of Specification 2 of Charge II as involves a finding that the accused, at the time of the making and uttering the check therein described, wrongfully failed to maintain sufficient funds in the alleged drawee bank to pay the check upon presentment; is legally sufficient to support all other findings as approved by the reviewing authority; and is legally sufficient to sustain the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Articles of War 61 and 96.

Abner E. Lipscomb, Judge Advocate.
Robert J. Cannon, Judge Advocate.
Samuel Morgan, Judge Advocate.

(400)

SPJGN-CM 280882 1st Ind
Hq ASF, JAGO, Washington 25, D. C.
TO: The Secretary of War

13 JUN 1945

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Adolph Hofferber (O-818523), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of absenting himself without leave on two occasions for ten days and eight days respectively, in violation of Article of War 61; and of fraudulently making and uttering eleven checks in the sums of \$20, \$10, \$20, \$20, \$25, \$25, \$25, \$20, \$20, \$20, and \$25; all 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 five years. The reviewing authority disapproved the finding of guilty of Specification 1, Charge II, the Specification involving the first of the checks in the sum of \$20, approved only so much of the sentence as provided for dismissal, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for three years, and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support only so much of the finding of guilty of Specification 2, Charge II, the finding involving the first check in the sum of \$10, as involves a finding that the accused at the time of the making and uttering of the check therein described wrongfully failed to maintain sufficient funds in the alleged drawee bank to pay the check upon presentment; legally sufficient to support all the other findings and sentence as approved by the reviewing authority and to warrant confirmation thereof.

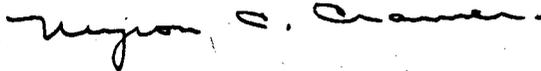
The record shows that the accused absented himself without leave on two occasions for ten days and 8 days respectively. During this time the accused made and uttered three checks to the Hotel Senator in Sacramento, California, six checks to the Spot Club in Lodi, California, and one check to the Victorville Army Air Field Officers' Mess, all of which were dishonored upon presentation. At the time of trial these dishonored checks had not been redeemed by the accused.

The accused's record shows that he has been awarded the Distinguished Flying Cross for extraordinary achievement in the carrying out of a bombing mission over enemy occupied continental Europe and the Air Medal with three Oak Leaf Clusters for similar meritorious service. Although his conduct in fraudulently issuing worthless checks and in absenting himself without leave cannot be condoned, his prior meritorious

service suggests clemency. However, it appears that he was tried by general court-martial for absence without leave from 4 January 1945 to 20 January 1945 and from 23 January 1945 to 24 January 1945 and was found guilty and sentenced to forfeit \$100 per month for five months. This sentence was approved 26 February 1945. The offenses in the instant case were committed within two weeks after the approval of the sentence in the prior case. In view of all these facts, while some clemency should be given him because of his prior combat service, I do not believe that he should escape all punishment. I therefore recommend that the sentence be confirmed but the forfeitures and confinement be remitted and that the sentence as thus modified be ordered executed.

4. Consideration has been given to a letter from Congressman Leroy Johnson, transmitting a letter addressed to him from the accused, and to a letter from Senator Hiram Johnson, transmitting a letter addressed to him from Miss Freda Rauser.

5. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should such action meet with your approval.



- 4 Incls
Incl 1 - Record of trial
Incl 2 - Form of action
Incl 3 - Ltr. fr. Hon. Leroy
Johnson w/incl.
Incl 4 - Ltr. fr. Hon. Hiram
Johnson w/incl.

MYRON C. CRAMER
Major General
The Judge Advocate General

(Findings disapproved in part. Sentence as approved by reviewing authority is confirmed, but forfeitures and confinement remitted. GCMO 350, 21 July 1945).



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

SPJGQ-CM 280898

UNITED STATES)
)
 v.)
)
 Captain FLETCHER L. DANNELLY)
 (O-311163), Air Corps.)

OKLAHOMA CITY AIR TECHNICAL -
SERVICE COMMAND

Trial by G.C.M., convened at
Tinker Field, Oklahoma City,
Oklahoma, 14 May 1945. Dismissal.

OPINION of the BOARD OF REVIEW
ANDREWS, BIERER and HICKMAN, 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 Captain Fletcher L. Dannelly, Air Corps, Squadron E, 6th Army Air Forces Base Unit, did, wrongfully and unlawfully, make and utter at Dayton, Ohio, on or about 16 August 1944, to Dayton Third National Bank, a certain check drawn on The First National Bank of Bryan, Texas, in the amount of \$35.00 the exact words and figures of said check being presently unknown, well knowing that he did not then have sufficient funds in said The First National Bank of Bryan for payment of said check, by means whereof he did obtain from said Dayton Third National Bank \$35.00, lawful money of the United States, and fail to maintain sufficient funds in said The First National Bank of Bryan for payment of said check when duly presented.

Specification 2: Same as Specification 1 except check dated 20 August 1944 in the amount of \$25 to same payee.

(404)

Specification 3: Same as Specification 1 except check dated 22 August 1944 in amount of \$25 to same payee.

Specification 4: Same as Specification 1 except check dated 23 August 1944 in amount of \$15 to Metropolitan Department Store.

Specification 5: Same as Specification 1 except check dated 7 September 1944 in amount of \$20 to Katz Drug Company, and the check is set out in words and figures.

Specification 6: Same as Specification 1 except check dated 24 October 1944 in amount of \$102 to Mrs. Gertrude Church in payment of rent, and that check is set out in words and figures.

Specification 7: Same as Specification 1 except check dated 24 October 1944 in amount of \$9.50 to Vandervoort's Dairy in payment for dairy products.

Specification 8: Same as Specification 1 except check dated 24 October 1944 in amount of \$18 to Sweetwater Laundry Company, in payment of laundry and certain moneys previously advanced, and the check is set out in words and figures.

Specification 9: Same as Specification 1 except check dated 8 November 1944 in amount of \$200 to McFall Realty Company, in partial payment for a house.

Specification 10: Same as Specification 1 except check dated 10 November 1944 in amount of \$25 to First National Bank in Wichita.

Specification 11: Same as Specification 1 except check dated 13 November 1944 in amount of \$2.60 to Post Exchange, in payment for certain merchandise and that check is set out in words and figures.

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

Specification: In that Captain Fletcher L. Dannelly, Air Corps, Squadron E, 6th Army Air Forces Base Unit, did, at Wichita, Kansas, on or about 6 November 1944, with intent to deceive his Commanding Officer, Lieutenant Colonel W. T. Chumney, officially state to the said Lieutenant Colonel Chumney, that sufficient money had been placed on deposit in a bank in Bryan, Texas, to pay outstanding checks drawn on said Bank, which statement was known by the said Captain Dannelly to be untrue, in that sufficient money had not been placed on deposit in said Bank to pay outstanding checks drawn on said Bank.

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

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

The accused was on duty as an accountant, which was also his civilian occupation (R. 42). The prosecution's evidence relating to Charge I and the Specifications thereof was introduced in the form of a stipulation of facts made in writing and executed for the prosecution by the Trial Judge Advocate and for the defense by the Defense Counsel and the accused (R. 11, Ex.A). This stipulation consisted of nine written pages, numbered parenthetically as A (1) through I (9), numerically, inclusive, and exhibits thereto attached, numbered A (10) through A (19), inclusive, plus eight statements in writing, sworn and signed by the accused, to the investigating officer before trial, all dated 26 or 27 April 1945, all qualified as voluntary and introduced pursuant to testimony of the investigating officer, First Lieutenant Robert Shulman, Air Corps (R. 12, 17, 22, 24, 26, 28, 30, 31). These statements, or accepted true copies thereof, were introduced in evidence as Prosecution's Exhibits B through I, alphabetically, inclusive (R. 14, 18, 23, 25, 26, 29, 30, 32). Exhibits D and F each consisted of two pages, each parenthetically numbered (1) and (2), following the identifying letter. The numerical pagination of the record of trial was carried through the exhibits thereto attached.

Prior to January, 1944, the accused and his wife opened a joint account, hereinafter referred to as his account, with the First National Bank of Bryan, Texas, hereinafter, for brevity, referred to as the Bryan Bank, as it was at the trial. At that time the accused was stationed at an Army Air Field at Bryan, Texas. The account remained in existence until February, 1945 (R. 11, 52; Pros, Ex. A (1)). Prior to January 1944, accused made an allotment from his pay of \$150 monthly to the Bryan Bank, for credit to that account. In May 1944, he borrowed \$1100 from that bank on a note maturing and bearing interest from 1 August 1944 under an arrangement whereby the allotment was continued but \$87.50 was to be withdrawn monthly by the bank from the account, leaving the balance of the allotment, \$62.50, to the credit of accused's account. Pursuant to these arrangements, accused's account was credited with \$150 each month from January 1944 through December 1944, with \$87.50 withdrawn by the bank each month from August on. These entries were made from the 4th to the 7th day of the month in each case (R. 52, 53; Ex. A (1)-(2)). All of the checks involved in this case were drawn on the Bryan Bank, wherein he had the mentioned account only. It does not appear that he had any bank account elsewhere.

Specifications 1, 2, 3 and 4, Charge I.

On 11 August 1944, accused, then stationed at Avenger Field, Sweetwater,

Texas, went under orders on temporary duty to Dayton, Ohio, where he remained from arrival 13 August to about 24 August, 1944. While there, he drew three checks to Dayton Third National Bank and cashed them at that bank, on 16, 20 and 23 August respectively, one for \$35 and two each for \$25. The last two were indorsed by Staff Sergeant Fran Instone, of the Contract Audit Division with which accused was on temporary duty, who had an account at the Dayton bank. On 23 August 1944, accused made and passed a check for \$15 to the Metropolitan Department Store, of Dayton, for merchandise. All four checks were dishonored on presentation in due course, the first check being twice presented and dishonored. Over the period covering the making and presentation of these four checks, accused's account showed on 16 August 1944 a credit balance of \$30.65; on 18 August, 17 cents; on 24 August, 73 cents overdraft; on 2 September, 98 cents overdraft; and on 6 September, \$38.48 overdraft. The accused's allotment was deposited on 6 September, but the account was then debited \$100 to pay a loan of that amount credited to the accused on 14 August pursuant to telephonic arrangements made by him with the Bryan Bank on 9 August, resulting in the \$38.48 overdraft. No other deposits were made to the account during the relevant period (R. 53, 54; Ex. A (2), (3)). The accused made restitution by telegraphic money orders on 11 September 1944 to the Dayton bank, the department store, and Sergeant Instone, his indorser, respectively, and stated by memorandum to his then commanding officer that he had made arrangements by telephone for the deposit of funds to cover these checks at the Bryan Bank, but then believed that credit had not been issued by the bank in accordance with such arrangements (R. 55; Ex. A (4); R. 62; Ex. A (11)). He admitted the makings and utterances involved, in his statement to the investigating officer on 27 April 1945, but asserted that he had no intention to deceive or defraud (R. 71; Ex. B).

Specification 5, Charge I.

The accused was transferred to Wichita, Kansas, by orders 24 August 1944, assigned to Squadron E, 6th Army Air Forces Base Unit, Contract Audit Branch, and proceeded there from his temporary duty assignment at Dayton, Ohio. From Wichita, he was sent on temporary duty to Kansas City, Missouri, where he remained from 6 September to 28 September 1944. On 7 September, he cashed his check for \$20 to Katz Drug Company at one of their drug stores (R. 63; Ex. A (12)), having procured the local chapter of the American Red Cross to assist him by indorsing the check. The check was dishonored on presentation 13 September 1944, accused's account showing an overdraft of from \$38.48 to \$39.23 at all pertinent times from 7 September to 3 October 1944 (R. 54, 55; Ex. A (3), (4)). His allotment was deposited 6 September (R. 53; Ex. A (2)). Subsequently, after 23 September, accused reimbursed the Red Cross, which had responded on its indorsement (R. 56; Ex. A (5)), and requested the Red Cross to destroy the check (R. 63; Ex. A (12)). The remittance was made through accused's

commanding officer. Accused asserted that he intended no deceit or fraud and "was of the opinion that funds would be available to cover this check" from his allotment by the time it would be presented for payment (R. 72; Ex. C).

Specifications 6, 7 and 8, Charge I.

The accused returned to his station at Wichita, Kansas, about 14 October 1944 (R. 56; Ex. A (5)). On 24 October he made and uttered three checks. He had previously, in September, leased from one Mrs. Gertrude Church a house in Wichita at a monthly rental of \$100. He gave Mrs. Church his check (R. 66; Ex. A (15)) on 24 October for \$102 to pay a month's rental plus some service charge. Presentation was made sometime prior to 3 November 1944 and payment refused (R. 57; Ex. A (16)). Accused made an arrangement with Mrs. Church's agent to pay the check on 1 December, and did redeem it on 28 December (R. 58; Ex. A (7)). Accused asserted that when he issued the check to Mrs. Church, he knew that he did not have sufficient funds in his account, but expected to cover it by going to Bryan, Texas, on an anticipated leave and getting a loan from the Bryan Bank, but the check was presented earlier than he anticipated. He was unable to get the loan anyway, but intended no fraud or deceit. Payment was made by him on 29 December. He did not pay it on 1 December as he had agreed "because funds were not available at that time". He had some complaints about the heating control system in the house, about which he advised Mrs. Church's agent when he gave her the check (R. 73; Ex. D).

Also on 24 October 1944, he made and sent his check (R. 64; Ex. A (13)), for \$9.50 to Vandervoort's, a dairy at Sweetwater, Texas, his former station, to pay a milk bill incurred during July, August and September 1944. The check was dishonored on presentation (R. 56; Ex. A (5)).

Also on 24 October 1944, accused made and sent his check (R. 65; Ex. A (14)) for \$18 to Sweetwater Laundry, at Sweetwater, Texas, to pay indebtedness to that concern. It was dishonored on presentation (R. 56; Ex. A (5)).

Accused wrote letters to Vandervoort's on 5 November, and to Sweetwater Laundry on 6 November 1944, after returning to Wichita from a three-day trip to Bryan, Texas, on emergency leave, advising these creditors that because of circumstances unknown to him and beyond his control "funds were not available" to cover his checks to them when presented, but that he had "made a special trip to Bryan, Texas," and "arranged to have these funds available" (Vandervoort's letter, R. 67; Ex. A (16)) and had "remedied the situation" (Sweetwater Laundry letter, R. 68; Ex. A (17)), and requested that the checks be redeposited for collection.

On 24 October 1944, accused's account showed a credit balance of

(408)

43 cents, at which amount it remained from 24 October to 5 November 1944 (R. 57; Ex. A (16)). Accused's statements to the investigating officer asserted that he knew that he did not have funds, at the time these checks were issued, for their payment, but expected to cover them with his allotment check arriving early in November, estimating that they would not be presented before then. The Vandervoort check was for a milk bill incurred by his wife, of which he was not notified until October, 1944. Later, concerned that his allotment might be late in arrival, he wrote the letters asking Vandervoort's and the Laundry to redeposit the checks. He was not notified that the Vandervoort check again failed to clear until the investigating officer, on 23 April 1945, showed him a letter from Vandervoort, dated 27 November 1944, to his commanding officer, wherefore that account remained unpaid (R. 75; Ex. E). He was not notified that the laundry check had failed to clear on redeposit until 28 December 1944, and then he sent them a money order to pay it (R. 76; Ex. F). In both cases, he denied intent to deceive or defraud.

Specification 9. Charge I.

On 8 November 1944, the accused made and uttered his check for \$200 to McFall Realty Company of Wichita, Kansas, as a down-payment on a house which he had agreed to buy. According to his own statement that check was to take up a previous check, already dishonored, made at the time when he agreed to buy the house, prior to 1 November. He had told the realtor that the money to pay that check would be on deposit by the time the check would be presented, and post-dated the check to 1 November. He then anticipated going to Bryan, Texas, on emergency leave and getting a loan from the Bryan Bank. He went to Bryan, but the loan was refused. Returning to Wichita about 5 November, he anticipated getting another emergency leave and procuring funds from his mother. The 1 November check having been dishonored, he issued the 8 November check in its place and the first check was destroyed. His leave was refused, whereby he was prevented from obtaining the funds necessary to cover the check. The check was dishonored on presentation sometime in November. The accused redeemed it in January 1945 and his contract to buy the house was rescinded (R. 58-59; Ex. A.(7), (8): R. 69; Ex. A (18): R. 78; Ex. G). For the pertinent period the balance to accused's credit in his account stood at figures from 3 cents to 78 cents, except from 6 November to 8 November, when it was \$47.93. On 8 November it was 78 cents.

Specification 10. Charge I.

On 10 November 1944, accused made and uttered a check for \$25 for cash, to the First National Bank in Wichita, Kansas. He showed the banker a deposit slip from the Bryan Bank showing \$62.50 deposited to his account from his allotment on 6 November 1944. The check was dishonored on presentation. The accused was notified on 28 November and

redeemed the check on 30 November 1944. Accused's bank balance on 10 November 1944 was 28 cents (R. 59; Ex. A (8); R. 79; Ex. A). Accused stated orally to the investigating officer that he had told the Wichita banker, when notified of the return of the check, that his former wife's brother, who was county attorney at Bryan, Texas, had tied up his bank account; and that this representation was made to the Wichita banker "just to stall him off". (R. 31).

Specification 11, Charge I.

On 13 November 1944, accused made and uttered his check (R. 70; Ex. A (19)) for \$2.60 to the Post Exchange at Strother Army Air Field, Winfield, Kansas, for merchandise. It was dishonored on presentation sometime in November. The accused redeemed it promptly on notification (R. 59, 60; Ex. A (8), (9)). He asserted that he "was of the opinion that funds would be available to cover this check when it was presented for collection". (R. 80; Ex. I).

Specification, Charge II.

Lieutenant Colonel W. T. Chumney (R. 34) was the accused's commanding officer at Wichita from the time of his arrival there, about 1 August 1944. He gave the accused three days emergency leave right after the first of November 1944 for the expressed purpose of going to Bryan, Texas, to arrange for some money to cover outstanding checks. Accused was gone a few days and came back. The witness called him in and asked him whether he had made arrangements for the money to take up those checks. The accused "said he had". "He said he had deposited sufficient money to take care of any outstanding checks that he had." (R. 35). The statement was made to the witness in his capacity as the accused's commanding officer and received by him as an official statement (R. 36). A week or ten days later, the accused again asked for leave to go to Texas to see his mother, to arrange for some money, and said that he had been unsuccessful in doing so when he went to Bryan (R. 35).

Cross-examination elicited the facts that the witness, Lieutenant Colonel Chumney, had known the accused for about thirteen years, and that the accused had been employed by the witness for eight or ten months about in 1931. Both were then civilians. The witness had not seen the accused again until the accused reported to him at Wichita (R. 37). The witness, asked under what circumstances the accused left his employ, answered, "I don't recall". (R. 43). It was stipulated (R. 45) that the accused's efficiency rating prior to his assignment at Wichita was "Excellent", and that at Wichita it was "Satisfactory". His "manner of performance" rating at Wichita was first entered as "Very Satisfactory", later reduced to "Satisfactory" to correspond with his reported efficiency rating for the period. (R. 45)

4. The accused testified. He was 41 years old, married, with three

(410)

children, one by his present wife and two by a former wife, divorced, to whom he was paying alimony for the support of those children, until February. He was an Accountant, employed by an accounting firm in San Francisco at between \$350 and \$450 a month when he entered the service. He had been a reserve officer since August, 1932, and was called to active duty as such (R. 46, 47). About thirteen or fourteen years ago, he was employed by (now) Lieutenant Colonel Chumney as an Accountant. He was performing the duties of a Senior Accountant but receiving the pay of a Junior Accountant. He secured employment with another firm at a Senior Accountant's pay. On notification of his leaving his then employment and of the name of the firm to which he was transferring, Lieutenant Colonel Chumney seemed to be "quite put out", and "definitely stated not to ever, under any circumstances, apply to him for another job". (R. 48). Accused expressly denied making the statement to Lieutenant Colonel Chumney that sufficient money had been placed on deposit in the bank at Bryan, Texas, to pay outstanding checks drawn on said bank (R. 48), or any statement that sounded like that (R. 49). He told him that he had taken care of one account down there that he had gone to see about. He was not asked whether he had been successful in getting the money to take care of the checks that "were floating around". That "wasn't brought up at all". (R. 49). Accused later asked for emergency leave to clear up his outstanding accounts, and it was refused (R. 49). The purpose of his being called in was for Lieutenant Colonel Chumney to inquire as to what arrangements had been made with a firm that accused owed some money at Bryan, not the bank. Lieutenant Colonel Chumney did have knowledge of some transactions that were causing the accused embarrassment (R. 50).

5. The record of trial amply sustains the findings of guilty of the eleven specifications of passing worthless checks against an insufficient bank account, with knowledge of its insufficiency, and failing to maintain the account for payment of the checks on presentation, all as alleged under Charge I, in violation of the 96th Article of War. It sustains, though less amply, the findings of guilty of making to the accused's commanding officer a false official statement that sufficient money had been placed in the accused's bank account to pay outstanding checks thereon, as specified under Charge II, in violation of the 95th Article of War.

The evidence reflects a course of conduct on the part of the accused marked throughout by irresponsibility and lack of proper regard for his obligations. The eleven checks involved in the case were issued over a period from 16 August to 13 November, 1944. Aggregating \$477.10, they ranged from a trivial \$2.60 to a Post Exchange for merchandise to \$200 for a purported down payment on the purchase of a house. One, for \$102, was for a month's rental, plus \$2 service charge, on another house. The others were in smaller amounts, one for \$35 and two for \$25 each to the

same bank for cash while away from his station on temporary duty, within six days, another for \$20 cash, to a drug store, and one for \$25 cash to another bank. One was for \$9.50 for a milk bill over three months old, and one for \$18 for an old laundry bill, both from a former station. His relations with the holders of these checks were marked in several instances by his assertion of specious, evasive and untrue excuses and evasive attempts to gain time by requests for useless re-presentations of his checks. Ultimately, under pressure, it appears that he redeemed all but one of the checks, that for the \$9.50 milk bill, but always after default and continuing to issue new worthless checks while belatedly redeeming the earlier ones.

In two instances involving three checks, he left endorsers to pay his obligations: one a noncommissioned officer at a temporary station, another a chapter of the American Red Cross.

The circumstances compel the conclusion that the accused acted in all instances with full knowledge of the insufficiency of his account to pay his checks and with a disregard for their inevitable dishonor alleviated by no more in any case than an unfounded hope that funds would become "available" in some fashion to cover them before they would reach the drawee bank. Thus, not only did he completely discredit himself, but reflected discredit upon the military service, his membership in which was assumably instrumental in inducing his creditors to extend credit to him and to accept his checks.

That the utterance of bank checks without maintaining a bank balance or credit sufficient for their payment on presentation constitutes an offense under the 96th Article of War, regardless of intent to defraud, is well established. (CM 202027 (1934) McElroy, Dig Op JAG 1912-40, Sec 453 (22); CM 224286, Hightower, 14 BR 97, 101; CM 249006, Vergara, 32 BR 5, 12, 3 Bull JAG 289; CM 249232, Norren, 32 BR 95, 102-103, 3 Bull JAG 290; CM 249993, Yates, 32 BR 255, 261; CM 250484, Hobb, 32 BR 397, 402; CM 251451, 4 Bull JAG 5). The additional fact alleged in the Specifications, that the accused knew when he issued his checks that he did not have sufficient funds in his bank account to pay them, is fully proved by inference from the condition of his account plus the fact that he was the person responsible for that condition, in the absence of countervailing evidence or explanation. The usual statement is that he is "chargeable" with such knowledge, where the status of the account results from his own acts. (CM 202601, Sperti, 6 BR 171, 214; CM 236070, Wanner, 22 BR 279; CM 257069, Bishop, 37 BR 7, 13; CM 257417, Sims, 37 BR 111, 117; CM 258314, Reeser, 37 BR 367, 378; CM 259005, Potest, 38 BR 197, 206). Although the accused's account was established as a joint account with his wife, it is clear from the evidence that he was the active person in regard to the deposits and withdrawals. If there was any activity in the account unknown to him, pertinent to its depleted condition, it was his province to furnish evidence thereof.

(412)

The burden of going forward with proof to dispel the ordinary inference from the established facts was upon him. (CM 249232, Norren, 32 BR 95, 103; CM 249993, Yates, 32 BR 255, 261; CM 250484, Hebb, 32 BR 397, 402).

The proof that the accused made the statement to his commanding officer for which he stands convicted under Charge II was solely upon the word of that officer against his own sworn denial. Circumstances were shown which might support an inference of some bias against the accused on the part of the officer concerned, in that the accused had, some eleven years before, left the private employment of that officer under circumstances which, the accused testified, indicated some irritation or hostility against the accused, and in that the same officer, as accused's commanding officer, had rated the accused's efficiency as "Satisfactory" only, in the face of previous ratings of "Excellent". Those circumstances were proper for the defense to show. They would have been proper to show on cross-examination of the officer, without forcing the defense to call him as its own witness, and the cross-examination was unduly restricted in the denial of that right, but no substantial injury resulted to the accused, as the matter was fully introduced in evidence by testimony and by stipulation. The probative weight of the circumstances so revealed was matter for the court. Its refusal to accept the accused's denial that he made the oral statement in question may have been influenced by the established undependable character of his statements to his creditors in attempted evasion of their importunities. If so, the court was fully justified in looking to that record as a measure of his credibility. The statement was false, and its official character was clearly established, as the persistent complaints from the accused's creditors over a period of several months formed a proper basis for his commanding officer to require him to explain and to improve his credit. It would have been decorous and desirable, where resort to the 95th Article of War was contemplated, to have such statement made in written form, as by indorsement in response to a written request for explanation, and not to place upon the court the burden of resolving a direct contradiction by the sworn testimony of the accused of the sworn testimony of his commanding officer as to whether the oral statement was in fact made. However, the court was called upon to determine that fact, and did so, resolving the conflict of evidence against the accused. Its findings were sustained by the evidence.

6. The accused is nearly 42 years of age, married. He has one minor child by his present wife and two children by a former wife, divorced. He was graduated from high school in 1921, and according to one of his statements in his War Department record, but not others, had three years of college education at Southwestern University. He is a native citizen of Texas. In civilian life, he was a bookkeeper and accountant. He has been a reserve officer since July 27, 1933, when he was appointed a second lieutenant, Cavalry Reserve. He was promoted to the grade of first lieutenant 26 August 1936. He served with the 5th

Cavalry from 27 August to 9 September 1933, the Civilian Conservation Corps from 26 December 1934 to 25 December 1937, the 12th Cavalry from 6 to 19 March 1938, the 5th Cavalry from 30 July to 12 August 1939, at Fort Sam Houston, Texas, from 3 June to 20 June 1941, and entered on extended active on 20 July 1942. He was promoted to the temporary grade of Captain, Army of the United States, Air Corps, 24 August 1943. A tour of duty as company commander with the Civilian Conservation Corps was terminated 6 September 1941 at the accused's request but with prejudice by reason of misuse of government funds. In connection with financial embarrassments arising from complaints of creditors and culminating in the present charges, acceptance of his proffered resignation was unfavorably considered 12 January 1945.

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 of the sentence. Dismissal is mandatory upon conviction of a violation of Article of War 95 and is authorized upon conviction of a violation of Article of War 96.

Fletcher R. Andrews, Judge Advocate

[Signature], Judge Advocate

On leave, Judge Advocate

(414)

SRJHQ - CM 280898

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Hq ASF, JAGO

JUL 16 1945

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain Fletcher L. Dannelly (O-311163), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of knowingly making and passing eleven worthless checks, aggregating \$477.10 and failing to maintain sufficient funds in his bank account for their payment, in violation of the 96th Article of War (Specifications 1 through 11, inclusive, Charge I), and of making a false official statement to his commanding officer that sufficient funds had been placed in his bank account to pay outstanding checks, in violation of the 95th Article of War (Specification, Charge II). He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence. I concur in that opinion.

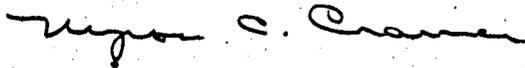
The accused officer, a professional accountant nearly 42 years old, stationed at Wichita, Kansas, after transfer from Texas stations, on Army Air Forces Contract Audit Branch duty, made and passed eleven worthless checks against a nominal account previously established by him at a bank in Bryan, Texas. The checks were made to persons and business concerns in Wichita and Winfield, Kansas; Dayton, Ohio; Kansas City, Missouri and Sweetwater, Texas. They varied in amount from \$2.60 to \$200, aggregated \$477.10, and were issued over a period from 16 August 1944 to 13 November 1944. One, for \$200, was for a down-payment on the purchase of a home; one, for \$102, was for house rental; two, for \$15 and for \$2.60, were for merchandise; two, for \$9.50 and \$18, were for old bills for milk and for laundry at a former station; the remaining five, for amounts from \$20 to \$35, were for cash. In each instance, the accused knew that his account was or probably was insufficient to pay the checks on presentation, and issued them on no better prospect of payment than the unfounded hope that "funds would be available". All were dishonored on presentation, some of them twice. After being granted emergency leave to go to Bryan, Texas, and straighten up his embarrassing financial affairs, the accused was officially asked by his commanding officer whether he had made arrangements to take care of his outstanding checks, and, as the court found upon

(415)

the evidence, answered orally that sufficient money had been placed in his account to do so. This statement was deliberately false. The accused, under oath, denied at the trial that he had made the statement. Although the accused ultimately redeemed all of his checks except the one for the \$9.50 milk bill, some promptly and some belatedly, the record reveals a long and uniform trail of defaulted obligations, abused credit and specious, evasive excuses offered to his creditors by the accused without regard for truth, whereby it is evident that he has thoroughly discredited himself and reflected disrepute upon the service wherever he has been stationed on his present tour of extended active duty.

I recommend that the sentence although inadequate be confirmed and carried into execution.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.



2 Incls

1. Rec of trial
2. Form of action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed. GCMO 380, 25 July 1945).

