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GENERAL
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Judge Advocate General's Department

BOARD OF REVIEW

Holdings, Opinions and Reviews

Volume XIII

including

CM 220455 to CM 223448

(1942)

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CONTENTS OF VOLUME XIII

CM No.	Accused	Date	Page
220455	Kennedy	4 Apr 1942	1
220483	Johnson	2 May 1942	3
220518	Quigley	11 Apr 1942	7
220604	Antrobus	7 Apr 1942	11
220642	Smith	11 May 1942	15
220643	Knight	14 Apr 1942	27
220672	Erickson	4 Jun 1942	35
220693	Dye	11 Apr 1942	53
220712	Brennan	9 Apr 1942	55
220746	Walling	21 Apr 1942	59
220760	Fanning	24 Apr 1942	61
220805	Peavy	29 May 1942	73
220877	Ruehl	30 Apr 1942	93
220886	Wright	5 May 1942	95
220890	Pagan	30 Apr 1942	99
220931	Bridgeman	25 Apr 1942	103
220946	Frank	14 May 1942	109
220947	Calvin	20 May 1942	113
221071	Hood	27 Apr 1942	117
221073	Fout	25 Apr 1942	119
221153	Hardin	30 Apr 1942	125
221170	Hemmitt	13 May 1942	131
221195	Lunsford	9 May 1942	137
221266	Janz	23 May 1942	141
221307	Stolworthy	22 May 1942	151
221336	Tucker, Clark	12 Jun 1942	155
221426	Shannon	8 May 1943	161
221445	Merner	25 May 1942	169
221488	Musselman	1 Jun 1942	171
221491	Peloquin	6 Jun 1942	175
221537	Hamilton	22 Jun 1942	179
221591	Brown	13 Jul 1942	183
221640	Loper	6 Jun 1942	195
221662	Knight	23 May 1942	211

CM No.	Accused	Date	Page
221670	Morang	2 Jun 1942	213
221686	Hicks	20 Jun 1942	219
221794	Jones	12 Jun 1942	231
221833	Turner	2 Jul 1942	239
221885	Bawsel	23 Jun 1942	249
221991	Edgerton	16 Jun 1942	255
221993	Baker	17 Jun 1942	259
222093	Kiser	4 Aug 1942	263
222140	Teal	12 Jun 1942	267
222148	Griggs	31 Jul 1942	269
222418	Manning	26 Jun 1942	279
222443	Lieberher	13 Jul 1942	283
222489	Cutting	11 Aug 1942	293
222598	O'Day, Pruett	16 Jul 1942	301
222660	Livingston	30 Jul 1942	305
222709	Jones	3 Jul 1942	307
222737	Gilbert	3 Jul 1942	313
222840	Holman	13 Jul 1942	317
222856	Stevenson	27 Oct 1942	325
222861	Fragassi	18 Jul 1942	329
222902	McLaughlin	18 Jul 1942	333
222952	Weidmann	22 Jul 1942	335
222993	Speed	18 Jul 1942	339
223054	Langanki	11 Jul 1942	347
223134	Dudley	11 Sep 1942	349
223160	Libonati	28 Jul 1942	359
223300	Manashian	3 Aug 1942	363
223315	Frawley	31 Jul 1942	367
223331	Ross	21 Sep 1942	375
223335	Price	3 Aug 1942	383
223448	Riesenman	12 Sep 1942	389

In the Office of The Judge Advocate General
Washington, D. C.

Board of Review
CM 220455

APR 4 1942

UNITED STATES	)	1ST ARMORED DIVISION
v.	)	Trial by G. C. M., convened at Fort Knox, Kentucky, February 24, 1942. Confinement for six (6) months and forfeiture of twenty-six dollars ($26) per month for like period. Fort Knox, Kentucky.
Technician 5th Grade HILARY M. KENNEDY (15042345), Battery B, 68th Armored Field Artillery Battalion.	)	

OPINION of the BOARD OF REVIEW
HOOVER, VAN BENSCHOTEN and KOTRICH, 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 and the Board submits this, its opinion, to The Judge Advocate General.

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

CHARGE: Violation of the 84th Article of War.

Specification: In that Technician 5th Grade Hilary M. Kennedy, Battery "B", 68th Armored Field Artillery Battalion, did, at Hardinsburg, Kentucky, on or about February 5, 1942, unlawfully sell to Marvin Beard, Jr., of Hardinsburg, Kentucky, a .45 caliber automatic pistol, Serial Number 390179, of the value of $26.42, issued for use in the military service of the United States.

He pleaded not guilty to the Charge and Specification. He was found guilty of the Specification except the word "sell", substituting therefor the words "dispose of by pawning", of the excepted words, not guilty, of the substituted words, guilty, and guilty of the Charge. No evidence of previous convictions was introduced. He was sentenced to confinement at hard labor for six months and forfeitures of $26 per month for a like period. The reviewing authority approved the sentence and directed its

execution. The proceedings were published in General Court-Martial Orders No. 21, Headquarters 1st Armored Division, March 14, 1942.

3. The only question requiring consideration is one as to the legal sufficiency of the finding, by exceptions and substitutions, that accused unlawfully disposed of the pistol described in the Specification by "pawning" it. He was charged with having unlawfully "sold" the pistol. The finding in question was not legally authorized. It has been repeatedly held that the offenses of unlawful sale and unlawful or wrongful disposition by pawning are distinct and that the act of pawning is not included in the act of sale. The offense of unlawful pawning as found by the court was not a lesser offense included in the offense of unlawful sale as charged. (CM 201596, Sigler; CM 187114, Portner; CM 153494, O'Connor; CM 152724, Qualls; CM 152725, Bashaw; CM 151689, Lightner; CM 143535, Thomas; CM 143500, Avala; CM 138679, Frisbie)

4. In the opinion of the Board of Review the record of trial is legally insufficient to support the findings of guilty and the sentence.

, Judge Advocate.

, Judge Advocate.

, Judge Advocate.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General.
Washington, D. C.

SPJGH
CM 220483

2

UNITED STATES v. Private ERNEST W. JOHNSON (6145709), Special Weapons Troop, 2nd Cavalry.	III ARMY CORPS Trial by G.C.M., convened at Phoenix, Arizona, February 2, 1942. Dishonorable discharge and confinement for five (5) years. Federal Correctional Institution, Englewood, Colorado.

HOLDING by the BOARD OF REVIEW
HILL, CRESSON and HALE, Judge Advocates.

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Private Ernest W. Johnson, Special Weapons Troop, 2nd Cavalry, on or about January 4, 1942, did, at Papago Park, Phoenix, Arizona, unlawfully, willfully and feloniously request Private Joe E. Lahman, Special Weapons Troop, 2nd Cavalry, to shoot him, the said Private Johnson, with a .45 caliber pistol; and a a result of said request, and at the instance of the said Private Johnson, the said Private Lahman did shoot the said Private Johnson in the upper left arm with a .45 caliber pistol.

He pleaded not guilty to and was found guilty of the Charge and its Specification. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for five years. The reviewing authority

approved the sentence, designated the Federal Correctional Institution, Englewood, Colorado, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

The accused and Lahman (CM 220481), though charged separately, were tried jointly and two records of trial were prepared.

3. The only question requiring consideration is the designation of a Federal correctional institution as the place of confinement.

Confinement in a Federal correctional institution or reformatory is not authorized under the letter dated February 26, 1941 (AG 253 (2-6-41)E), from The Adjutant General to all Commanding Generals, subject: "Instructions to reviewing authorities regarding the designation of institutions for military prisoners to be confined in a Federal penal or correctional institution", except in a case where confinement in a penitentiary is authorized by law (CM 220093, Unckel).

The Specification falls short of alleging mayhem because it does not allege the infliction of such "a hurt of any part of a man's body whereby he is rendered less able in fighting, either to defend himself or to annoy his adversary", as mayhem is defined by Bishop in his New Criminal Law (vol. 2, sec. 1001). Nor does the proof of a superficial flesh wound, which required only cleansing with iodine and the application of a dressing at the dispensary, show that an injury sufficiently serious to be defined as mayhem was in fact committed.

The act alleged under Article of War 96 is not one recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by some statute of the United States of general application within the United States, excepting section 289, Penal Code of the United States, or by law of the District of Columbia. Even if the act could be considered as an attempt to commit mayhem, the confinement therefor authorized under section 103, title 22, Code of the District of Columbia (1940) is for not more than one year.

In the opinion of the Board of Review, confinement in a

penitentiary or Federal correctional institution is not authorized in this case.

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 five years in a place other than a penitentiary, Federal correctional institution or reformatory.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General.
Washington, D. C.

SPJGH
CM 220518

APR 11 1942

UNITED STATES)	ICELAND BASE COMMAND
)	
v.)	Trial by G.C.M., convened at Camp Pershing, Iceland, December 22, 1941, and January 22, 1942. Dishonorable discharge and confinement for five (5) years. Disciplinary Barracks.
Pharmacist's Mate Third Class WILLIAM C. QUIGLEY (3820176), U. S. Navy, Headquarters Company, Third Battalion, 6th Marines (Rein), First Marine Brigade (Prov).)	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and HALE, 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 and sentence in part, has been examined by the Board of Review, and the Board submits this, its opinion, to The Judge Advocate General.

2. The accused pleaded not guilty to and was found guilty of all Specifications and the Charge. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for five years. The reviewing authority approved the sentence, ordered its execution but suspended the dishonorable discharge, and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. The result of his trial was published in General Court-Martial Orders No. 10, Headquarters Iceland Base Command, dated February 27, 1942.

3. The only question necessary to be considered is the legal sufficiency of the record of trial to support the finding of guilty of Specification 1, alleging, in substance, that accused, on November 5, 1941, in Reykjavik, Iceland, married Hildur Ingibjorg Gudlaugodottir while married to Ann Margaret Quigley, who was then alive.

4. The marriage of accused to Hildur Ingibjorg Gudlaugodottir on November 5, 1941, is established by the certificate of marriage introduced by the prosecution under stipulation with the defense (R. 4; Ex. 1).

The only competent testimony bearing upon the marital status of the accused on November 5, 1941, is the unsworn statement of the accused, setting forth in part -

> "At the time I married here in Iceland I knew that the annulment proceedings were in progress in the case of my marriage at home. I was not trying to take advantage of my present wife, as I felt that the annulment would go through. * * *." (R. 6.)

There is no competent proof that accused was ever married to Ann Margaret Quigley or that the unnamed person against whom he stated he had started annulment proceedings was alive and married to him on November 5, 1941.

5. Bigamy is defined as follows:

> "Bigamy is willfully and knowingly contracting a second marriage where the contracting party knows that the first marriage is still subsisting; also the state of a man who has two wives or of a woman who has two husbands, living at the same time." (10 C.J.S. 359.)

> "The criminal offense of willfully and knowingly contracting a second marriage (or going through the form of a second marriage) while the first marriage, to the knowledge of the offender, is still subsisting and undissolved. * * *." (Black's Law Dictionary, Third Edition, p. 215.)

> "The state of a man who has two wives, or of a woman who has two husbands, living at the same time." (Bouvier's Law Dictionary, Rawle's Third Revision, vol. 1, p. 343.)

> "Whoever, having a husband or wife living, marries another shall be deemed guilty of bigamy, * * *." (Sec. 171, title 6, D.C. Code.)

6. In the opinion of the Board of Review, the record of trial, in the absence of competent proof that accused married Ann Margaret Quigley and that she was alive and undivorced on November 5, 1941, fails to establish the essential elements of the offense of bigamy.

7. The aggregate maximum punishment under Specifications 2 and 3 of the Charge - breach of restriction - is confinement at hard labor for two months and forfeiture of two-thirds pay per month for a like period.

8. For the reasons stated, the Board of Review is of the opinion that the record of trial is not legally sufficient to support the finding of guilty of Specification 1 of the Charge, but is legally sufficient to support the findings of guilty of Specifications 2 and 3 of the Charge, and of the Charge, and legally sufficient to support only so much of the sentence as involves confinement at hard labor for two months and forfeiture of two-thirds pay per month for a like period.

_____, Judge Advocate.

_____, Judge Advocate.

(On leave), Judge Advocate.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General.
Washington, D. C.

Board of Review
CM 220604

APR 7 1942

UNITED STATES	FORT KNOX, KENTUCKY.
v.	Trial by G.C.M., convened at Fort Knox, Kentucky, March 12, 1942. Dishonorable discharge and confinement for three (3) years. Reformatory.
Private JOHN M. ANTROBUS (15057434), 1550th Service Unit, Detachment Medical Section, Fort Knox, Kentucky.	

HOLDING by the BOARD OF REVIEW
HILL, CRESSON and HALE, Judge Advocates.

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

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private John Antrobus, 1550th Service Unit, Detachment Medical Section, did, at Ft. Knox, Ky. on or about Jan 8, 1942 in conjunction with Pvt. 1cl Robert Hancock, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection with him by way of the mouth.

Specification 2: In that Private John Antrobus, 1550th Service Unit, Detachment Medical Section, did, at Ft. Knox, Ky. on or about Jan. 13, 1942 in conjunction with Pvt. 1cl Robert Hancock and Pvt. Wallace Jackson, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection with them by way of the mouth.

Specification 3: In that Private John Antrobus, 1550th Service Unit, Detachment Medical Section, did, at Ft. Knox, Ky. on or about Jan. 21, 1942 in conjunction with Pvt. 1cl Robert Hancock and Pvt. William Svendsen, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection with them by way of the mouth.

The accused pleaded not guilty to and was found guilty of all Specifications and the Charge. He was sentenced to be dishonorably discharged, 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, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

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

The accused was on duty in the Armored Force Reception Training Center Dispensary at Fort Knox. Privates Hancock, Jackson, and Svendsen, with whom he is accused of committing sodomy, were on duty at the 1st Armored Regiment Dispensary, Fort Knox (R. 6). The accused became acquainted with Privates Hancock and Jackson in the fall of 1941 and with Private Svendsen in January 1942 (R. 8, 17, 25). They had visited each other at one or the other dispensary two or three times in January (R. 8, 12, 13, 18, 26).

Captain Davison, the commanding officer of the accused, testified that after warning him that anything he said might be used against him (R. 7), he confessed that on two or three occasions in January he had committed acts of sodomy with Privates Hancock, Jackson, and Svendsen from the 1st Armored Regiment Medical Detachment at the 1st Armored Regiment Medical Dispensary (R. 6, 31-33), asserted that they had asked to see a couple of rings accused was wearing, and after obtaining possession of them they had refused to return them and had threatened accused with exposure if he tried to make any trouble (R. 6). Captain Davison stated that he found the larger of the two rings in the possession of Private Svendsen, who claimed the accused had given it to him, and the smaller ring in the possession of Private Hancock, who said he had paid the accused $4 for it (R. 6-7, 30; Exs. A, B).

A statement purporting to be a full confession, dated January 30th, was received in evidence (Ex. C) upon the admission of the accused that he had signed a paper without reading it thoroughly, though the accused was not sure that he had ever seen the offered statement, nor whether the signature thereon was actually his (R. 24, 33, 35-37). Captain Brown, investigating officer in relation to a charge against Private Svendsen, testified that the accused admitted the commission of sodomy with Privates Hancock, Jackson, and Svendsen on three occasions (R. 33). Neither of these confessions was properly admissible. The former, because it was not proven to have been signed by the accused, nor read by or to him, nor that he was warned of his rights prior to his signing it (if indeed he did sign it). The latter, because there was no showing that the confession was voluntary in that there is no proof that the accused had been warned before confessing to his military superior, Captain Brown (R. 34).

The prosecution called as its other witnesses the three soldiers with whom the accused is charged with committing sodomy. They testified to a few visits with the accused either at his dispensary, or at theirs (R. 8, 12-13, 18), on which occasions they went into the furnace room of the dispensary involved because they could smoke there (R. 8, 19). Catechized concerning their personal relations with accused, they denied any irregularity therein, but two of them admitted having heard that the accused had committed acts of homosexuality (R. 8-12, 17, 20, 23). The record also reveals that a couple of rings belonging to the accused were found in the possession of these soldiers (R. 6-9, 13-15, 20-21, 24-25).

The above constitutes the only testimony tending to furnish any corroboration of the confession made to Captain Davison, but it obviously does not touch the corpus delicti further than to establish the statement in accused's confession that he was in the dispensary furnace rooms with the three soldiers with whom he is charged with committing sodomy (R. 6).

4. The question of the sufficiency of proof of the corpus delicti is discussed at length in the Mallon case (CM 202213) and in the Alexander case (CM 210693). In its opinion in the Mallon case (Dig. Ops. JAG 1912-30, Supp. VII, sec. 1292 a (2)), the Board thus stated the rule:

"The general rule * * * is that the corpus delicti need not be proved aliunde the confession beyond a reasonable doubt or by a preponderance of evidence or at all, but that some evidence corroborative of the confession must be produced and such evidence must touch the corpus delicti."

That rule was quoted with approval in the Alexander case.

5. In the opinion of the Board of Review, the record contains no evidence, either direct or circumstantial, other than that of the confession itself, that the offense was probably committed, and there is no other proof of the corpus delicti (par. 114 a, M.C.M., 1928).

6. The Board of Review, accordingly, holds the record of trial legally insufficient to support the findings of guilty and the sentence.

Judge Advocate.

Judge Advocate.

Judge Advocate.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General.
Washington, D. C.

SPJGH
CM 220642

MAY 11 1942

UNITED STATES)	2nd INFANTRY DIVISION
)	
v.)	Trial by G.C.M., convened at
)	Fort Sam Houston, Texas, Febru-
Second Lieutenant WILSON)	ary 27, 1942. Dismissal.
J. SMITH (0-312090), 9th)	
Infantry.)	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and HALE, Judge Advocates.

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: In that Second Lieutenant Wilson J. Smith, Ninth Infantry, Fort Sam Houston, Texas, being indebted to the Officers' Mess, Fort Sam Houston, Texas, in the sum of $68.30 for mess bills, merchandise and dues, which amount became due and payable on November 10, 1941, did, at Fort Sam Houston, Texas, from November 10, 1941, to January 28, 1942, dishonorably fail and neglect to pay said debt.

Specification 2: In that Second Lieutenant Wilson J. Smith, Ninth Infantry, Fort Sam Houston, Texas, being indebted to the Officers' Mess, Fort Sam Houston, Texas, in the sum of $40.95 for purchases in the month of November, 1941, and which amount became due and payable on December 10, 1941, did, at Fort Sam Houston, Texas, from December 10,

1941, to January 28, 1942, dishonorably fail and neglect to pay said debt.

Specification 3: In that Second Lieutenant Wilson J. Smith, Ninth Infantry, Fort Sam Houston, Texas, being indebted to the Officers' Mess, Fort Sam Houston, Texas, in the sum of $28.39 for purchases in the month of December, 1941, and which amount became due and payable on January 10, 1942, to January 28, 1942, dishonorably fail and neglect to pay said debt.

Specification 4: In that Second Lieutenant Wilson J. Smith, Ninth Infantry, did, at Fort Sam Houston, Texas, on or about January 23, 1942, conduct himself in a manner unbecoming an officer and gentleman by using abusive and threatening language toward Tony Rodriguez, employee of the Officers' Mess, Fort Sam Houston, Texas, by saying to him "Get away from here before I grab you by the neck", and "Son of a bitch bastard" or words to that effect.

Specification 5: In that Second Lieutenant Wilson J. Smith, Ninth Infantry, did, at Fort Sam Houston, Texas, on or about January 23, 1942, conduct himself in a manner unbecoming an officer and gentleman by using abusive and threatening language toward Oscar Tatum, employee of the Officers' Mess, Fort Sam Houston, Texas, by yelling at him "God damn you, I don't want any trouble out of you", or words to that effect.

Specification 6: In that Second Lieutenant Wilson J. Smith, Ninth Infantry, did, at Fort Sam Houston, Texas, on or about January 23, 1942, conduct himself in a manner unbecoming an officer and gentleman by attempting to overturn a display case in the Officers' Mess, Fort Sam Houston, Texas.

Specification 7: In that Second Lieutenant Wilson J. Smith, Ninth Infantry, did, at Fort Sam Houston, Texas, on or about January 23, 1942, conduct himself in a manner unbecoming an officer and gentleman by wrongfully taking and carrying away charge slips of the Officers' Mess, Fort Sam Houston, Texas,

same being the property of the Officers' Mess, Fort Sam Houston, Texas.

Specification 8: In that Second Lieutenant Wilson J. Smith, Ninth Infantry, did, at Fort Sam Houston, Texas, on or about January 23, 1942, wrongfully and unlawfully attempt to deceive the agent and representative of the Officers' Mess, Fort Sam Houston, Texas, one Tony Rodriguez, by signing the name of Lt. Fred W. Schweikhard to a chit and by means of such deception did attempt to secure delivery to himself of valuable goods, by representing himself as Lt. Fred W. Schweikhard.

Specification 9: In that Second Lieutenant Wilson J. Smith, Ninth Infantry, having on or about June 10, 1941, become indebted to the Federal Services Finance Corporation of Washington, D.C. in the sum of One Hundred and Fifty Dollars, ($150.00), for a loan, and in which transaction he signed a contract promising to pay back the loan in ten payments of Fifteen Dollars ($15.00), each, the first payment to be made on August 2, 1941, and has without due cause at Fort Sam Houston, Texas, on or about August 2, 1941, September 2, 1941, October 2, 1941, November 2, 1941, December 2, 1941, and January 2, 1942, dishonorably failed to keep said promise.

Accused pleaded not guilty to the Charge and its nine Specifications. He was found guilty of the Charge and all Specifications except the words, "by representing himself as Lt. Fred W. Schweikhard", of Specification 8. 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 with respect to four specifications, alleging dishonorable failure to pay four debts, is substantially as follows:

a. Specification 1 - Accused was indebted on November 1, 1941, to the Officers' Mess, Fort Sam Houston, Texas, in the amount of $68.30, for dues and for merchandise furnished during the month of October 1941. On November 10, 1941, that bill became delinquent and a letter was written accused. On November 20, 1941, an official letter was written accused. About November 24th, accused stated to

the Mess Officer that he was having difficulty in getting more money from his parents but would try to get some money and would pay the bill in a few days (R. 9).

b. Specification 2 - On December 1, 1941, the indebtedness of accused to the Officers' Mess was $109.26, an increase of $40.96 during November (R. 17).

c. Specification 3 - On January 1, 1942, the indebtedness of accused to the Officers' Mess was $138.65, an increase of $29.39 during December to the date of his expulsion.

About December 11 or 12, 1941, the Commanding Officer notified accused in writing that he had been expelled from the Officers' Mess (R. 11). On the night of the day that letter was written, the Mess Officer personally informed accused that he had been expelled from the Mess. At that time the accused told the Mess Officer that if the mess and the council were going to act that way "he wouldn't pay them the money he had in his pocket". Prior to that day the Mess Officer had endeavored to assist accused in securing a bank loan to take care of his mess bill and post exchange account (R. 11).

The regular procedure in cases of failure to pay mess bills was followed in this case. When not paid by the 10th of the month, the member was notified by letter or phone reminding him to pay his account; on the 20th, a notice was sent through the Post Commander; credit of the member was thereby stopped; and if that notice failed to bring payment, expulsion by order of the Post Commander followed (R. 13).

The credit of accused was not stopped prior to December 10th because of a desire to permit his use of the club to get necessities (R. 15). The accused was authorized by the Mess Officer to attend with his wife a New Year's eve party as a guest, notwithstanding his expulsion (R. 19). The Mess Officer conceded that he had told the officer investigating those charges that he felt sure that the accused would take care of these bills, and that he was all right except that he was too much of a good fellow (R. 16).

No payment was made by accused upon his Officers' Mess account from November 10, 1941, to the date of trial February 27, 1942 (R. 13).

d. Specification 9 - It was stipulated that accused in June 1941, borrowed $150 from the Federal Services Finance Corporation of Washington, D. C., to be repaid in monthly installments of $10 commencing August 2, 1941; no payment was received until October 16, 1941, when the Corporation received a check for $30, which was subsequently returned marked insufficient funds (R. 41). It was further stipulated that the Corporation acknowledged on February 16, 1942, receipt of a check for $15 and mailed accused a rewritten agreement bringing it up to date (R. 55).

e. The accused testified with respect to these specifications substantially as follows:

(1) He is thirty years old. His only dependent is his wife. For the year prior to his call to active duty on April 14, 1941, his net income as a superintendent of dirt work on construction work had been approximately $6500 a year. He had no outstanding debts at that time except current accounts (R. 11). Since coming to Fort Sam Houston he had gotten into debt "by just living too high on the pay that I was getting and by borrowing money to pay off and trying to pay everybody and I couldn't get enough and I have just been robbing Peter to pay Paul * * *" (R. 52-53).

Early in January, perhaps January 15th and before his arrest, accused submitted to his Battalion Commander a list of his debts and worked out with him a system of payment. A few days after the investigation of these charges, accused submitted, upon request, to his regimental commander, a list of his debts and a statement as to his plans for paying them (R. 77-78). As of January 26, 1942, the debts of accused included: Officers' Mess, $138.65; Post Exchange, $158.11; Federal Services Finance Corporation, $150; Union State Bank, $200; National Bank of Fort Sam Houston, $293; Bexar County National Bank, $100; Pincus Clothing Company, $37.25; Guarantee Shoe Store, $11.45; Frank Brothers, $19.10; Lautersteins, $55; and personal debts, $175; total, $1354.99 (R. 53).

About February 5, 1942, accused submitted to his Regimental Commander a letter (R. 18), stating that he had disposed of his pay check for January by making the following payments: National Bank of Fort Sam Houston, $40; Union State Bank, $40; Treasury of the United States, $17.43; Snow White Laundry, $14.86; Federal Services Finance Corporation, $15; house rent, $40; a total payment of $167.29 (R. 56). He intended to use his complete salary, less $40 a month for house rent, in the payment of his debts. He could do this because he is now getting a little outside income (R. 57).

The accused admitted upon cross-examination that he had paid nothing upon these obligations until charges were preferred (R. 65), and explained, with respect to his failure to include the Officers' Mess or the Post Exchange in the partial payments which he made to his creditors, that he was under the impression that those obligations could not be paid upon a monthly basis except if the Finance Department would make the deductions from his check (R. 69).

(2) With respect to Specification 9, accused in February signed and returned to the Federal Services Finance Corporation the rewritten contract for the $150 loan, and paid $15 on account which brought his dealings with that Corporation entirely up to date.

4. The Board of Review has held -

"Dishonorable neglect to pay debts is a violation of A.W. 95. Neglect on the part of an officer to pay his debts promptly is not of itself sufficient grounds for charges against him. Where the nonpayment amounts to dishonorable conduct, because accompanied by such circumstances as fraud, deceit, or specific promises of payment, it may properly be deemed to constitute an offense. Where the specification alleged that accused, as an officer, failed and neglected to pay debts, and the proof does not show such conduct with reference to the debts as would constitute an offense, although some of the debts had been due for more than seven months, a finding of guilty can not be sustained. C. M. 121207 (1918)." (Dig. Ops. JAG 1912-30, sec. 413.)

"Neglect on the part of an officer to pay his debts promptly is not of itself sufficient ground for charges against him. Where the non-payment amounts to dishonorable conduct, because accompanied by such circumstances as fraud, deceit or specific promises of payment, it may be properly deemed to constitute an offense." (CM 121152, Robertson; Dig. Ops. JAG 1912-30, sec. 1494.)

"The record shows no false representations by the accused, nor a failure to pay, characterized by deceit, evasion, or dishonorable conduct. Neglect on the part of an officer

to pay his debts promptly is not of itself sufficient ground for charges against him. Inasmuch as this specification does not allege or the evidence prove any circumstances amounting to dishonorable conduct in the non-payment of this debt, the finding of guilty of specification 4, charge II, cannot be supported." (CM 123090, Hansbrough; Dig. Ops. JAG 1912-30, sec. 1494.)

"* * * While it is true that some of the debts were long overdue and that accused did not always reply to demands for payment, there is nothing of substantial weight to indicate that he finally intended to avoid his obligations, or that he did not make reasonable efforts to discharge them. In such a case, it is believed that his acts were not proved beyond reasonable doubt to have been dishonorable within the meaning of the 95th Article of War or discreditable within the meaning of the 96th Article of War." (CM 217636, Nichols.)

In listing instances of punishment for dishonorable neglect to discharge pecuniary obligations, Winthrop, in his Military Law and Precedents (reprint, p. 715), states -

"In these cases, in general, the debt was contracted under false representations, or the failure to pay characterized by deceit, evasion, false promises, denial of indebtedness, etc., and the neglect to discharge the obligation, at least in part, was continued for an unconscionable period. Some such culpable and dishonorable circumstances should characterize the transaction to make it a proper basis for a military charge. A mere failure to settle a private debt, (which may be more the result of misfortune than of fault,) cannot of course properly become the subject of trial and punishment at military law."

5. a. With respect to the failure to pay installments due on August 2, 1941, and monthly thereafter on the $150 note to the Federal Services Finance Corporation (Spec. 9), the accused in February 1942, refinanced the note with that Corporation, made an initial payment, and thereby brought that account up to date. There is no proof or suggestion of false representations in the

contracting of the debt, nor of any deceit, evasion, false promise, denial of indebtedness, nor a neglect for an unconscionable period in connection with the failure to pay the debt.

b. With respect to monthly accounts due the Officers' Mess on November 10, 1941, December 10, 1941, and January 10, 1942, the only suggestion of conduct which would bring the failure to pay within the principles cited in paragraph 4, supra, is the testimony of the Mess Officer with respect to an alleged promise to settle the indebtedness, and the statement of accused to the Mess Officer when he orally informed accused of his expulsion from the Mess.

The Mess Officer made an affirmative reply to the question whether in the latter part of November 1941, accused did "promise to pay the amount of $68.30" (the amount due Nov. 1). Doubt whether there was a specific promise on the part of accused to pay on a date certain is raised in the accompanying testimony of the Mess Officer to the effect that accused at that time told the Mess Officer that he was trying to get the money; that he had been getting some money from his parents, and was having difficulty in getting any more, and that he would try to get it to the Mess Officer in a few days; that he told the Mess Officer "he would have it in a few days", and that "it would be paid in a few days".

When the Mess Officer informed accused of his expulsion from the Mess, accused stated that if the mess and the council were going to act that way "he wouldn't pay them the money he had in his pocket". There is nothing to show how much, if any, money accused had in his pocket with which to make any payment, or that the remark was anything more than a "smart" rejoinder to the action of the mess in depriving him of its privileges.

c. The accused proposed to his Battalion Commander, in January before his arrest, a budget for the payment of his debts, a few days later submitted to his Regimental Commander a list of debts with a plan for payment, on February 5, 1942, submitted a report showing the payment of $167.29 to his creditors, and his sworn statement at the trial was that he intended to use his complete salary, less $40 a month for house rent, on paying his debts.

d. While it is true that accused was living upon the scale of his former income in civil life and beyond his Army pay, the record

shows no false representations, deceit, evasion, or dishonorable conduct, and there is nothing of substantial weight in the record to indicate that he finally intended to avoid his obligations. He applied $167.29 of his "salary" as a second lieutenant for January 1942, in the payment of his obligations and stated at the trial his intent to use all but $40 a month (for rent) of his pay to the discharge of his obligations. In view of all of the circumstances, it is believed that his acts were not proved beyong a reasonable doubt to have been dishonorable within the meaning of the 95th Article of War or discreditable within the meaning of the 96th Article of War.

The Board of Review is, accordingly, of the opinion that the record of trial is not legally sufficient to support the findings of guilty of Specifications 1, 2, 3 and 9 of the Charge.

6. The evidence with respect to the offenses alleged to have been committed at the Officers' Mess on the evening of January 23, 1942 (Specs. 4, 5, 6, 7 and 8), is substantially as follows:

The accused at about 10:30 p.m. (R. 31), came up to the liquor counter in the bar and asked a clerk, Rodriguez, for a pint of rye whiskey. Rodriguez replied that quarts only were available. Upon learning the price, $2.60, accused asked for a quart. After telling accused that he would have to pay cash, Rodriguez handed accused a quart and found him signing the name of Lieutenant Schweikhard to the chit. Accused stated that he had permission from Lieutenant Schweikhard to sign Schweikhard's name. Rodriguez told accused that he would have to show some permission to sign that name before he could get the whiskey. Accused then said, "The goddam son-of-a bitch, you are going to give me that liquor or I turn this case [liquor display case] over" (R. 22-24).

Rodriguez then called Oscar Tatum, the head bartender, who came over. Accused told Tatum that he had permission to sign Schweikhard's name. When Tatum told accused that he must show some authority to sign that name, the accused said, "What the hell are you talking about?", grabbed the counter which contained the liquor "and it seemed he tried to turn it over" (R. 32). Tatum saw accused actually try to manhandle or push over the display case (R. 37). Accused followed Tatum back to the bar, stuck his finger in Tatum's face and said, "Goddam you, I don't want any trouble out of you" (R. 32). The accused then took the white and yellow copy of the chit out of

the machine (R. 25, 27). The chits were in series of three, of which two came out of the machine, and the third (pink) goes down into a locked box (R. 36). When Rodriguez told accused he needed the chits, accused said, "You had better get away from here before I grab you by the neck". After accused found out that Rodriguez needed something to identify the chits, accused tore off the serial numbers of the white and of the yellow copy of the chit and handed the numbers to Rodriguez. The pink copy of chit A-9852, Exhibit A, and a part of the yellow copy (with the number from the white copy attached), Exhibit B, were received in evidence. The accused, prior to the time he was refused the liquor, offered no explanation as to why or whose name he was signing (R. 25-30).

Second Lieutenant Fred H. Schweikhard never gave accused permission to sign his name to any document, nor to a chit at the Officers' Mess (R. 39).

The accused testified that he left home about 8 p.m., visited with a friend and had three highballs, drove to the Officers' Mess at about 9:30 and went in by the rear door to the bar. He ordered a pint of Rewco Rye and started to count out the money for it. When informed that there was no rye in pints, accused asked for a quart and said that he would sign a friend's name for it and pay the friend in the morning. After he signed the friend's name, he was told that he could not do so unless Oscar approved. Oscar said that it could not be done. Accused then asked for the chits, picked them up, and crumpled them in his pocket, walked over to the bar, and tried to get Oscar to let him have the liquor. When they kept wanting the chits, accused told them that they only needed the serial numbers as a record was in the box. Accused tore off the name of a member of his company, Lieutenant Fred Schweikhard, which he had signed, tore off and gave the serial numbers to the clerk, and threw the rest of the chits away. Accused denied that he had attempted to deceive Rodriguez or said, or attempted to deceive Rodriguez into thinking, that his name was Schweikhard. He did not think he was obtaining anything by false pretenses, knew that the pink copy of the chit was in the machine and thought that he was tearing up only the signature on the original. He fully realizes that what he had done was not exactly right, but that he had not intentionally done anything wrong and was doing everything possible to straighten it out (R. 57-60).

Upon cross-examination accused admitted that he did not have permission to sign the name of Lieutenant Schweikhard to the chit but knew that he could take care of it with Lieutenant Schweikhard the next morning (R. 73-74).

It was stipulated that the Commanding Officer, 9th Infantry, under date of October 18, 1941, and of October 28, 1941, had recommended the promotion of accused to the grade of first lieutenant (R. 75-76).

7. "'Conduct unbecoming an officer and a gentleman' may thus be defined to be: - Action or behaviour in an official capacity, which, in dishonoring or otherwise disgracing the individual as an officer, seriously compromises his character and standing as a gentleman; Or action or behavious in an unofficial or private capacity, which, in dishonoring or disgracing the individual personally as a gentleman, seriously compromises his position as an officer and exhibits him as morally unworthy to remain a member of the honorable profession of arms." (Winthrop Military Law, reprint, 713.)

a. The conduct shown under Specifications 4 and 5 - abusive and threatening language to two employees of the Officers' Mess - under Specification 6 - the attempt to overturn the display case - and under Specification 7 - the removal of the charge slips - was not, in the opinion of the Board of Review, of a sufficiently serious and disgraceful nature to warrant a finding of guilty under the 95th Article of War. Those Specifications are, in substance, the component parts of a single transaction which might well have been charged as disorderly conduct in violation of Article of War 96.

In the opinion of the Board of Review, the record is legally sufficient to support only so much of the findings of guilty under Specifications 4, 5, 6 and 7 as involves findings of guilty in violation of Article of War 96.

b. With respect to the attempt to deceive the representative of the mess by signing the name of Lieutenant Schweikhard to the chit (Specification 8), the proof shows that accused did attempt to

secure delivery to himself of the quart bottle of liquor by signing Schweikhard's name to the chit and representing that he had permission from that officer to sign that name.

Lieutenant Schweikhard testified that he had never given accused permission so to sign his name and the accused admitted upon cross-examination that he did not have permission from Lieutenant Schweikhard to sign Schweikhard's name to the chit. Such conduct was an attempt to secure property under false pretences and his statement of authority to sign the name was a deliberate falsehood made in aid of such an attempt.

In the opinion of the Board of Review, the conduct of accused with respect to Specification 8, dishonored and disgraced him personally and constituted an offense cognizable under the 95th Article of War.

8. The records of the Office of The Adjutant General (Reserve Division) show his service as follows:

Appointed Second Lieutenant, Infantry Reserve, October 9, 1933; reappointed October 9, 1938; extended active duty, April 14, 1941.

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

In the opinion of the Board of Review, the record of trial is not legally sufficient to support the findings of guilty of Specifications 1, 2, 3 and 9 of the Charge; legally sufficient to support only so much of the findings of guilty of the Charge and Specifications 4, 5, 6 and 7 of the Charge as involve findings of guilty, in violation of Article of War 96; legally sufficient to support the finding of guilty of Specification 8 of the Charge, and of the Charge, and the sentence, and warrants confirmation of the sentence. Dismissal is mandatory upon conviction of violation of the 95th Article of War, and is authorized upon conviction of violation of the 96th Article of War.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General
Washington, D. C.

SPJGK
CM 220643

APR 14 1942

UNITED STATES v. Second Lieutenant REX B. KNIGHT (O-450314), Infantry.	NINTH CORPS AREA Trial by G. C. M., convened at Fort Mason, California, February 24, 1942. Dismissal.

OPINION of the BOARD OF REVIEW
HOOVER, VAN BENSCHOTEN and KOTRICH, Judge Advocates.

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: In that Second Lieutenant Rex B. Knight, Infantry, Army of the United States, was at San Francisco, California, on or about January 9, 1942, in a public place, to wit: Pampas Club, 333 O'Farrell Street, San Francisco, California, drunk and disorderly while in uniform.

Specification 2: In that Second Lieutenant Rex B. Knight, Infantry, Army of the United States, at San Francisco, California, on or about January 9, 1942, in a public place, to wit: Pampas Club, 333 O'Farrell Street, San Francisco, California, did willfully and unlawfully discharge a service pistol.

He pleaded not guilty to and was found guilty of the Charge and Specifications. He was sentenced to be "dismissed from the service". The reviewing authority took action worded as follows: "the sentence is approved but the execution thereof is suspended to await the pleasure of the President under and pursuant to A. W. 51".

3. The evidence may be summarized as follows:

The accused, recently commissioned, arrived at Fort Mason, California, about December 1, 1941, on his way to service in the Philippine Islands, and remained at Fort Mason as a casual officer when the war broke out (R. 95). On January 8 and 9, 1942, he was living at the Richelieu Hotel in San Francisco, California, without duty other than to be on the post at Fort Mason daily between the hours of 9 a.m., and 4:30 p.m. (R. 97). At about 5 p.m., January 8, a young lady took him to her home as a dinner guest, following which she and accused went to a show (R. 100). Accused left the lady at her home at about 11 p.m. (R. 101). With her permission he retained possession of her automobile (R. 100). At about 2 a.m., January 9, he went in the car to the vicinity of the Pampas Club, a "tavern" or night club at 333 O'Farrell Street, San Francisco (R. 13, 39). He was in uniform (R. 23, 44). He demanded admission to the Pampas Club for the purpose of getting a "drink" (R. 14). Admission was refused with the statements that it "was after hours" (R. 59) and that liquor was not sold to men in uniform after 10 p.m. Accused insisted on his admission and threatened that if he were not admitted he would get a "squad of men and raid your place" (R. 14). He did not gain admission and left in the automobile, driving at a high speed, but returned in about ten minutes and parked the car across the street. He then ran to the entrance of the tavern, wearing a belt, holster and "45" pistol. As he approached he drew the pistol, "pumped a shell" into the chamber, and demanded that the door be opened. The doorman and one of the proprietors of the tavern were at the door (R. 40, 65). Accused pressed the pistol against the doorman's abdomen and said, "If you don't open the door I will blow a hole through you". The door was opened and accused "forced" the proprietor and the doorman into the tavern ahead of him. Inside, pointing the pistol at them, he "forced" these two men, another proprietor and some customers "against the bar" (R. 16, 40). A city police inspector in plain clothes appeared at about this time, showed his badge to accused and attempted to quiet him, but accused thrust the pistol against the inspector's "stomach", threatened him and ordered him to "line up" at the bar with the others (R. 41, 52). Some of the customers, ladies, left the room (R. 29). Exclaiming, "you think I am fooling", accused fired his pistol "in the air" (R. 62), the bullet striking a wall near the ceiling of the room (R. 42, 62). Shortly thereafter accused started to return the pistol to the holster (R. 52). At this time military police, called by one of the proprietors (R. 17), seized accused and after some resistance secured the pistol. Accused ceased his resistance as soon, apparently,

as he recognized the military police (R. 19, 20, 43, 53, 63). One of the proprietors of the Pampas Club and the doorman, who saw accused at the time, testified that he was not armed when he first sought admission (R. 23, 48). The two proprietors and the police inspector testified that during the occurrences described accused appeared to be drunk (R. 20, 55, 64). The doorman testified that accused "didn't stagger any too much" but had the odor of liquor on his breath and appeared to be under the influence of liquor (R. 44, 46). One proprietor testified that accused's face was flushed (R. 23) and that he seemed to be "crazy drunk" (R. 21). A chief petty officer of the Navy was in the tavern during the disturbance (R. 29). After his seizure by the military police, "some time after 2" a.m., accused was taken to an office of the military police at the Presidio of San Francisco. After having been required to walk "a line" and after having been observed by an officer in charge, he was permitted to leave in the automobile for the purpose of returning to his hotel. At this time a bruise or scratch on accused's cheek was observed (R. 68, 117-120).

The defense introduced evidence that on January 7, 1942, the third of a series of three doses of triple typhoid vaccine was administered to accused (Def. Ex. A), and that on January 8, 1942, yellow fever vaccine was administered to him (Def. Ex. B).

Accused testified that at about 6 p.m., January 8, before dinner at the home to which he had been invited, he had one Martini cocktail (R. 81). He did not have anything more to drink until about 10 p.m. (R. 82), at which time he went to a bar in San Francisco called the "Rainbow Room" (R. 101). At this place, between 10 and 12, he drank two Scotch whiskies, of ordinary size, with soda (R. 82, 103). Upon leaving the bar he drove about the streets for f fteen or twenty minutes. Upon passing the Pampas Club he noticed a man entering who appeared to be a chief petty officer of the Navy. It occurred to accused that he should "investigate the place, to find out what they were doing, if there were any sailors in the place, and if they were serving drinks at that particular time of the morning". He accordingly parked his car and went to the Pampas Club (R. 82). The doorman, with whom accused was acquainted, permitted him to enter by a side door (R. 83). Within the tavern he observed a group of people, some of whom were talking loudly and in an argumentative manner. Some of them became engaged in "a fracas or a fight". Two of them, after watching accused, started toward him. Accused retreated but

one of the men attempted to strike him. In self-defense accused struck back, knocking one man down and knocking the other to a sitting position. Accused drew his pistol and one of the proprietors of the tavern asked him to put it away. Other men of the group continued to press toward accused, however, and he turned from them and fired the pistol, taking care that no one would be injured. The police inspector addressed him but accused was not satisfied as to his authority so told him to go back to the bar and stay there. The group of disorderly persons disappeared after the shot was fired, some going to the vicinity of the bar (R. 83-86, 95). Accused realized that he "had done something that wasn't very becoming to an officer" (R. 87) and returned the pistol to the holster. He then engaged in conversation with the "sailor" and at that point was seized from behind. As soon as he knew that the military police were intervening he ceased resistance (R. 87, 88). His memory was very clear as to the events leading up to his arrival at the Pampas Club and as to the events following his departure (R. 105, 106, 114). He also believed that his memory was clear as to the events within the club (R. 115). He wore the pistol and belt when he went with the young lady for dinner at her home. He removed the pistol at her home but "put it back on" when he left. He later removed the pistol and left it in the car while he went to the show but on his return to the car again put it on and wore it when he went into the Rainbow Room (R. 116, 117). Upon being asked why he had worn the pistol to dinner and to the bar he testified as follows:

> "What else was I to do with it? I couldn't leave it back at the hotel; I didn't go back by the hotel, and I either had to go by the hotel and leave it there, or leave it out here (Fort Mason), which would have left it open to theft by most any one at either place, and I usually wore it between the hotel and here when I was on duty here, and then proceed back to the hotel and take it off and put it away in the evening before I would go out."

He did not have an opportunity to go to the hotel before going to dinner (R. 107). In December, 1940, following administration of a series of typhoid inoculations, accused developed a fever and went to bed. While in bed he drank some whisky. About forty-five minutes later he became violent and was forcibly restrained by other men (R. 94).

Two medical officers testified for the defense that typhoid and yellow fever inoculations sometimes bring about high fever and delirium (R. 131, 132, 150), and that mental delusions may result in either case or may follow administration of both inoculations within a short period (R. 132, 151). In response to hypothetical questions based on the evidence in this case, one of the medical officers testified that it was possible that at the time of the occurrences described accused was suffering from delusions (R. 139, 140). This witness also testified, however, that a delusion of this kind would "be a constant thing" (R. 143) which would gradually develop and more gradually recede (R. 144). He also testified that reactions from yellow fever inoculations usually appear on the fifth day following the injection (R. 13, 147). The other medical officer testified that he had observed patients who had recovered from a "peak of delusion" within an hour (R. 152).

4. The evidence, including the testimony of accused, thus shows that at the place and time alleged in the Specifications accused was disorderly while in uniform and that he willfully and unlawfully discharged a service pistol. The defense contended that accused was not drunk but was suffering from a mental disturbance attributable to inoculations. It is conceded that accused drank an appreciable amount of intoxicating liquor during the evening preceding his disorderly conduct, and upon all the evidence the Board of Review has no doubt that accused was in fact drunk and that his disorderly behavior was the result of his drunkenness. He was in uniform. His actions were of such indecorous and violent character that they must be characterized as conduct unbecoming an officer and a gentleman within the meaning of Article of War 95.

5. During the examination of a witness for the defense the court sustained an objection by the prosecution to a question calling for the witness' testimony as to the reputation of accused for "truth, honesty and integrity" (R. 125, 126). Accused had already testified in contradiction of some of the evidence for the prosecution. No attempt at his impeachment had been made.

The action of the court was proper. The proffered testimony was designed to bolster accused as a witness. The rule for courts-martial is that evidence favorable to the general reputation of a

witness for truth and veracity may not be introduced unless he is impeached, and that mere contradiction of his testimony does not constitute impeachment for this purpose (CM 201997, Mellon; CM 202940, Riggs; CM 203036, Gemeke). Paragraph 124b of the Manual for Courts-Martial provides that after impeaching evidence has been introduced, evidence that a witness' reputation for truth and veracity is good may be used in rebuttal.

Evidence of the good character of an accused is always admissible if pertinent to the issue of guilt or innocence. As stated in paragraph 112b, Manual for Courts-Martial,

> "*** The accused may introduce evidence of his own good character, including evidence of his military record and standing in order to show the probability of his innocence, and if he does so the prosecution may introduce evidence in rebuttal.
>
> "If the accused takes the stand as a witness, his reputation for truth and veracity may be shown. See 124 (Impeachment)."

But the evidence here offered as to accused's reputation for truth, honesty and integrity had no bearing upon the probability of his innocence. The broad authority given to an accused to introduce evidence of his own good character to establish his innocence does not embrace authority to bolster his credibility when he becomes a witness. The provision of the Manual above quoted to the effect that reputation for truth and veracity of an accused may be shown if he takes the stand as a witness contains an express reference to the rules of impeachment elsewhere appearing in the Manual and does not give an accused any exceptional status with respect to proof of his reputation for truth and veracity. Paragraph 120d of the Manual provides in this connection that:

> "*** Upon taking the stand as a witness he (an accused) occupies no exceptional status. The same rules as to the admissibility of evidence, privilege of the witness, impeaching of his credit, etc., will apply to him as to any other witness."

6. The reviewing authority, in his action upon the record, erred in attempting under Article of War 51 to suspend the execution of the

sentence to dismissal. As the reviewing authority and as Corps Area commander he was without authority to confirm the sentence or order its execution under Article of War 48 (par. 88, M.C.M.). Only an authority competent under Article of War 48 to order the execution of a sentence to dismissal of an officer may take action under Article of War 51. The action of the reviewing authority, however, suggests a conviction on his part that the sentence to dismissal should be suspended. The record of trial has been treated as if it had been properly forwarded for action by the President under Article of War 48.

7. War Department records show that accused was 28 years of age at the time of the commission of the offenses. He entered upon active duty as a second lieutenant of Infantry following his graduation from the Officers' Candidate School on November 7, 1941.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. 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 mandatory upon conviction of violation of Article of War 95.

, Judge Advocate.

Judge Advocate.

, Judge Advocate.

1st Ind.

War Department, J.A.G.O., APR 14 1942 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Rex B. Knight (0-450314), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence. The disorderly conduct of accused was highly indecorous but insofar as appears it was an isolated occurrence and did not demonstrate incapacity for future valuable service to the Army. The Commanding General, 32nd Division, has informally recommended that the sentence to dismissal be suspended or commuted in order that the officer concerned may be available for field service with that division. The reviewing authority in his action upon the record of trial indicated his conviction that the dismissal should be suspended. I recommend that the sentence be confirmed but that the execution thereof be suspended.

3. Inclosed are the draft of a letter for your signature transmitting the record to the President for his action, and a form of Executive action designed to confirm the sentence but suspend the execution thereof.

Myron C. Cramer

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

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

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General.
Washington, D.C.

PJGH
M 220672

JUN 4 1942

UNITED STATES v. Lieutenant Colonel WILBUR ERICKSON (0-17380), Air Corps.	GULF COAST AIR CORPS TRAINING CENTER Trial by G.C.M., convened at Randolph Field, Texas, February 19 and 20, 1942. Dismissal.

OPINION of the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates.

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: In that Lieutenant Colonel (then Major) Wilbur Erickson, Air Corps, having received a lawful command from Lieutenant Colonel (then Major) Frederick W. Ott, Air Corps, his superior officer who was then in the execution of his office, to refrain from "hedge-hopping", did, while enroute by plane from El Paso, Texas, to Lordsburg, New Mexico, on or about January 26, 1942, wilfully disobey the same.

Specification 2: In that Lieutenant Colonel (then Major) Wilbur Erickson, Air Corps, was, at Lordsburg, New Mexico, on or about January 26, 1942, found drunk while on duty as pilot and flight commander.

Specification 3: In that Lieutenant Colonel (then Major) Wilbur Erickson, Air Corps, was, at Randolph Field, Texas, on or about December 18th, 1941, found drunk while on duty as squadron commander.

Specification 4: In that Lieutenant Colonel (then Major) Wilbur Erickson, Air Corps, did, at Randolph Field, Texas, on or about December 18th, 1941, abuse the perquisites of his rank by behaving boisterously and obstreperously in the presence of enlisted men and civilian employees of the United States.

The motion of defense to strike figures "95" and substitute "96" in the Charge was denied. The accused pleaded not guilty to the Charge and all Specifications. He was found guilty of all Specifications. He was found guilty of the Charge with respect to Specifications 2 and 4. He was found not guilty of the Charge but guilty of violation of the 96th Article of War with respect to Specifications 1 and 3. He was sentenced "to be dismissed the military service". The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. Of the four specifications, two relate to offenses alleged to have occurred on December 18, 1941, and two on January 26, 1942.

4. a. The testimony for the prosecution upon Specifications 3 and 4 is substantially as follows:

At about 2:30 or 3 p.m., December 18, 1941, Staff Sergeant George Mundy by telephone called accused, who was then present for duty as Squadron Commander, 47th School Squadron, Air Corps, Randolph Field, Texas, and asked him, by direction of the Commanding Officer, to come down to the Personnel Office to pick up a classification board form and arrange for an appointment at a convenient time. At request of accused Sergeant Mundy read three questions. Accused replied that they had all of that information and asked to talk to the "boss" (R. 126-127). Technical Sergeant J. Y. Kinsall (Ex. 11) and First Lieutenant William F. Schreiner, Air Corps, Personnel Officer, successively talked to accused. Lieutenant Schreiner asked accused to come over and fill out the

classification form which he stated was required of all officers of the Regular Army (R. 135).

Shortly thereafter accused entered the Personnel Office with a three-foot stick like the sawed-off handle of a broom and said "Rest", came to Sergeant Kinsall's desk and remarked that he had just killed a negro (R. 127, 133; Ex. 11). Lieutenant Schreiner came over, explained the purpose of the form and asked the accused to fill it out (R. 134). Accused said that he had already filled out it and a lot of other "damn forms" that were not doing anyone any good, that he had something else to do besides fill out forms for Headquarters, that all the information was in the Army Register, and directed Sergeant Kinsall to go get a copy (Ex. 11). When Sergeant Kinsall returned, Lieutenant Schreiner told him he could go, but accused told him to sit down and fill out the form for the accused. Accused had told Sergeant Kinsall, "Christ, why don't you use your initiative?" (R. 141). As accused was talking in a boisterous voice and had been drinking, Lieutenant Schreiner left for the Provost Marshal's office to have accused taken out of Post Headquarters to save embarrassment because ladies and soldiers were present.

Lieutenant Colonel Frank W. Ott, Air Corps, heard accused talking loudly and arguing with a noncommissioned officer about filling out a form. Colonel Ott walked over and tried to calm down accused but was unsuccessful. The tone and manner of accused were bellicose, his voice very loud, his remarks ill-timed and not quite appropriate, and his manner was conspicuously disorderly (R. 146-148).

A stenographer, Miss Morris, and the Chief Clerk were working on an involved radiogram at a desk near accused, had to quit work and sit there because accused was so oisterous and talked very loud. Accused was very rude to the officer and the noncommissioned officers. Accused said to Lieutenant Schreiner in a very loud voice, "Christ why don't you use your initiative" (R. 150-152).

First Lieutenant Frank E. Rowe, Air Corps, Adjutant, Randolph Field, at direction of Provost Marshal, went down to the Personnel Office and found accused in a very pugnacious, demanding, and rather boisterous attitude toward Lieutenant Schreiner and the noncommissioned officers, which was not in keeping with the time and place. The last thing accused said to Lieutenant Schreiner was not to have a soldier call him and give him an order in the future. Lieutenant Rowe asked accused to go upstairs with him. When they were outside, Lieutenant Rowe directed accused to go home and stay

there until further orders and told accused that his actions were not in keeping with his rank. Accused then asked if the situation could be taken care of. Lieutenant Rowe explained to the Commanding Officer what had happened without mentioning the name of accused. The Commanding Officer guessed who the offender was, and directed Lieutenant Rowe to send accused to the hospital for physical examination (R. 142-144).

The result of the examination of accused as to his sobriety by Major Paul C. Gilliland, M.C., Post Surgeon, was stated in his report to the Commanding Officer, Randolph Field, as follows:

> "1. Major Wilbur Erickson was examined at 3:30 P.M. December 18, 1941, with the following findings:
> (1) Well oriented as to time, place and person. Mentally clear.
> (2) Muscular coordinations; pass pointing, self balancing test, Romberg, etc., were good but all tests performed very deliberately.
> (3) There was a slight impediment of speech (this may be normal with this officer).
> (4) Pupils were moderately dilated. There was a slight, fine tremor of fingers.
> (5) Pulse 100/min; blood pressure 150/78.
> (6) Test for alcoholic content of blood showed 2.5 Mg. per c.c.
> 2. These findings are diagnostic of slight alcoholic intoxication." (Ex. 12)

Starting the scale with the least degree of intoxication which can be detected and ending with complete loss of possession of physical and mental capacities, it was Major Gilliland's opinion that accused showed the smallest amount of detectable evidence of intoxication. He stated that his findings might have been caused by many things, but in view of the fact that the blood showed an alcoholic content of 2.5 Mg. per c.c. it was his professional opinion that his condition was due to alcohol (R. 152-155).

Colonel Ott stated that accused was slightly unsteady but not staggering, and had a slight thickening of speech. In his opinion the accused was under the influence of liquor to the extent that he had lost his judgment of the proprieties of the situation (R. 148). Lieutenant Schreiner expressed the opinion that accused

was drinking to the extent that he was talking in a boisterous voice, that his breath smelled of liquor, but that he was not drunk and that his conduct was boisterous and obstreperous due to drinking (R. 136-140). Lieutenant Rowe, from his own observation and from conversation with accused, was of the opinion that accused was slightly under the influence of intoxicating liquor, but was not necessarily drunk, and that accused was sufficiently under the influence of intoxicants to influence his normal and physical reactions and to make them perhaps different from their normal reactions, but would not say whether it would impair them (R. 145-146). Staff Sergeant Mundy was of the opinion, from his loud and unreasonable tone of voice, his belligerent manner toward Sergeant Kinsall, that accused was under the influence of liquor (R. 128-129). Technical Sergeant Kinsall formed the opinion that accused was intoxicated (Ex. 11). Miss Morris was of the opinion that accused was either intoxicated or was insanely angry (R. 152).

b. The defense presented no testimony upon these specifications. The accused elected to remain silent.

5. a. The testimony for the prosecution upon Specifications 1 and 2 is substantially as follows:

Lieutenant Colonel Frederick A. Ott, Air Corps - then Major - was on January 21, 1942, directed to proceed as officer in charge with a number of officers, including accused, by rail to Sikeston, Missouri, to secure certain airplanes and ferry them to Hemet, California (Ex. 1). The party left Randolph Field on January 22, 1942, and arrived at Sikeston, January 23, 1942. The flight left Sikeston January 24, 1942, with twenty-five airplanes divided into two sections. Colonel Ott led group I and flight A of that group. The accused led flight B of group I. Flight A and B each had six ships (R. 13-15; Exs. 1, 2).

The airplanes arrived at Wink, Texas, at 12:45 January 25, 1942. About thirty minutes before arrival, Colonel Ott had observed plane No. 33, piloted by the accused, flying along the road, and saw a car come along, slow down and pull off to the side of the road because the plane was flying along the road (R. 17). After all of the engines were stopped and it was quiet, Colonel Ott hollered as loud as he could across to accused, who was getting out of his airplane about fifty feet away, "Erick, cut out that hedgehopping". That statement was given as an emphatic order. Colonel Ott thought that

he had secured the attention of accused who was looking in the general direction of Ott, and that accused had heard and understood the order, but could not be certain, because the accused did not answer (R. 16-17, 39, 52-54). The accused said to Captain Lawerence F. Taber, A.C., and another officer after the planes had refueled at Wink preparatory to taking off for Biggs Field, El Paso, Texas, "I had better be good from now on because Fred [Ott] didn't like what I had been doing back there" (R. 105-106). The flight landed at El Paso, Texas, on the afternoon of January 25 (R. 55).

On the morning of January 26, 1942, Lieutenant Colonel Richard Montgomery sat beside accused at breakfast in the Post Exchange Restaurant, Biggs Field, El Paso, Texas. The accused was not normal, was talking more than usual, repeated his words and phrases two or three times, his eyes were not normal and a little glassy, and had the odor of alcohol on his breath. In Colonel Montgomery's opinion the accused had been drinking and was not in the full possession of his faculties. He had no doubt that accused could probably get his plane off the ground, and considered it would be "pretty hard" to make a statement that accused was not fit to fly a plane that morning, because he did not see accused walk, or handle himself, or get into his ship. He did caution a junior officer not to fly too close to accused (R. 56, 61-63).

At about 8:30 a.m., after Colonel Ott had gotten clearance and take-off instructions from Biggs Field, El Paso, and was waiting for one of his men, the accused, contrary to previous instructions, pulled out and took off with the three planes of his element ahead of Colonel Ott, and at right angles to the tower instructions. When Colonel Ott taxied out with the rest of the flight, accused with his two wing men dove at the field and went across the field before pulling up (R. 19). The wheels of the plane of accused were within five or ten feet of some of the planes (R. 41, 74). The ship of accused circled and then "zoomed" across the field about twenty feet off the ground (R. 75). Upon a third pass at the field accused flew down to 15 feet (R. 107).

Some time after leaving El Paso, Colonel Ott saw the airplane piloted by accused flying right under the tail of his plane. He pulled up and motioned accused away. Accused attempted to get on his tail and it was only by rather violent maneuvering that Ott was finally able to shake the accused (R. 21). Other

members of the flight saw accused flying alone directly behind Colonel Ott's ship very definitely in the propellor wash for twenty or twenty-five minutes (R. 59, 75, 84-85, 108-109). When the accused left his position behind Colonel Ott, he came under, behind, and in the propellor wash of the ship of Captain Roy P. Ward who maneuvered three times and was finally able to get away from accused (R. 86).

Between El Paso, Texas, and Lordsburg, New Mexico, Colonel Ott at one point saw accused head down for a lone ranch house and windmill with his wheels within five or ten feet of the ground, and then pull up and pass directly over the house (R. 21). The hedgehopping of accused between those points was, in the opinion of Colonel Ott, not only dangerous and in violation of regulations, but such as to bring discredit upon the Air Corps when accused jazzed the house (R. 21, 43). Lieutenant Colonel Richard M. Montgomery saw a ship, which he believed to be that of accused, drop to a very low position, fly down very close to the ground, around fifty feet or possibly lower, and considered the ship was hedgehopping (R. 59, 66-67). After accused dropped out of the propellor wash, Major John K. Brown, Jr., saw him flying across the desert at a low altitude and hedgehopping. When an obstacle appeared, accused would turn off and fly very close to it. The accused was flying dangerously, and as close as 15 or 20 feet to the ground (R. 75-76, 79). After Captain Ward had shaken the ship of accused from his tail, he saw accused fly fairly low to the valley floor and hedgehop at an estimated level under 75 feet (R. 87). Captain Taber observed accused hedgehopping to within ten or fifteen feet of the ground (R. 108).

Upon arrival at Lordsburg at 10:10, January 26, 1942, Colonel Ott wrote a note notifying accused that he intended, upon their return, to inform the Commanding Officer, Randolph Field, of the breach by accused of flying regulations, and his violation of Colonel Ott's direct instructions at Wink, and to request disciplinary action for violation of those instructions. Colonel Ott showed the note to Majors Montgomery and Brown and to Captain Ward, and in their presence handed the note to accused saying, "Here, I am through talking with you" (R. 22-23, 88-89).

After the servicing of the planes was under way, Colonel Ott noticed a strong odor of liquor emanating from the accused, seven feet away. Colonel Ott then noted a slight thickening of the speech of accused, difficulty in pronouncing the word "incomprehensive" and a very slight unsteadiness. He concluded that accused was under the influence of liquor and arranged for a Dr.

Johnson to come out and examine the accused. Prior to the arrival of Dr. Johnson at eleven o'clock, Colonel Ott saw accused visit the baggage compartment of his plane twice (R. 23-24).

Dr. Ross W. Johnson found accused sitting on a wheel of his plane with head in his hands. When accused asked what it was all about, Colonel Ott told him that Dr. Johnson was going to examine him to determine if he was drunk. Accused then said "Fred don't do anything foolish about this." The breath of accused smelled of alcohol. When Dr. Johnson told accused to put heels and toes together and close his eyes, accused fell against the airplane. Accused then said he could do it easy and put his back against the plane so that he could not move. When Dr. Johnson told accused to close eyes, put hands out full length and then touch his nose with his hands, accused could not do so directly, but wavered and hesitated before he did so. The breath of accused smelled of alcohol, his hands and face were flushed and a little purplish colored. From observation and examination, Dr. Johnson formed the opinion that accused was drunk and not competent to operate an airplane at that time (Ex. 8).

While moving to shut off the gas on the plane of accused, Colonel Ott saw in the open baggage compartment of the plane in the pocket of the short overcoat of accused, a bottle of Four Roses whiskey, about two-thirds full. Dr. Johnson tasted some of the liquid from the bottle and found it to be whiskey. The bottle was sealed and was received in evidence as Exhibit 3. A statement signed by Dr. Johnson to the effect that he had examined accused and found accused under the influence of liquor, was received in evidence as Exhibit 6 (R. 26-27; Ex. 8).

Colonel Ott then handed accused a note to the effect that Dr. Johnson had informed him that accused was under the influence of liquor and not in condition to fly, and directing accused to remain in Lordsburg until accused received instructions from the Commanding Officer, Randolph Field. Colonel Ott telegraphed the Commanding Officer, Randolph Field, that he had grounded accused because of intoxication and was leaving accused at Lordsburg to await instructions (R. 26-27; Exs. 4, 5).

Lieutenant Colonel Montgomery based his opinion that accused was under the influence of intoxicating liquor, of alcohol, not in the full possession of his faculties, and unfit to fly his ship, upon the manner in which accused flew his ship between El Paso and Lordsburg and his actions on the ground at Lordsburg (R. 60-63).

Major Brown based his opinion that accused was drunk after landing at Lordsburg upon the facts that accused was not steady on his feet, took stiff-legged steps in contrast with his normal brisk stride, his pronounciation of words, his directions about gassing plane were not normal and that his breath smelled very strongly of liquor (R. 76-80).

Captain Ward, from observation of the actions of accused on the field at Lordsburg, and his incoherent speech at the hotel, expressed the opinion that accused was grossly drunk (R. 81-100).

Captain Taber thought that accused was under the influence of intoxicating liquor, that he had lost the faculty of good judgment and ability to act normally, and acted in an unnecessarily boisterous manner in directing the movement and gassing of the plane (R. 109-112).

First Lieutenant Sam W. Graham, A.C., could not say that accused was drunk, but in his opinion the accused was sufficiently under the influence of alcohol to render his flying dangerous (R. 122-123).

Mr. Lewis B. Robinson, manager of the Lordsburg airport, formed the opinion that accused was drinking and under the influence of intoxicants from his breath and from the manner in which accused gave commands to him. As a layman he considered that accused was not in condition to fly a plane (Ex. 7).

b. The testimony for the defense upon Specifications 1 and 2 is substantially as follows:

The accused elected to remain silent (R. 167). First Lieutenant James R. Williams, A.C., saw accused, after landing at Lordsburg, leading and directing work in pushing plane up to be gassed. Until someone made a remark, he had noticed nothing unusual in the actions of the accused (R. 157-160).

Second Lieutenant Maurice Rosener, A.C., slept in the same room with accused in hotel at El Paso. The accused was then perfectly normal. At Lordsburg the accused was in charge of gassing the planes and his actions were normal as far as Rosener could see. Rosener was not close enough to accused at Lordsburg to smell his breath (R. 161-163).

Patrol Inspector Orfa T. Mann, United States Immigration and Naturalization Service, Lordsburg, New Mexico, came out to the airport just before accused was being taken to town. The accused appeared perfectly normal and in control of his faculties, although Mann had been led to expect otherwise from "the talk". Mann next saw accused at the airport when planes took off and left accused behind. Accused was then perfectly normal except that he was perturbed at being left behind. Mann did not notice anything about accused to lead him to think accused was under the influence of liquor. In his opinion accused had complete control of his faculties and was not drunk (Def. Ex. 1).

Patrol Inspector Clifton M. Monroe, of the same service, came out to the airport about noon, observed actions of accused and heard him talk. From those observations and the statements of other officers, his opinion at the time was that accused was under the influence of liquor, but at the present time he has no opinion whether accused was under the influence of liquor. He observed accused from 30 to 45 minutes when the planes were taking off, and the actions of accused were normal and accused seemed to be in full possession of his faculties (Def. Ex. 2).

The defense submitted a file of photostat copies of efficiency reports (Def. Ex. 3), a true copy of cumulative individual flight records of accused on War Department Form No. 5 (Def. Ex. 4), and a certificate of Colonel William E. Lynd, A.C., as to character, and his efficiency rating of accused (Def. Ex. 5).

6. The undisputed evidence with respect to Specification 3 shows that accused, on duty as squadron commander at Randolph Field, Texas, on December 18, 1942, was found drunk when, by direction of the Commanding Officer, Randolph Field, he reported to the Personnel Office in connection with the filling out of a classification board form.

While the degree of drunkenness was slight, the evidence shows that accused was drunk within the definition that "any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties is drunkenness within the meaning" of the 85th Article of War (p. 160, M.C.M., 1928). The Post Surgeon, upon his examination of accused, found that accused had the smallest amount of detectable evidence of intoxication, which condition in his opinion was due to alcohol in view of an alcoholic content of 2.5 Mg. per c.c. of the blood of accused.

In the opinion of the Board, the evidence supports the finding of guilty of Specification 3, in violation of Article of War 96.

7. With respect to Specification 4, the evidence likewise undisputed shows, as alleged, that the conduct of accused in the Personnel Office was boisterous and obstreperous in the presence of the officer, enlisted, and civilian personnel of that office. The accused entered the office with a three-foot stick, made unreasonable demands upon the noncommissioned personnel, talked loudly, made inappropriate remarks in a pugnacious manner, and embarrassed all present by his conduct.

Winthrop defines the conduct contemplated by the 95th Article of War in an official capacity, as action or behavior which in dishonoring or disgracing the individual as an officer, seriously compromises his character and standing as a gentleman (Winthrop's Military Law and Precedents, 2nd Ed., p. 213).

Although one witness replied in the affirmative to a leading question whether the manner of the accused was conspicuously disorderly, the conduct of accused as shown by the entire testimony fails to support that conclusion or to fall within any of the examples cited by Winthrop as conduct of a serious nature inhibited by the 95th Article of War.

In the opinion of the Board of Review, the evidence supports only a finding of guilty of Specification 4 in violation of Article of War 96.

8. With respect to Specification 1, the evidence shows that on January 25, 1942, upon landing at Wink, Texas, Colonel Ott, the Commanding Officer of the flight, ordered accused to "cut out that hedgehopping". The evidence also shows that while enroute from El Paso to Lordsburg, New Mexico, on January 26, 1942, the accused was seen to hedgehop by Colonel Ott, Lieutenant Colonel Montgomery, Major Brown, and Captain Ward. In doing so he flew down to within seventy-five, fifty, twenty, and ten feet of the ground, headed for a house, windmill or an obstacle and pulled up to pass over them. That flying was in violation of regulations, dangerous and such as to bring discredit upon the Air Corps. Upon landing at Lordsburg, Colonel Ott handed accused a note saying that he intended upon return, to inform the Commanding Officer, Randolph

Field, of the breach by accused of flying regulations and of Colonel Ott's direct instructions given at Wink.

In the opinion of the Board of Review, the evidence supports the finding of guilty of Specification 1, in violation of Article of War 96.

9. With respect to Specification 2, the evidence shows that he was, on January 26, 1942, on duty as a pilot and flight commander of flight B of group I, ferrying planes on that day from El Paso, Texas, to Lordsburg, New Mexico. At breakfast that morning accused was not normal and had the odor of alcohol on his breath. In leaving the field accused took off ahead of the flight leader, Colonel Ott, at right angles to the tower instructions and then flew three times over the field within ten, fifteen, and twenty feet of the planes on the ground. During the flight accused was on the tail and in the propellor wash of the ships of Colonel Ott and Captain Ward, who had to maneuver violently to shake the accused.

Upon landing at Lordsburg accused was slightly unsteady, had a slight thickening and incoherence in his speech and a strong odor of liquor. A doctor whom Colonel Ott called from Lordsburg examined the accused, put him through several tests, and expressed the opinion that the accused was drunk and not competent to operate an airplane. Colonel Ott found in the baggage compartment of the plane - which accused had twice visited while waiting for the doctor - a bottle of whiskey about two-thirds full. Lieutenant Colonel Montgomery, Major Brown, Captains Ward and Taber, and the manager of the airport, expressed an opinion based upon the manner in which accused flew his ship between El Paso and Lordsburg and his conduct on the field at Lordsburg, that accused was drunk or under the influence of intoxicating liquor to the extent that he was not normal, not in full possession of his faculties, and unfit to fly his ship. Colonel Ott telegraphed the Commanding Officer that he had grounded accused because of intoxication and was leaving accused in Lordsburg to await instructions.

In the case of Cadet Mini (CM 197378), in which the Board of Review discussed at length the meaning of "conduct unbecoming an officer and a gentleman", as denounced by the 95th Article of War, particularly in its application to offenses involving drunkenness,

the Board said:

> "From the authorities quoted above, it appears that to constitute a violation of the 95th Article of War the conduct must be such as to show moral turpitude on the part of the officer or cadet concerned, of a nature to stamp him as morally unfit to hold a commission and one with whom his brother officers or cadets cannot associate without loss of self-respect. Acts prosecuted and punished as violations of this Article are, as a rule, of a clearly dishonorable character, such as acts of fraud or dishonesty, knowingly making a false official statement, opening and reading another's letters without authority, giving worthless checks, and the like. The Manual for Courts-Martial (par. 151), however, mentions among instances of violation of this Article 'being grossly drunk and conspicuously disorderly in a public place'; and Colonel Winthrop cites 'drunkenness of a gross character committed in the presence of military inferiors or characterized by some peculiarly shameful conduct or disgraceful exhibition of himself by the accused', as an example of conduct unbecoming an officer and a gentleman (Reprint, page 717)."

The evidence upon this specification shows clearly that the accused was under the influence of intoxicating liquor while on duty, that his intoxication was "sufficient sensibly to impair the rational and full exercise of the mental faculties" and constituted drunkenness within the meaning of the 85th Article of War. The degree of drunkenness shown does not, however, approach a degree which could be characterized as gross, and cognizable under Article of War 95. The available proof should have indicated the propriety of charging and of referring for trial this Specification as a violation of the 85th instead of the 95th Article of War.

In the opinion of the Board of Review the record fails to show under Specification 2 such a degree of drunkenness as to constitute a violation of the 95th Article of War but does show a violation of the 96th Article of War.

10. A brief from defense counsel to the Commanding General,

Gulf Coast Air Corps Training Center, Randolph Field, accompanies the record, and bears seven inclosures:

(1) Statement by accused reciting two family matters which "have given me much worry on account of which I did at times drink alcoholic liquor to excess" and closing with the statement "I will not touch alcoholic liquor again".

(2) Certificate of Colonel J. A. Bethea, M.C., as to physical condition of wife of accused.

(3) Letter from Medical Superintendent, Norwalk State Hospital, Norwalk, California, as to mental condition of sister of accused.

(4) Letter from Lieutenant Colonel R.M.Montgomery, A.C., a prosecution witness, requesting clemency for accused.

(5) Letter from Major James A. Healy, A.C., Administrative Inspector, Randolph Field, requesting clemency for accused.

(6) Letter from Captain R. P. Ward, A.C., a prosecution witness, requesting clemency for accused.

(7) Telegram of Colonel Snavely as to character and ability of accused.

The defense counsel also submitted individual clemency recommendations from four of eight members of the court. One recommendation was based upon the evidence adduced at the trial, the statement submitted by accused after the trial, upon the Army record of accused, and upon his definite value to the service; of the second upon additional evidence adduced subsequent to the trial showing stresses to which accused was subjected; the third upon certain facts concerning personal problems of accused which came to the member's attention since the trial; and the fourth for no stated reason. In connection with the reasons for clemency stated by those members it should be noted that the accused at his trial elected to remain silent.

Since the receipt of the record in this office a fifth member of the court has submitted a recommendation for clemency

on the ground that while accused might be unreliable in times of stress, with proper control, accused could become a very valuable member of the Air Force.

11. The accused is 39 years of age. The Army Register, 1942, shows his service as follows:

"2 lt. Air-Res. 28 Feb. 27; accepted 28 Feb. 27; active duty 1 May 27 to 30 June 27 and from 1 July 28 to 22 Feb. 29. - Flying cadet A.C. 2 Mar. 26 to 28 Feb. 27; 2 lt. A.C. 2 Feb. 29; accepted 23 Feb. 29; 1 lt. 1 Oct. 34; capt. (temp.) 20 Apr. 35 to 16 June 36; capt. 2 Feb. 39; maj. (temp.) 1 Feb. 41; accepted 1 Feb. 41."

The records of the Office of The Adjutant General show in addition:

"Appointed Lieutenant Colonel (Temp.) 5 January 1942."

12. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of the Specifications of the Charge, legally sufficient to support only so much of the findings of guilty of the Charge as finds the accused guilty of violation of the 96th Article of War, legally sufficient to support the sentence, and warrants confirmation of the sentence. Dismissal is authorized for violation of the 96th Article of War.

Robert S. Hedy Jr., Judge Advocate.

Chas. C. Gresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

1st Ind.

War Department, J.A.G.O., JUN 12 1942 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and opinion of the Board of Review in the case of Lieutenant Colonel Wilbur Erickson (0-17380), Air Corps.

2. Colonel Erickson was convicted under four specifications: willful disobedience of the command of his superior officer, drunk on duty (two specifications), and behaving in a boisterous and obstreperous manner in the presence of enlisted men and civilian employees. He was sentenced to be dismissed from the service. The reviewing authority approved the sentence.

3. The records of the War Department show that accused was born in Nebraska, March 22, 1903. He attended high school for five years and the University of Omaha for one-half year. He was a flying cadet, Air Corps, from March 2, 1926 to February 28, 1927. He was appointed second lieutenant, Air Corps, February 2. 1929; first lieutenant, October 1, 1934; captain (temporary), April 20, 1935; captain, February 2, 1939; major (temporary), February 1, 1941; lieutenant colonel (temporary), January 5, 1942. He was graduated from the Air Corps Primary Flying School, 1926, Advanced Flying School, Attack Course, 1927, Technical School, Armament course, 1932. He is rated as a senior pilot.

During his service a total of thirty-seven efficiency reports have been rendered upon him. In two of these reports covering a period of about eleven months, his general rating was superior; in twelve of the reports covering a period of about forty-two months, his general rating was excellent; in three of the reports covering a period of about fifteen months, his general rating was very satisfactory; and in twenty of the reports covering a period of about sixty-two months, his general rating was satisfactory. He was commended in 1937 and again in 1938 for performance of duties as Air Corps Supply Officer. He was reprimanded in 1929 for low flying over Omaha, Nebraska, and in 1941 for addressing the Provost Marshal in a most abusive, profane and threatening manner.

4. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty of the Specifications of the Charge, legally sufficient to support only so much of the findings of guilty of the Charge as finds the accused guilty of violation of the 96th Article of War, legally sufficient to support the sentence, and to warrant confirmation of the sentence.

5. I have discussed with Lieutenant General Arnold, Commanding General, Army Air Forces, the matter of clemency in this case. We have come to the conclusion that because of the long service of accused, of his good record, of his promise not to drink, and of other extenuating circumstances, that the sentence of dismissal should be suspended.

6. I recommend that only so much of the findings of guilty of the Charge as finds accused guilty of violation of the 96th Article of War and the sentence be confirmed, but the execution thereof be suspended during the pleasure of the President.

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

Myron C. Cramer

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

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

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General
Washington, D. C.

SPJGK
CM 220693

APR 11 1942

UNITED STATES v. Private ALBERT H. DYE (15012985), Company I, 13th Armored Regiment.	1ST ARMORED DIVISION Trial by G. C. M., convened at Fort Knox, Kentucky, March 17, 1942. Confinement for six (6) months (suspended) and forfeiture of twenty-six dollars ($26) per month for like period.

OPINION of the BOARD OF REVIEW
HOOVER, VAN BENSCHOTEN and KOTRICH, 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 and the Board submits this, its opinion, to The Judge Advocate General.

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

CHARGE I: Violation of the 94th Article of War.
(Finding of not guilty)

Specification: (Finding of not guilty)

CHARGE II: Violation of the 84th Article of War.

Specification: In that Private Albert H. Dye, Company "I", 13th Armored Regiment, did, at Fort Knox, Kentucky, on or about February 5, 1942, wrongfully dispose of by selling to Private Hillery N. Kennedy, Battery "B", 68th Armored Field Artillery Battalion, one (1) Colt 45. Caliber Automatic Pistol, Model 1911, Serial Number 390179, of the value of $26.42, issued for use in the military service of the United States.

He pleaded not guilty to the Charges and Specifications. He was found not guilty of Charge I and its Specification, guilty of the Specification, Charge II, except the words "by selling", substituting therefor the words "by pawning", of the excepted words, not guilty, of the substituted words, guilty, and guilty of Charge II. No evidence of previous convictions was introduced. He was sentenced to be confined at hard labor for six months and to forfeit $26 per month for a like period. The reviewing authority approved the sentence and directed its execution but suspended the execution of that portion thereof involving confinement at hard labor. The proceedings were published in General Court-Martial Orders No. 35, Headquarters 1st Armored Division, March 30, 1942.

3. The finding, by exceptions and substitutions, that accused wrongfully disposed of the pistol by pawning it, was fatally at variance with the allegation of the Specification, Charge II, that he wrongfully disposed of the pistol by selling it. The offense found was not included in the offense charged. See opinion of Board of Review in CM 220455, Kennedy, and precedents cited therein.

4. The record of trial shows that Captain Harold F. Blodgett, 13th Armored Regiment, who signed and swore to the Charges and was the accuser (par. 60, M.C.M.), participated in the trial as a member of the court. He also testified as a witness for the prosecution and it does not appear that prior to qualifying as a witness or upon withdrawal from the witness stand he was excused or withdrew from further duty as a member of the court (A.W. 8). The court was not legally constituted and the proceedings were null and void ab initio (sec. 365 (7) (8), Dig. Ops. J.A.G. 1912-1940).

5. 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.

Herbert A. G. Hoover, Judge Advocate.

Charles M. Van Buskirk, Judge Advocate.

E. J. Kotrick, Judge Advocate.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General
Washington, D. C.

SPJGK
CM 2[illegible]

APR 9 1942

UNITED STATES	33RD INFANTRY DIVISION
v.	Trial by G. C. M., convened at Camp Forrest, Tennessee, March 19, 1942. Dishonorable discharge and confinement for one (1) year. Federal Reformatory, Chillicothe, Ohio.
Private BERNARD J. BRENNAN (36026741), 108th Ordnance Company, Special Troops.	

HOLDING by the BOARD OF REVIEW
HOOVER, VAN BENSCHOTEN and KOTRICH, Judge Advocates.

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

2. Accused was found guilty of desertion on or about June 9, 1941, terminated by apprehension on December 24, 1941, in violation of Article of War 58. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one and one-half years. The reviewing authority approved the sentence, reduced the term of confinement to one year, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. Confinement in a Federal reformatory is not authorized. Paragraph 90b, Manual for Courts-Martial, provides:

> "Subject to such instructions as may be issued from time to time by the War Department, the United States Disciplinary Barracks at Fort Leavenworth, Kans., or one of its branches, or a military post, station, or camp, will be designated as the place of confinement in cases where a penitentiary is not designated."

War Department letter dated February 26, 1941 (AG 253 (2-6-41)E), subject: "Instructions to reviewing authorities regarding the designation of institutions for military prisoners to be confined in a Federal penal or correctional institution", authorizes confinement in a reformatory only

when confinement in a penitentiary is authorized by law. (CM 220093, Unckel) Penitentiary confinement is not authorized by Article of War 42 for the offense (peacetime desertion) of which accused was found guilty in this case.

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 in a place other than a penitentiary, Federal correctional institution or reformatory.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

APR 11 1942

War Department, J.A.G.O., - To the Commanding General, 33rd Infantry Division, Camp Forrest, Tennessee.

1. In the case of Private Bernard J. Brennan (36026741), 108th Ordnance Company, Special Troops, attention is invited to the foregoing holding by 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 in a place other than a penitentiary, Federal correctional institution or reformatory, which holding is hereby approved. Upon designation of a place of confinement other than a penitentiary, Federal correctional institution or reformatory you will have authority to order the execution of the sentence.

2. Accused deserted within less than two months after his induction. In view of this circumstance and in order that accused may be held in the Army for further possible military service, it is recommended that execution of that portion of the sentence adjudging dishonorable discharge be suspended.

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 220712).

Myron C. Cramer

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

1 Incl.
Record of trial.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General.
Washington, D. C.

SPJGH ✓
CM 220746

APR 21 1942

UNITED STATES	1st ARMORED DIVISION
v.	Trial by G.C.M., convened at Fort Knox, Kentucky, March 30, 1942. Confinement for six (6) months and forfeiture of $20 for like period.
Private HOLLIS G. WALLING (6665848), Company B, Maintenance Battalion, 1st Armored Division.	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and HALE, Judge Advocates.

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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 and sentence, has been examined by the Board of Review, and the Board submits this, its opinion, to The Judge Advocate General.

2. The record of trial in the case of Private Raymond L. Solt, in which it is alleged Private Hollis G. Walling, the accused in the present case, was guilty of perjury, is not attached, so the materiality of the testimony of Private Walling cannot be determined from it. The statements of Lieutenant John H. Ford, trial judge advocate in the Solt case, on pages seven and eight of the record of the present case, are contradictory and cannot establish the materiality of Private Walling's testimony. The record of trial in the Solt case speaks for itself, the court must pass on the materiality of the testimony and the statement of the trial judge advocate in that case are not sufficient proof. However, it is not necessary to determine this question.

3. The testimony of Captain Charles E. Douler (R. 11) in the present case sets out that when Private Walling, the accused, was recalled to the stand, he corrected his former testimony and stated "he did change the Trip Ticket", substantiating the testimony of Private Solt (R. 11).

The first time Private Walling testified he stated, "he did not change the Trip Ticket and he did not know anything about the Trip Ticket", and also that he had not altered the Trip Ticket.

But, as stated, promptly in the same trial before any findings, he corrected his first testimony. Therefore, the accused purged himself of his false testimony and cannot be convicted of perjury.

4. In the case of People v. Brill (100 Misc. Rep. 92; 165 N.Y.S. 65), the court held -

> "The law encourages the correction of * * * even intentionally false statements * * * and perjury will not be predicated upon such statements when the witness before the submission of the case fully corrects his testimony." (Citing Brannen v. State (Fla.), 114 So. 429; also see People v. Gillette, 126 App. Div. 665; 111 N.Y.S. 133, to the same effect.)

CM 122370 (p. 61, Dig. Ops. JAG 1919-23) states in part -

> "* * * that during the same trial he went on the stand, had his former testimony read to him, and corrected the false testimony; the evidence will not sustain a conviction of perjury. * * *."

Norris v. United States (86 Fed. (2d) 379) holds in part -

> "When a witness in a trial, hearing, or investigation has, whether intentionally or unintentionally, given false or perjured testimony, but afterwards in the same trial, hearing, or investigation, and before such trial, hearing, or investigation, has been completed, fully corrects all false answers and statements theretofore made by him, he cannot be successfully prosecuted for perjury."

5. The Board of Review is, therefore, of the opinion that the record of trial is not legally sufficient to support the findings of guilty and not legally sufficient to support the sentence.

(On leave), Judge Advocate.

Charles Bresson, Judge Advocate.

Harold Tyler, Judge Advocate.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General
Washington, D. C.

SPJGK
CM 220760

APR 24 1942

UNITED STATES)	III ARMY CORPS
)	
v.)	Trial by G. C. M., convened at Pasadena, California, March 17, 1942. Dismissal.
)	
Second Lieutenant JOHN C. FANNING (0-410109), 804th Tank Destroyer Battalion.)	

OPINION of the BOARD OF REVIEW
HOOVER, VAN BENSCHOTEN and KOTRICH, Judge Advocates.

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: In that 2nd Lt. John C. Fanning, 804th Tank Destroyer Battalion, did, at Fort Benning, Georgia, on or about November 25, 1941, with intent to deceive and injure wrongfully and unlawfully make and utter to the Mess Officer of the 3rd Student Training Battalion, 1st Student Training Regiment, The Infantry School, Fort Benning, Georgia, a certain check, in words and figures as follows, to wit: Thirty-five Dollars and sixty-five cents ($35.65), drawn on the Broadway National Bank of Alamo Heights, San Antonio, Texas, dated November 25, 1941, in payment of mess account which was then due and owing, he the said Lt. Fanning, then well knowing that he did not have and not intending that he should have sufficient funds in the Broadway National Bank of Alamo Heights, San Antonio, Texas, for the payment of said check.

Specification 2: *** did, at Fort Benning, Georgia, on or about November 28, 1941, with intent to

deceive and injure wrongfully and unlawfully make and utter to the Mess Officer of the 3rd Student Training Battalion, 1st Student Training Regiment, The Infantry School, Fort Benning, Georgia, a certain check, in words and figures as follows, to wit: Thirty-two Dollars and eighty cents ($32.80), drawn on the Broadway National Bank of Alamo Heights, San Antonio, Texas, dated November 28, 1941, in payment of mess account which was then due and owing, he *** then well knowing that he did not have and not intending that he should have sufficient funds in *** Bank *** for the payment of said check.

Specification 3: *** did, at Columbus, Georgia, on or about November 28, 1941, with intent to defraud wrongfully and unlawfully make and utter to the Ralston Hotel, Columbus, Georgia, a certain check, in words and figures as follows, to wit: One Hundred Dollars ($100.00), drawn on the Broadway National Bank of Alamo Heights, San Antonio, Texas, dated November 28, 1941, part of which was for payment of a bill then due and owing, and part of which was for cash, he *** then well knowing that he did not have and not intending that he should have sufficient funds in *** Bank *** for the payment of said check.

Specification 4: *** did, at Camp San Luis Obispo, California, on or about December 20, 1941, with intent to defraud wrongfully and unlawfully make and utter to the Camp Exchange, Camp San Luis Obispo, California, a certain check, in words and figures as follows, to wit: Fifteen Dollars ($15.00), drawn on the National Bank of Fort Sam Houston, San Antonio, Texas, dated December 18, 1941, he *** then well knowing that he did not have and not intending that he should have sufficient funds in *** Bank *** for the payment of said check.

Specification 5: *** did, at Camp San Luis Obispo, California, on or about December 20, 1941, with intent to defraud wrongfully and unlawfully make and utter to the Camp Exchange, Camp San Luis Obispo, California, a certain check in words and

figures as follows, to wit: Ten Dollars ($10.00), drawn on the National Bank of Fort Sam Houston, San Antonio, Texas, dated December 20, 1941, he *** then well knowing that he did not have and not intending that he should have sufficient funds in *** Bank *** for the payment of said check.

Specification 6: *** did, at Camp San Luis Obispo, California, on or about December 21, 1941, with intent to defraud wrongfully and unlawfully make and utter to the Camp Exchange, Camp San Luis Obispo, California, a certain check, in words and figures as follows, to wit: Forty Dollars ($40.00), drawn on the National Bank of Fort Sam Houston, San Antonio, Texas, dated December 21, 1941, he *** then well knowing that he did not have and not intending that he should have sufficient funds in *** Bank *** for the payment of said check.

Specification 7: (Disapproved by reviewing authority)

Specification 8: (Finding of not guilty)

Specification 9: (Finding of not guilty)

Specification 10: (Finding of not guilty)

Specification 11: (Finding of not guilty)

Specification 12: (Finding of not guilty)

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

Specification 1: *** having on or about November 15, 1941, become indebted to Columbus Fender and Body Works, Columbus, Georgia, in the sum of $73.50 for repairs on certain automobiles ordered done by him, and having on or about December 10, 1941, promised in writing *** that he would on or about December 13, 1941, settle such indebtedness in full, did, without due cause, on or about December 13, 1941, dishonorably fail to keep said promise.

Specification 2: *** having on or about November 31, 1941, become indebted to Chancellor Company, Columbus, Georgia, in the sum of $50.00 for clothing, and having on or about December 10, 1941, promised in writing *** that he would on or about December 13, 1941, settle such indebtedness, did, without due cause, on or about December 13, 1941, dishonorably fail to keep said promise.

Specification 3: *** having on or about November 28, 1941, become indebted to the Ralston Hotel, Columbus, Georgia, in the sum of $100.00 for lodging and cash, and having on or about December 10, 1941, promised in writing *** that he would on or about December 13, 1941, settle such indebtedness in full, did, without due cause, on or about December 13, 1941, dishonorably fail to keep said promise.

He pleaded not guilty to the Charges and Specifications. He was found guilty of the Charge and Specifications 1, 2, 3, 4, 5, 6 and 7 thereunder, and of the Additional Charge and its Specifications, and not guilty of Specifications 8, 9, 10, 11 and 12 of the Charge. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority disapproved the finding of guilty of Specification 7 of the Charge, and approved the remaining findings of guilty and the sentence. In forwarding the record of trial he took action as follows: "Pursuant to A. W. 48, the order directing execution is withheld."

3. The evidence shows that accused was stationed at the Infantry School, Fort Benning, Georgia, from about August 28, 1941, to about November 28, 1941. From Fort Benning he was ordered to return to his organization at Fort Sam Houston, Texas, at which latter place, after a short leave of absence, he reported for duty on December 10. On December 11 he proceeded with his organization from Fort Sam Houston to Camp San Luis Obispo, California (R. 14). He arrived at Camp San Luis Obispo in due course (date not specified) (R. 16), remaining there for a period extending beyond December 21 (date not otherwise specified). Accused testified that he was married on October 19, 1941 (R. 16). He had no regular income other than his pay, but at least on one occasion received financial help from his father (R. 29).

On November 25, 1941, at Fort Benning, Georgia, accused made and presented to the mess officer, "3rd Student Training Battalion", Fort Benning, in payment of his October, 1941, mess bill, his check for $35.65, payable to that officer, drawn on the Broadway National Bank of Alamo Heights, San Antonio, Texas (Specification 1 of Charge), and on November 28 he made and presented to the same officer, in payment of his November, 1941, mess bill, his check for $32.80, payable to that officer, drawn on the same bank (Specification 2 of Charge) (R. 8, 9; Stip. 1; Def. Exs. G, H). On November 28 he also made and presented to the Ralston Hotel, Columbus, Georgia, in payment of a lodging account, his check for $100, payable to the hotel, and drawn on the same bank (Specification 3 of Charge) (R. 9; Stip. 1). The three checks were written for the purpose of obtaining a clearance from Fort Benning (R. 8). Each was presented for payment but was returned by the drawee bank marked "Insufficient Funds" (R. 9). At the time the checks were drawn and delivered accused knew his balance in the bank was insufficient to meet them. He did not intend to make any deposit to cover the checks prior to the time at which they would normally be presented to the drawee bank for payment (R. 9, 23, 25; Stip. 1). On November 19, 1941, he had made a deposit of $550 covering overdrafts of $380.05 (R. 9; Def. Exs. A, B, C). He had, however, also drawn at about this time several additional checks against the account, aggregating about $500 (R. 9, 23; Def. Ex. E), resulting in new overdrafts of about $330 (R. 23). The bank had previously allowed overdrafts (R. 9; Def. Ex. F). Accused testified that the cashier of the bank, Mr. Sharpe McCullough, a friend, allowed him to overdraw his account "numerous times" - the bank "had always honored every check" (R. 9, 10); that McCullough was "on his vacation" when the checks to the mess officer and the hotel were presented for payment; and that on December 6, after McCullough "found out what happened he *** requested that the checks be paid" (R. 11). The evidence shows that on December 12 accused made a deposit of $560 from which the two checks to the mess officer (Specifications 1 and 2 of the Charge) were paid through the issuance of cashier's checks (R. 12; Def. Exs. E, F). The balance of the deposit was consumed by overdrafts and by other outstanding checks (Def. Exs. E, F). The amount of the check to the Ralston Hotel (Specification 3 of the Charge) was not paid until about February 1, 1942 (Stip. 6).

On December 10, 1941, accused telegraphed to the Ralston Hotel that within three days he would send to it a money order for $100 to cover his indebtedness. As noted, he made payment about February 1, 1942. (R. 14, 15; Stip. 6) (Specification 3, Additional Charge)

On December 10 he also telegraphed to the Columbus Fender and Body Works of Columbus, Georgia, to whom he owed $73.50 for automobile repairs (R. 14; Stip. 4) (Specification 1, Additional Charge), and to the Chancellor Company of Columbus, Georgia, to whom he owed $50 on a merchandise account (R. 14; Stip. 5) (Specification 2, Additional Charge), that he would send to these concerns within three days money orders in the amounts above stated to cover the respective indebtednesses (Stips. 4, 5). He did not make the payments until March 17, 1942, the date of trial (R. 15). Accused testified with respect to these transactions that on the night of December 11, 1941, at Fort Sam Houston, Texas,

> "the Adjutant called and told me to report for duty as we were going on in the morning. I immediately reported to the Adjutant and at the same time, I received a telephone call from Dallas from my wife. I had told her to stay there since war had been declared and it would be safer. Well, accordingly she left Dallas and was driving the automobile to San Antonio. About half an hour after the call saying we were to move to Camp San Louis Obispo, California, I got this telephone call at San Antonio from my wife saying she had had an accident - not badly hurt, but hurt. The money I had intended to send these payees was used to fix up the car, obtain a driver to drive her on out to California, and expenses incurred while enroute for her hotel bills, etc." (R. 14).

About December 18, 1941, accused made and delivered to the camp exchange, Camp San Luis Obispo, California, in payment for merchandise or in exchange for cash, his check for $15, payable to the exchange and drawn on the National Bank of Fort Sam Houston, San Antonio, Texas (Specification 4 of the Charge). About December 20 he made and delivered to this exchange, likewise for merchandise or cash, a similar check for $10 (Specification 5 of the Charge). On December 21 he made and delivered to the exchange for merchandise or cash, a similar check for $40 (Specification 6 of the Charge). When these checks were presented to the drawee bank for payment accused did not have sufficient funds on deposit to pay them (R. 16; Stip. 2) and they were returned unpaid (R. 16-19). Accused had been warned by his commanding officer at Fort Sam Houston, Texas, about December 9, 1941, concerning

the making of checks without sufficient funds in bank to pay them (R. 25, 28). He testified that he kept "a personal account" at the Broadway National Bank of Alamo Heights and that he maintained a second account with the National Bank of Fort Sam Houston. The latter account was maintained through deposits of his pay checks by the Finance Officer at Fort Sam Houston. About November 1, 1941, following his marriage, he applied to the Finance Officer at Fort Sam Houston,

> "for additional quarters for the $40.00 quarter's allowance which I received, which is given to married second lieutenants after I put in this application. I naturally assumed my check would be deposited to my account. It has been deposited unfailingly for a year. I never see the check. It never passes through my hands. At the time I left to go to Fort Benning before going to service school I went to the Finance Officer at Fort Sam Houston in the latter part of August and signed three pay vouchers for the months of September, October and November". (R. 16)

He did not receive any deposit slips covering deposits of his pay checks for November and December, but assumed that an additional rental allowance of $40 per month had been included in the pay checks as deposited. He believed, at the time he made the checks for $10, $15 and $40 that he had a balance in the bank of $70, as his check stubs showed (R. 16,17,26 On December 21, after making the checks, he received notice from the bank that his balance was only $.67. By the letter conveying this notice the bank asked for his remittance to pay a note for $100 which he had given to the bank about November 15, 1941 (R. 18; Def. Ex. M). On December 21, immediately upon receipt of the notice and request for remittance, accused telegraphed $90 to the bank for deposit (R. 18; Def. Ex. N). The evidence shows that the checks were not paid from this remittance but were made good on the date of trial from funds received by accused from his father (R. 19, 26, 29).

As a second lieutenant with less than three years' service accused was not entitled to additional allowances for rental or subsistence on account of a dependent wife (37 U.S.C., 9, 10).

In general reference to his difficulties with his various accounts accused testified:

"it is all due to my negligence in handling the matters, but at no time did I ever attempt to defraud or try to get away with anything like that. It was purely negligence on my part. I made up debts. I made every effort possible to pay all debts as soon as possible. Since that time, I have made up all debts that the charges specify. I made good all the checks and I have nothing further to say, sir." (R. 22)

4. With respect to Specifications 1, 2 and 3 of the Charge, the evidence thus shows that at Fort Benning, Georgia, on November 25 and 28, 1941, just prior to his departure from Fort Benning, and for the purpose of obtaining a clearance, accused made and delivered, in payment of accounts owing by him, the three checks on the Broadway National Bank of Alamo Heights, San Antonio, Texas, for $35.65, $32.80 and $100, described in the Specifications, and that the checks were dishonored by the drawee bank. Accused knew that he had insufficient funds in bank to pay the checks, but testified that because of his relations with the cashier of the bank and because he had made previous overdrafts which had been paid, he believed that the checks in question would be likewise paid. There is evidence that numerous other overdrafts by accused were in fact allowed, and in view of this circumstance accused's assertion that he honestly thought the later checks would be paid is not unworthy of belief. Upon consideration of all the evidence, the Board of Review is not convinced that accused did not intend to have funds in bank to pay the checks or that in negotiating them he intended to deceive or defraud. Violation of Article of War 95 is not therefore proved. The making and delivery of the checks with knowledge that there were not on deposit sufficient funds for their payment, and without making definite arrangements for their payment, was discreditable to the military service within the meaning of Article of War 96 (CM 202027, McElroy; CM 203870, Moore; CM 220160, Faulkner). There is no evidence to support the allegation of Specification 3 of the Charge that accused obtained part of the proceeds of the $100 check in cash.

As to the Additional Charge and the three Specifications thereunder it is proved that, as alleged, accused failed on December 13, 1941, to keep his promises to the creditors named to settle his indebtednesses to them on that specified date. One of the creditors was the Ralston Hotel to which accused had previously given the worthless check for $100. The aggregate amount owing to the three creditors

was $223.50. Accused testified that he failed to make the payments because of intervening and unexpected needs for funds to pay for automobile repairs and other expenses incidental to his wife's travel to his new station. There is evidence that on December 12 accused made a bank deposit of $560 but that this was consumed in paying other obligations. There is no evidence that he had immediate resources beyond the amount so deposited and beyond his current pay as a second lieutenant with less than three years' service. It may have been a serious error of judgment for accused to incur at this time expenses for his wife's travel to his new station, but the expenses were legitimate. Insofar as the evidence shows, he did not, on December 13, 1941, after meeting his other legitimate expenses, have the means to make good his promises. [The mere failure by an officer to keep his promise to pay a debt is not dishonorable unless the promise is made with a false or deceitful purpose, or unless the failure to pay is characterized by a fraudulent design to evade payment (CM 207212, Thompson; CM 217636, Nichols; sec. 453 (14) (15), Dig. Op. J.A.G., 1912-1940; Winthrop's Military Law and Precedents (Reprint), p. 715).] The circumstances in evidence do not prove beyond reasonable doubt that accused made his promises with false or deceitful purposes or that his failure to keep the promises on the specific date alleged was fraudulent, evasive or dishonorable. It follows that the proof is not legally sufficient to support the findings of guilty of the Additional Charge and its Specifications.

With respect to Specifications 4, 5 and 6 of the Charge, it appears that on the dates alleged, December 18, 20 and 21, 1941, after his arrival at Camp San Luis Obispo, California, accused made and delivered, in payment for merchandise or in exchange for cash, the three checks on the National Bank of Fort Sam Houston, San Antonio, Texas, for $15, $10 and $40 described in the Specifications, and that these checks were likewise dishonored by the drawee bank. Accused testified that he had not received current statements of account from this bank, that he believed he had sufficient funds on deposit to pay the checks, and that had the full allowances to which he thought he was entitled been included in his pay checks deposited with the bank his balance would have been sufficient. Full proof of specific deposits, withdrawals and balances in this account was not offered. Although it is clear that the account was depleted and that had accused been prudent he would have been aware of this fact,

the Board of Review is not convinced upon the evidence as presented that at the times he made and delivered the checks accused knew he did not have sufficient funds in bank to pay them, that he did not intend to have such funds on deposit, or that he intended to defraud. The evidence is not legally sufficient to support the findings of guilty of Specifications 4, 5 and 6 of the Charge.

5. War Department records show that accused reached his 23rd birthday on December 2, 1941. He was a member of the Reserve Officers' Training Corps at the New Mexico Military Institute, New Mexico, from September 1, 1938, to June 5, 1940. He was appointed a second lieutenant in the New Mexico National Guard on October 22, 1940. He was ordered into the active military service of the United States as a member of the 104th Antitank Battalion, New Mexico National Guard, on January 6, 1941.

6. The court was legally constituted. 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 Specifications 1, 2 and 3 thereunder as involves findings that accused did, at the place and at the times alleged, wrongfully and unlawfully make and utter to the respective persons named the checks described in the Specifications, in payment of accounts then due and owing, accused then well knowing that he did not have sufficient funds in the drawee bank for payment of the checks, in violation of Article of War 96; legally insufficient to support the findings of guilty of Specifications 4, 5 and 6 of the Charge and of the Additional Charge and its Specifications; and legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of violation of Article of War 96.

_____, Judge Advocate.

_____ Judge Advocate.

(On Leave) _____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., MAY 1 1942 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant John C. Fanning (0-410109), 804th Tank Destroyer Battalion.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty of the Charge and Specifications 1, 2 and 3 thereunder as involves findings of guilty of the wrongful and unlawful making and uttering as alleged of the checks described with knowledge that there were insufficient funds in the drawee bank to pay them, in violation of Article of War 96; legally insufficient to support the findings of guilty of Specifications 4, 5 and 6 of the Charge and of the Additional Charge and its Specifications; and legally sufficient to support the sentence and to warrant confirmation thereof. The record of trial shows that accused exhibited inexcusable heedlessness in the issuance of checks against his bank accounts, apparently to meet debts incurred beyond his capacity to pay. The worthless checks have been redeemed. Accused is young and probably capable of future valuable service to the Government. I recommend that the sentence be confirmed but in view of all the circumstances recommend that it be suspended.

3. Inclosed are the draft of a letter for your signature transmitting the record to the President for his action, and a form of Executive action designed to approve only so much of the findings of guilty of the Charge and Specifications 1, 2 and 3 thereunder as involves findings of guilty of violation of Article of War 96, to disapprove the findings of guilty of Specifications 4, 5 and 6 of the Charge and of the Additional Charge and its Specifications, and to confirm the sentence but suspend the execution thereof.

Myron C. Cramer.

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

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

Services of Supply
In the Office of The Judge Advocate General.
Washington, D. C.

SPJGH
CM 220805

MAY 29 1942

UNITED STATES	3rd ARMORED DIVISION
v.	Trial by G.C.M., convened at Camp Polk, Louisiana, March 18, 1942. Dishonorable discharge and confinement for ten (10) years. Reformatory.
Private JOHNIE F. PEAVY (6927603), Company D, 32nd Armored Regiment.	

HOLDING by the BOARD OF REVIEW
HILL, CRESSON and HALE, Judge Advocates.

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

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private Johnie F. Peavy, Company D, 32nd Armored Regiment, then Sergeant, Company D, 32nd Armored Regiment, did, at Leesville, Louisiana, on or about February 28, 1942, in the nighttime, feloniously and burglariously break and enter the dwelling house of Lieutenant Colonel John G. Howard with intent to commit a felony, viz, rape, therein.

Specification 2: In that Private Johnie F. Peavy, Company D, 32nd Armored Regiment, then Sergeant, Company D, 32nd Armored Regiment, did, at Leesville, Louisiana, on or about February 28, 1942, with intent to commit a felony, viz, rape, commit an assault upon Katharine M. Howard, by willfully and feloniously getting in bed with and laying hands on the said Katharine M. Howard.

The accused pleaded not guilty to and was found guilty of all

Specifications and the Charge. 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, designated the Federal Reformatory 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 Saturday evening, February 28th, the accused and Private Futch arrived in Leesville by bus at about eight o'clock. They went to a liquor store where the accused bought a pint of whiskey and went to another place where a party of four finished the bottle. They then went down the street to a third place and had some more drinks. The accused had an argument with a man there and ran out. It was then about 10:30 p.m. Futch did not see the accused again. He would not say that accused was drunk but he was not sober (R. 29-34).

Lieutenant Colonel John G. Howard and Mrs. Howard occupied a fourteen-room house in Leesville. Their seventeen year old daughter, Katharine, occupied a front bedroom on the second floor adjacent to that of her parents. The house has entrances on front, side, and rear, and has front and rear staircases (R. 8). This house was previously occupied by Colonel Allen, whom Colonel Howard "believed" was in the 32nd Armored Regiment of which accused was a member (R. 10).

On Saturday evening, February 28th, Colonel Howard left his house about 9:40 and went to a party at Camp Polk (R. 9). His wife, with some supper guests, left the house about half an hour later, and joined Colonel Howard at the party (R. 18). A house guest, Mrs. Kay, and Mrs. Kay's young grandson, had retired and remained in the house (R. 9, 18-19), and Sergeant Ray and his wife, Mary (who was employed at Colonel Howard's), "had gone upstairs" (R. 19). Katharine had retired about 9 p.m. (R. 13). The outer house doors were all closed (R. 9). Before leaving for the party, Mrs. Howard had opened the door of Katharine's room, looked in on her, and closed the door (R. 19).

Katharine was awakened during the night and found the accused, with his blouse, trousers, underpants, and shoes off, standing along-side her bed. He took hold of her shoulders and kissed her on the mouth. Katharine "asked him who he was and some things". The accused replied, "Just somebody". Thereupon Katharine got out of bed, put on her robe and put on the lights, talked to him, asked him who he was, where he was from and how he

got in. The accused replied that he came through the door like anyone else. She also asked him his outfit and he told her correctly. Accused dressed without "a bit of trouble". Katharine told him to leave ("I said 'Amscray'"), and encountered no difficulty in persuading him to do so. She led the way to the front door, which she found closed, and let him out. As the accused left he said that he was sorry. She did not notice the smell of liquor on his breath, nor anything abnormal about his manner, appearance or talk (R. 13-17).

After accused departed Katharine started upstairs, thought of the side and back doors and went down and locked them. She found them closed but not locked. Then she went to her room and turned the lights off, woke her maid, Mrs. Ray, and told Mrs. Ray what had happened. They heard some noises and so woke Sergeant Ray, who got his revolver. After they sat around five or ten minutes and heard some more noises, Mrs. Ray called the police (R. 15-17).

Mrs. Ray testified that between one and two in the morning she went down when Katharine called her. Katharine then told Mrs. Ray that "there had been a man in her room; he had pulled off his clothes, and gone to bed, tried to kiss her, and she had turned on the light and somehow got him to leave the house" (R. 21). Mrs. Ray called her husband. While they sat on a bench in the hall talking about it, they heard noises below. About ten or fifteen minutes after she was awakened, Mrs. Ray saw someone - she was positive it was a man - go past the window outside. They then called the Military Police. When the police arrived, Mrs. Ray "just told them that there was a prowler around the house" (R. 21-23).

In about five minutes after the telephone call, five Military Police and a city policeman arrived at Colonel Howard's residence at about 1:30 a.m. After about ten minutes they found the accused asleep in a coupe parked alongside the house, where accused seemed to have rolled over from sitting in the seat under the steering wheel. After he was shaken once, accused woke up, asked where he was and what he was doing there, and got out of the car by himself. The police escorted him to the front porch, straightened and buttoned his blouse and shirt, and took him to jail (R. 23-25). When the accused was questioned at the jail he

said that he did not remember anything (R.37).

Colonel Howard arrived home from the dance at about 1:30 or 1:45 a.m. (R. 9). He interviewed the accused on March 1st (R. 10) at "about 3:00 o'clock". Colonel Howard warned the accused of his rights and questioned him. Accused stated that he had "never done anything like this before", that he didn't remember anything about it other than that he had been with a man named Futch, that he was fighting and running, and the next thing he knew the Military Police took him in a car (R. 9-11).

Upon the question of intoxication, Private Futch would not say that accused was drunk but said that he was not sober (R. 34). Katharine Howard did not notice any smell of liquor on the breath of accused and stated that his manner, appearance and talk were not abnormal (R. 15-16). Technician McLeod of the Military Police smelled something on the breath of the accused but did not know what it was, would not say that he was sober or drunk, but would say that he was under the influence of intoxicants or drugs (R. 25-26). In the opinion of Sergeant Mathison of the Military Police, the accused looked as if he had been intoxicated earlier, but had recovered from it when the police picked him up (R. 35-36).

4. The accused was the only witness for the defense. He testified, in substance, that he arrived in Leesville with Private Futch at about eight o'clock on February 28, 1942. Accused purchased a pint of whiskey at a store opposite Dodge's Cafe, went to Eddie's Beer Garden, and with Futch consumed the whiskey. They went across the street where accused had a beer. Sometime later they went to another store, bought a quart of whiskey, and went to another cafe where accused had a drink. Accused did not remember anything after that. His memory did not clear until the Military Police woke him up in the automobile. Accused asked them where he was and what he was doing there. He was taken up to the front porch and he next remembered waking up in jail (R. 40-42).

Upon cross-examination accused stated that he left Camp Polk about seven o'clock right after supper. Four of them chipped in to buy the quart bottle of whiskey. He was in the restaurant across from the bus station at about 10:30. Futch told accused that the accused hit a fellow there and then ran off. He remembered nothing more except that he recalled that he

was running, and was awakened by the Military Police in the automobile. He could not say that he did or did not go in the house and enter Miss Howard's room. He did not remember taking hold of her shoulders and kissing her. He did not know where Colonel Allen lived, had never been to Colonel Allen's or to Colonel Howard's house, and had never seen Miss Howard until during the investigation of his case (R. 42-52).

5. Mrs. Ray was permitted - with a specific statement of no objection by the defense - to relate the statements which she states Katharine made to her on the ground that it was an exception to the hearsay rule. The only items of importance in Mrs. Ray's testimony were that accused had gone to bed with Katharine, which fact was not stated in Katharine's testimony before the court, and that Katharine "somehow got him to leave the house", which in its import of resistance is in contradiction of Katharine's testimony that she encountered no difficulty in persuading accused to leave.

With respect to the admissibility of an extrajudicial statement by the woman assaulted, the Board of Review has said -

> "* * * in the language of the Federal Supreme Court in Railroad Co. v. O'Brien, 119 U.S. 99, applicable here, 'The fact remains that the occurrence had ended when the declaration in question was made'. Such being the case, 'The better rule is that when the transaction is over, no matter how short may have been the interval and the assailant is absent, declarations by the assailed, even though subsequently deceased, are not part of the res gestae' (1 Wharton's Crim. Ev. 503 n. and authorities cited). * * *." (CM 197011, Kearney.)
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> "The 'main fact' in the instant case is, of course, the assault with intent to commit rape. The authoritative rulings of the Federal Courts, applied by the Board of Review in consonance with the provisions of Article of War 38, require that in order to be part of the res gestae statements must be spontaneous, substantially involuntary, remarks or exclamations caused by and growing out of the main fact to which they relate and so nearly contemporaneous with the main fact as to exclude the possibility

75

that they are the result of reflection or design (CM 197011, Kearney, and cases cited)." (CM 198724, Clark.)

It is not shown how long after the assault the statements were made to Mrs. Ray. They do not contain any instinctive, involuntary, or spontaneous words of Katharine nor were they connected with the principal act so as to form a part of the transaction. Katharine made no outcry or appeal for help, or showed any evidence of fear after she was awakened by accused, nor while accused was putting on his clothes, nor while she was escorting accused from the house. After accused had peaceably left the house, she returned downstairs to lock the doors, went to her room and turned off the lights before she called Mrs. Ray.

In the opinion of the Board, the testimony of Mrs. Ray as to the statements stated to have been made by Katharine was improperly admitted, except as a statement of the complaint made by one upon whom the assault was made. In view, however, of the conclusion of the Board as to the sufficiency of the record to support the findings, the Board is of the opinion that the substantial rights of the accused were not thereby injuriously affected within the meaning of the 37th Article of War.

6. With respect to the intent to commit rape, the evidence shows that the accused used no force in his assault beyond taking hold of Katharine's shoulders and kissing her. Katharine met no further force in getting out of bed, in putting on her robe, in telling accused to leave, and no difficulty in escorting him downstairs and out the door. The mere statement of such facts is sufficient support of a conclusion that the record affords no basis of any reasonable hypothesis of an intent to commit rape. There is no evidence of any intent to use or of the use of force to overcome her resistance, and forcibly to ravish her. There is in fact no evidence to point to the offense, if any, for which he entered the house. If at any time during his presence there, he entertained the intent to have intercourse with Katharine, there is no evidence of intent to use or of the use of such force as would forcibly overcome her resistance in accomplishing such purpose.

The evidence in this case is no more persuasive of an intent to commit rape than in CM 188356, Sheehan, and in CM 151153, Goff, in which cases the Board of Review held the evidence legally insufficient to establish the alleged intent to rape.

As was stated by the Board of Review in the Goff case,

supra:

"* * * Surely no reasonable hypothesis of entry with intent to rape can be drawn from the evidence of record. In fact the evidence is insufficient to show what was the intent possessed at the time of breaking and entering."

In the opinion of the Board the evidence is legally sufficient to support only so much of Specification 2 of the Charge as involves findings of guilty of the lesser included offense of assault and battery, in violation of Article of War 96, for which the maximum authorized punishment is confinement for six months and forfeiture of two-thirds pay per month for a like period (CM 153668, Lombardo).

The Board is also of the opinion that the evidence is legally sufficient to support only so much of the finding of guilty of Specification 1 of the Charge as involves findings of guilty of the lesser included offense of breaking and entering a dwelling house without the consent of the lawful occupant, in violation of Article of War 96 (CM 188356, Sheehan). No maximum punishment for this offense is expressly fixed by paragraph 104 c, Manual for Courts-Martial, but the analogous offense of entering a private dwelling without lawful authority against the will of the lawful occupant as denounced by section 22-3102, District of Columbia Code, 1940, is punishable by confinement for not more than six months.

The aggregate maximum authorized punishment is dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year (par. 104c M.C.M., 1928).

7. For the reasons stated above, the Board of Review holds the record of trial legally sufficient to support only so much of the findings of guilty of Specification 1 of the Charge as involve findings of guilty of the lesser included offense of entering the private dwelling of Lieutenant Colonel John G. Howard without lawful authority and against the will of the lawful occupant thereof in violation of the 96th Article of War; legally sufficient to support only so much of the findings of guilty of Specification 2 of the Charge as involve findings of guilty of the lesser included offense of assault and battery in violation of the 96th Article of War; and legally sufficient to support only

so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year in a place other than a penitentiary, Federal correctional institution, or reformatory.

_____, Judge Advocate.

_____(Dissent)_____, Judge Advocate.

_____, Judge Advocate.

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MAY 29 1942

MEMORANDUM on dissent in case of Private Johnie F. Peavy.

1. I have not signed the majority opinion, having on April 21, 1942, with Major Hale, signed a holding that the case was legally sufficient, the testimony sustained the findings and sentence, and do not see any reason for changing my opinion, nor being induced to disapprove the case even in part.

The following is a brief synopsis of the testimony, together with a few of the authorities requiring the approval of the case and reasons for such action.

2. Lieutenant Colonel and Mrs. John G. Howard, on February 28, 1942, lived in Leesville, Louisiana, with their daughter, Katharine M. Howard, who was seventeen years and three months of age. That evening, Colonel Howard left the house at about twenty minutes to ten for Camp Polk, by himself (R. 9), while Mrs. Howard left about half an hour later. Before leaving she looked in her daughter's room, closing the door afterwards (R. 18-19).

3. Later in the night, Katharine Howard, who had retired about nine o'clock, was awakened by some man standing alongside her bed in her room upstairs, the lights were off, he grabbed hold of her, kissed her on the mouth, took hold of her shoulders, said he was "just somebody", and that he came in "Like anyone else, through the door". He had his blouse, trousers, underpants and shoes off, was in his stocking feet. She got out of bed, talked to the man, put on her bathrobe, lit the light, and left the room, followed downstairs by the man, whom she told to leave, said to him, "Amscray", opened the front door and he went out, as she intended he should. She had never seen the man before, he is the accused sitting there.

At the time his conversation seemed to be normal, he did not have any odor of liquor on his breath, did not have a bit of trouble getting his clothes back on, and she did not notice any trouble in his getting downstairs. As she ushered him out of the front door, which was closed, he said he was sorry, she locked the back door and side door, which were closed, walked back to her room, turned the lights off and woke her maid, Mrs. Ray, to whom she then

told what had happened. They heard some noises, went back, woke Mrs. Ray's husband, called the police, when they arrived they all went downstairs and the police arrested the accused in a car alongside their house (R. 12-17).

4. Mrs. Ray, wife of Sergeant Homer H. Ray, was employed in Colonel Howard's home the night of February 28, 1942, when his daughter, "Kathy", called her into the hall, about one in the morning, and told her that there had been a man in her room, he had pulled off his clothes, gone to bed, tried to kiss her, she had turned on the light and somehow got him to leave the house. Mrs. Ray called her husband, they called the Military Police about ten or fifteen minutes after the occurrence (R. 20-23). That the accused was not so drunk as to be unable to form an intent and know what he was doing, is established further by the testimony of Technician Ralph E. McLoed (R. 26), Sergeant James J. O'Connel (R. 28), and Sergeant John J. Mathison (R. 35, 36, 37). The statement of accused to Katharine Howard, when she let him out of the front door, that "he was sorry" indicates that he knew what he had done was wrong, shows him able to have formed the intent.

The testimony of Mrs. Ray was properly admitted, the defense stating they had no objections, it was clearly res gestae, being the substance of statements made to her by Katharine M. Howard, the girl assaulted, from ten to fifteen minutes after it occurred (R. 21-22). This time is further established by the testimony of Katharine M. Howard herself, who states that after she got the accused out of the front door, which was closed, she locked the back and side doors, went back to her room, turned the lights off and then woke her maid, Mrs. Ray (R. 15-16). Res gestae is fully discussed in the Bright case (SM 218643), holding that facts such as the above, make this testimony res gestae and admissible.

5. The offense alleged is that accused assaulted Katharine M. Howard, with intent to commit rape, not that he actually did commit rape. An intent had by the accused at anytime during the occurrence is sufficient, it is not necessary for it to continue throughout, and the intent must be inferred from the acts of accused. He unlawfully opened the closed front door of Colonel Howard's residence, went upstairs to Katharine Howard's bedroom, between 11 and 12 p.m., when she was asleep in bed, her father and mother being away, opened the door to that room, entered when the lights were off, removed his shoes, trousers and drawers, got

in bed, committed an assault and battery upon her by grabbing her by both shoulders and kissing her on the mouth. She then got out of bed, put on her bathrobe, lit the light, talked to accused, went downstairs, he followed and she let him out of the front door.

6. The court and reviewing authority passed on these facts, saw and heard the witnesses, found accused guilty of an intent to rape, which is amply supported by the testimony. To hold that the accused did not intend to accomplish his purpose by such force as necessary, expected merely to have intercourse, with her consent, with the Colonel's daughter, who had never seen him before, is a violent illogical and unwarranted presumption, not supported by any evidence of any kind.

7. The Manual for Courts-Martial, page 179, states: "This is an attempt to commit rape in which the overt act amounts to an assault upon the woman". In the case under consideration it is absolutely established that the accused committed a deliberate assault and battery upon the girl, both by kissing her on the mouth and seizing her by the shoulders.

The Manual further states: "No actual touching is necessary", while in this case there was an actual touching of her person in two ways, as set forth above, the overt act necessary is complete and accomplished.

Again the Manual states: "Once an assault with intent to rape is made, it is no defense that the man voluntarily desisted." Therefore, the fact that the accused ceased in his attempt and left her bed room and the house at her direction, does not excuse his acts. The <u>intent</u> need only exist for a very short time, need not be continuous throughout the entire proceedings.

The Manual also states:

> "When a man entered a woman's room and got in the bed where she was and within reach of her person * * * he committed the offense under discussion, although he did not touch the woman".

It is absolutely established that the accused illegally and improperly entered the house, also entered her bedroom where she was asleep in bed, in the same manner, and the testimony of the servant sets out that the girl told her, right after the assault, that the accused got into the bed, his shoes, trousers and drawers being removed.

All these actions clearly show his <u>intent</u> to have inter-

course with the young girl, using such force as was necessary.

In 52 Corpus Juris, page 1029, it is set forth:

"* * * It is not necessary that it be intended to use force to overcome all resistance. There must and need only be an intention to use such force as may be necessary to accomplish the object, and an intent to overcome resistance if made; so that the fact that the female yields does not necessarily negative the fact that defendant intended to use force to overcome her resistance, if necessary. The required intent need be present only for an instant, and it may be inferred from the circumstances. * * *" (Underscoring supplied.)

"To constitute an attempt to rape, it is essential that, coupled with the intent to commit the offense, there be some overt act, beyond mere preparation, in furtherance of the intent; and there must be an actual or apparent present ability to complete the crime. While it has been held that an assault is not necessarily involved in an attempt to commit rape, that a battery is not necessary to constitute the offense, and that the overt act need not amount to a technical trespass, there is also authority that an assault is essential to commit the offense. Mere indecent advances, solicitations, or importunities do not amount to an attempt." (52 C.J. 41)

"To constitute an assault with intent to rape, there must be, coupled with the required intent, an overt act amounting to an assault upon the female. An assault for this, as for other purposes, is an attempt or offer with force or violence to do corporal injury to another, although to constitute an assault it is not essential that there shall be a direct attempt at violence. Mere preparation or solicitation is not sufficient; but there is also authority that preparations coupled with an intent, with the present means of carrying it out, are sufficient to complete the offense. It has also been held that there must be an assault which is the beginning of an attempt to rape, and there must be a present ability to commit

any act tending to an injury, accompanied by circumstances denoting an intent, coupled with a present ability, to use violence against the person, whether there is any battery or not, for in fact there may be an assault with intent to commit rape without any battery. * * * It has been held that the assault must be such that, if the assailant's purpose were accomplished, it would be rape; but there is also authority that the offense is committed where it is impossible for the assailant to accomplish his purpose. Neither exposure of the man's person nor a spoken demand for intercourse is necessary to constitute the offense." (52 C.J. 42.)

It is stated in Ruling Case Law, page 1232: "No actual touching of the woman's person is necessary, however, to complete the assault". The evidence in this Peavy case is more than what is necessary, it shows two touchings of her person.

8. "* * * Intent, we know, being a state or condition of the mind, is rarely, if ever, susceptible of direct or positive proof, and must usually be inferred from the facts testified to by witnesses and the circumstances as developed by the evidence." (Pumphrey v. State, 47 So. 156.)

"In all such cases the intent with which an assault is committed is a fact which can only be inferred from the outward act and the surrounding circumstances. It is, in other words, a question of fact for the jury, and not a question of law for the court, except in a case where the facts proved afford no reasonable ground for the inference drawn." (People v. Moore, 100 Pac. 688,689; Underscoring supplied.)

Therefore the jury, the court in this Peavy case, having decided and found that accused had the necessary intent and was guilty, there being testimony to support such findings, the Board of Review is not warranted in weighing the evidence and setting aside such finding of fact, irrespective of the individual beliefs of its members, or how they might have found had they been members of the court.

9. The accused had violated the law by improperly entering the house and bedroom, was at the very least a trespasser ab initio, and as such his conduct must be viewed with suspicion, his act followed his prior unlawful

93

former actions. No reason appears for the accused to have unlawfully entered the residence in the nighttime, going into the bedroom of the young girl during the absence of her father and mother, when she was undressed, asleep in her bed, committing an assault and battery upon her, except his intent to gratify his bestial desire to have sexual intercourse with her, using such force as was necessary to overcome any resistance, verbal or physical. By these acts of the accused his intent to rape her if necessary, is clearly shown, nothing is shown to justify the theory that he expected to have intercourse with her consent. Certainly when this Private Peavy, the accused, like a burglar, unlawfully entered Colonel Howard's house and the bedroom of the young daughter, he must have had the purpose and intent to have sexual intercourse with the girl by any possible means. Any idea or theory that she would agree to have intercourse with him, or consent to his advances, is not supported by any evidence, is preposterous and outrageous. Therefore, the alternative, shown by the evidence, is the intent to accomplish his purpose by force, his several assaults on the young girl in her bed constituted an assault with intent to rape. For the reasons and facts stated I hold the record of trial legally sufficient to support the findings and sentence.

Chas. L. Larsson Judge Advocate.

1st Ind.

War Department, J.A.G.O., JUN 30 1942 - To the Secretary of War.

1. Pursuant to the provisions of Article of War 50½, as amended by the act of August 20, 1937 (50 Stat. 724; 10 U.S.C. 1522), there are transmitted herewith for your action the record of trial and the accompanying papers in the case of Private Johnie F. Peavy (6927603), Company D, 32nd Armored Regiment, together with the opinion thereon by the Board of Review, and the dissenting opinion of one of the members of the Board.

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private Johnie F. Peavy, Company D, 32nd Armored Regiment, then Sergeant, Company D, 32nd Armored Regiment, did, at Leesville, Louisiana, on or about February 28, 1942, in the nighttime, feloniously and burglariously break and enter the dwelling house of Lieutenant Colonel John G. Howard with intent to commit a felony, viz, rape, therein.

Specification 2: In that Private Johnie F. Peavy, Company D, 32nd Armored Regiment, then Sergeant, Company D, 32nd Armored Regiment, did, at Leesville, Louisiana, on or about February 28, 1942, with intent to commit a felony, viz, rape, commit an assault upon Katharine M. Howard, by willfully and feloniously getting in bed with and laying hands on the said Katharine M. Howard.

The accused pleaded not guilty to and was found guilty of both Specifications and the Charge. 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, designated the Federal Reformatory, El Reno, Oklahoma, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The 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

85

of Specification 1 of the Charge as involves findings of guilty of the lesser included offense of entering the private dwelling of Lieutenant Colonel John G. Howard without lawful authority and against the will of the lawful occupant thereof in violation of the 96th Article of War; legally sufficient to support only so much of the findings of guilty of Specification 2 of the Charge as involves findings of guilty of the lesser included offense of assault and battery in violation of the 96th Article of War; and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year in a place other than a penitentiary, Federal correctional institution, or reformatory.

The opinion of the dissenting member of the Board maintains that the evidence of record is in every respect sufficient to support the findings of guilty of assault with intent to rape and the sentence of dishonorable discharge and confinement for ten years.

In my opinion, the correct disposition of this case lies in a solution which falls between the extremes of the two opinions referred to above. Accordingly, I am dissenting from both opinions and presenting herewith my own opinion and accompanying recommendations.

4. The evidence shows that at about midnight of February 28, 1942, the accused entered the large fourteen-room home of Lieutenant Colonel John G. Howard in Leesville, Louisiana. According to his own admission, he entered through a door. He ascended a winding stair and entered the bedroom occupied by Katharine Howard, the 17-year-old daughter of Colonel Howard. Miss Howard, who was asleep when the accused entered, awakened to see the accused standing by her bed. He was partially disrobed, his shoes, slacks, underpants, and blouse were removed. Upon her awakening, he grasped her by the shoulders and kissed her on the mouth.

Miss Howard got out of bed, put on her robe, turned on the lights, asked the accused who he was and how he got in. The accused replied that he was "just somebody" and that he came through the door like anyone else. Miss Howard told him to leave, and encountered no difficulty in persuading him to do so. He dressed without a "bit of trouble", and was led to the front door. Miss Howard testified that she did not notice any odor of liquor on his breath, nor anything abnormal about his manner, his appearance, or his manner of speech. Before leaving, the accused said that he was sorry. Miss Howard testified further that she had never seen the accused before his entry into her room.

After the accused departed, Miss Howard started upstairs, thought of the side and back doors and went to lock them. She found them closed but not locked. She then went to her room and turned off the lights, after which she went and awakened the family maid, Mrs. Ray, and told her what had happened. They heard noises about the house, so they awakened Sergeant Ray, the maid's husband. Later, after Mrs. Ray had seen a man pass by a window, they called the military police.

Upon the arrival of the military police they found the accused, at about 1:30 a.m., in a coupe parked near the house. The accused appeared to be asleep but was easily awakened. The police, after straightening and buttoning his blouse and shirt, took the accused to the guard house. In the opinion of Sergeant Mathison of the military police, the accused looked as if he had been intoxicated earlier but as if he had recovered before his arrest. Later that night when Colonel Howard interviewed the accused, the accused stated that he had "never done anything like this before", that he did not remember anything about it other than that he had been with a man named Futch, that he was fighting and running, and the next thing he knew the military police had taken him in a car.

Private Futch testified that he came to Leesville from Camp Polk by bus with the accused, and that about 10:30 p.m. the accused had an argument with a soldier in a cafe, that accused struck the soldier and ran. Futch testified further that he did not see the accused again that day. He would not say that the accused was drunk, but he would not say that he was sober.

The accused, the only witness for the defense, testified to the purchase of a pint and a quart of whiskey on the evening in question and to drinking with Private Futch and two other soldiers. He testified further that he did not remember anything that had happened after going into a cafe until he was arrested by the military police. He testified that he could not say whether he did or did not go into Miss Howard's room. He testified further that he had never been in Colonel Howard's house and that he had never seen Miss Howard until the investigation of this case.

On the evening in question Colonel and Mrs. Howard had gone to a party, leaving at their house two house guests, Mrs. Kay and her young grandson, the Howard maid, Mrs. Ray, and her husband, Sergeant Ray, and their daughter, Miss Katharine Howard.

5. In order to sustain the court's finding of housebreaking with intent to commit a felony of rape, as alleged in Specification 1, and the court's finding of assault with intent to commit rape, as alleged in Specification 2, it is necessary that the evidence show that the accused had the specific intent to rape both at the time he entered the house and at the time he assaulted Miss Howard. Rape is defined as "* * * the unlawful carnal knowledge of a woman by force and without her consent" (Manual for Courts-Martial, 1928, p. 165). It follows, therefore, that the existence of an intent to have carnal knowledge by force and without consent, was an essential element of both offenses as alleged.

As previously stated, the Board of Review, with one member dissenting, held that there was no evidence in the record to show that the accused held such an intent. Since there is no evidence showing that the accused at any time had the intent to overcome Miss Howard by force, I agree with the Board's holding on this point. I differ from the opinion of the Board, however, in that I believe the evidence does show that the accused had, both at the time of entering the house and the time of his assault upon Miss Howard, the specific intent of making an assault and battery. I am of the opinion, therefore, that the evidence sustains as to Specification 1, the lesser included offense of housebreaking with the intent to commit an assault and battery, and as to Specification 2, the lesser included offense of assault and battery, aggravated by indecencies. Furthermore, since the maximum penalty for housebreaking is ten years' confinement at hard labor, the same number of years of confinement as were approved by the reviewing authority for the two offenses as alleged, I am of the opinion that the sentence should be approved.

The evidence shows very clearly that the accused unlawfully entered the home of Colonel Howard at midnight. It is equally clear that the accused made an assault and battery upon Miss Howard which was aggravated by the indecent exposure of his person and by the manner in which he grasped her and kissed her upon the mouth. Furthermore, although the accused had been drinking on the evening in question, the evidence for the prosecution shows that he was not drunk when in Colonel Howard's home, and that he was mentally capable at that time of having a specific intent. This fact is shown by his conduct toward Miss Howard, by his speech, by his lack of difficulty in dressing, and by his statement to Miss Howard that he was "sorry".

In view of this direct evidence of his mental alertness, the important question for determination is the question as to whether the

accused had the intent to make an assault at the time of his unlawful entry into the home. This question appears to be answered by the evidence showing his mental alertness within a short time after his entry into the house. Since he was mentally awake, it follows as a matter of plain logic that he possessed some intent at the time of his entry and the nature of such intent can only be revealed by what he did either before or after entering.

Colonel Wigmore, in considering the ~~this~~ problem of proving intent in connection with housebreaking, has made the following statement:

> "* * * If, for example, the charge is of breaking and entering with intent to steal, obviously 'intent' here signifies 'design', or 'plan', and whatever would otherwise be receivable to show Design would also be here receivable, - in particular, the conduct throwing light on the design of the person's entrance. * * *. Intent as a separate proposition for proof does not commonly exist. * * *" (Wigmore on Evidence, Third Ed., Vol II, sec. 242, pp. 38, 39).

An example of the application of the above logic is presented in the case of State v. Teeter (69 Ia. 718, 27 N.W., 485), wherein the court stated as follows:

> "* * * It often occurs in human experience that the mere fact that a particular act has been done affords the best evidence of the motive or intention with which it was done. If one was to break and enter a building which was known to be on fire, the reasonable presumption from his act would be that his intention was either to attempt the extinguishment of the fire, or the rescue of the property or persons within it. So, if one was to be found in the night-time in the act of breaking into a building in which money or property of great value was deposited, his act would give very strong evidence indeed of the motive or purpose which prompted it. * * *."

In line with the above analysis is the previous holding of the Board of Review in the case of Private Robert Davis (CM 199369). In that case, as in the present one, the accused was charged first with housebreaking, with intent to commit rape, and second, with assault with intent to rape. As in the present case, there was a finding of

guilty on each specification. The Board of Review held that the facts did not show an assault with an intent to rape, but only an indecent assault. As a logical consequence of the holding that there was no intent to rape in the assault, the Board held under the housebreaking Specification that the evidence supported only the lesser included offense of housebreaking with intent to commit an indecent assault and battery. Although the facts of the Davis case differ from the present case, the principle of proof as to the specific intent of the accused upon entering the house is as applicable in one case as in the other.

6. In view of the authorities above cited, I recommend the approval of so much of the findings of guilty of Specification 1 of the Charge as involves the findings of guilty of the lesser included offense of breaking and entering the dwelling house of Lieutenant Colonel John G. Howard with intent to commit a criminal offense, viz., assault and battery, therein, in violation of the 93rd Article of War; the approval of so much of the findings of guilty of Specification 2 of the Charge as involves the findings of guilty of the lesser included offense of assault and battery, aggravated by indecencies, in violation of the 96th Article of War; and the approval of the sentence of dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for ten years in a Federal reformatory.

A form of action approving my recommendation is inclosed herewith, marked "A". A form of action disapproving the sentence in accord with the holding of two members of the Board, marked "B", is also inclosed for use should such action be deemed appropriate.

Myron C. Cramer

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

4 Incls.
Incl 1-Record of trial.
Incl 2-Dissenting Op.
Incl 3-Action "A".
Incl 4-Action "B".

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General
Washington, D. C.

SPJGK
CM 220877

APR 30 1942

UNITED STATES	37TH INFANTRY DIVISION
v.	Trial by G. C. M., convened at Camp Shelby, Mississippi, January 6, 1942. Confinement at hard labor for forty-five (45) days and forfeiture of thirty dollars ($30) of his pay.
Private JOHN L. RUEHL, JR. (20508071), Company D, 147th Infantry.	

OPINION of the BOARD OF REVIEW
HOOVER, VAN BENSCHOTEN and KOTRICH, 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 in part. The record has now been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

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

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

Specification: In that Private John L. Ruehl, Jr., 20508071, did, without proper leave, absent himself from his post and command at Camp Shelby, Mississippi from about November 18, 1941, to about December 2, 1941.

CHARGE II: Violation of the 54th Article of War.
(Plea in bar of trial sustained)

Specification: (Plea in bar of trial sustained)

He pleaded guilty to and was found guilty of Charge I and its Specification. A plea in bar of trial upon Charge II and its Specification, based on the statute of limitations, was sustained by the court (R. 7). No evidence of previous convictions was introduced. He was sentenced:

"To be confined at hard labor, at such place as the reviewing authority may direct for 45 days. To forfeit $30.00 of his pay."

The reviewing authority approved the sentence and directed its execution. The proceedings were published in General Court-Martial Orders No. 30, Headquarters 37th Infantry Division, February 26, 1942.

3. The only question requiring consideration is whether the sentence to forfeiture is excessive.

The monthly pay of accused is stated on the charge sheet to be $30, but inasmuch as the charge sheet shows that he was inducted into the Federal service on October 15, 1940, and has been continuously in active military service since that date, it must be assumed that, with the additional pay provided by Public Law No. 213, 77th Congress, 1st Session, dated August 18, 1941, his monthly pay at the time of trial was $40.

The forfeiture adjudged was a lump sum forfeiture for it was not expressed in dollars or dollars and cents per month and did not by its terms extend over a period greater than one month (sec. 402 (10), Dig. Op. J.A.G., 1912-1940; CM 204568, Tucker; par. 1, A.R. 35-2460, Nov. 28, 1940). Inasmuch as a court may not, by a single sentence which does not include dishonorable discharge, adjudge against an accused forfeiture of pay at a rate greater than two-thirds of his pay per month (par. 104b, M.C.M.), so much of the sentence to forfeiture as exceeds forfeiture of $26.66 is excessive and illegal.

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 sentence as involves confinement at hard labor for 45 days and forfeiture of $26.66.

Hubert H. D. Hoover, Judge Advocate.

Charles M. Van Buskirk, Judge Advocate.

(On Leave), Judge Advocate.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General.
Washington, D. C.

SPJGH ✓
CM 220886

UNITED STATES v. Private DONALD E. WRIGHT (17030621), Detachment 48th Air Base Group, Antigua Base Command, Antigua, B.W.I.	PUERTO RICAN DEPARTMENT Trial by G.C.M., convened at Antigua, British West Indies, March 11, 1942. Confinement for three (3) months. Antigua Base Command, Antigua, British West Indies.

OPINION of the BOARD OF REVIEW
HILL, CRESSON and HALE, Judge Advocates.

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

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

CHARGE: Violation of the 86th Article of War.

Specification: In that Private Donald E. Wright, Detachment 48th Air Base Group, being on guard and posted as sentinel, at Antigua Base Command, Antigua, B.W.I., on or about 4:15 A.M., January 24, 1942, was found sleeping upon his post.

The accused pleaded not guilty to, and was found guilty of, the Charge and Specification. He was sentenced to be confined at hard labor for three months. The reviewing authority approved the sentence, directed its execution, and designated the Antigua Base Command, Antigua, British West Indies, as the place of confinement. The sentence was published in General Court-Martial Orders No. 27, Headquarters Puerto Rican Department, March 21, 1942.

3. The evidence for the prosecution shows that the accused was on guard duty on January 24, 1942. The tour here involved was on Post No. 5 (R. 7) from 12:45 a.m., to 4:45 a.m. (R. 8). Post No. 5 included the gas drums, which are covered with brush (R. 9).

The Officer of the Day, on inspecting the guard at 2:45 a.m., could not locate the accused on Post No. 5 (R. 9), whereupon another soldier was posted there (R. 10). In searching for accused, the Officer of the Day and the Sergeant of the Guard flashed their flashlights but did not call to the accused (R. 11). The Officer of the Day conceded, however, that accused might have been among the bushes (R. 10). The supernumerary, who was posted at No. 5 at about 3:45 a.m. (R. 11), later found the accused lying "under a small tree or brush" (R. 12) not more than "a few feet" off his regular tour circuit (R. 13). He flashed a light on accused's face (R. 13), whereupon accused got up and challenged him (R. 12), saying that it had been raining and that he got under the tree to get out of the rain (R. 13).

On the question of whether accused was asleep, the supernumerary testified as follows:

"Q Was he sleeping when you found him? (R. 12)
A I'm not sure sir.
Q What did you do when you first saw him?
A I shined the light on him.
Q Did you speak to him?
A No, sir.
Q Did he appear to be asleep?
A No, sir.
Q Do you think he was sleeping?
A Yes, sir." (R. 13.)

The Officer of the Day did not know what, if any, instructions were given the accused, nor whether there were any special orders for this post, but said that special orders were posted in the guardhouse, and that orders had been issued that guards were not to sit on post (R. 10). The corporal of the guard stated that guard instructions were posted in the guardhouse (R. 8), and that a soldier about to go on guard duty was given his instructions by the sentry he relieved (R. 7), and that he knew of no order against sitting on a post (R. 8). The

220886

supernumerary stated guards were not allowed to sit on post, but that most of them did (R. 12). Staff Sergeant Brown stated that he did not know whether accused had been given any guard instructions and that there were no special orders for the various posts (R. 15).

4. The accused testified that he posted himself on the tour. When it started to rain (R. 16), he went under an archway and put his raincoat over his head. A car stalled on his post, but got under way again. He sat down half an hour later. When the supernumerary flashed a light on him, he challenged the latter. Previously, at the east end of his post, he had seen other lights in the distance and had run toward them, but his post is three-quarters of a mile long, and he did not find out who had the light (R. 17). He asserted that the Officer of the Day had told the guard to take measures to get out of the rain (R. 17-18); that he had been given no guard orders except from the guard he relieved (R. 16-17); that there were no special orders for his post; and that guards usually sat on their posts (R. 16). The supernumerary, called by the prosecution, stated that it took fifteen minutes to walk Post No. 5 (R. 12).

Staff Sergeant Brown testified that accused "is a very good soldier. He performed his duties in a cheerful manner" (R. 15).

5. The testimony is too uncertain in probative effect to furnish a sufficient foundation for a finding that accused was asleep upon his post. The testimony of the supernumerary is obviously inconsistent within itself, and falls far short of proving beyond a reasonable doubt that accused was asleep. Small inference of guilt only may be drawn from the testimony of the Officer of the Day in view of his limited efforts to locate the accused, and of the extent in area and terrain characteristic of Post No. 5.

6. For the reasons above 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.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General
Washington, D. C.

SPJGK
CM 220890

APR 3 0 1942

UNITED STATES	PUERTO RICAN DEPARTMENT
v.	Trial by G. C. M., convened at Fort Buchanan, Puerto Rico, February 25, 1942. Dishonorable discharge (suspended) and confinement for six (6) years. Fort Buchanan, Puerto Rico.
Private LEONCIO PAGAN (30404839), Battery D, 123rd Separate Coast Artillery Battalion (AA).	

OPINION of the BOARD OF REVIEW
HOOVER, VAN BENSCHOTEN and KOTRICH, 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 and the Board submits this, its opinion, to The Judge Advocate General.

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

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

Specification: In that Private Leoncio Pagan, Battery D 123rd Separate Coast Artillery Battalion AA, having received a lawful command from First Lieutenant Jose E. Bengoa, his superior officer, to halt, did at Catano, P.R., on or about December 27, 1941, willfully disobey the same.

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

Specification: In that Private Leoncio Pagan, Battery D 123rd Separate Coast Artillery Battalion AA, having been restricted to the limits of camp for one week, did, at Catano, P. R., on or about December 27, 1941, break said restriction by going to the Habana Bar, near Catano.

He pleaded not guilty to and was found guilty of the Charges 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 six years. The reviewing authority approved the sentence, directed its execution but suspended the execution of that portion thereof adjudging dishonorable discharge and designated Fort Buchanan, Puerto Rico, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 31, Headquarters Puerto Rican Department, March 31, 1942.

3. The evidence shows that on about December 26, 1941, as punishment for a failure to repair at the fixed time to his place of duty, accused was restricted by his company commander to the limits of his battery camp near Catano, Puerto Rico, for one week (R. 6-9). On December 27 he broke this restriction by going to an off limits place known as the "Havana Bar", about one kilometer from camp (R. 8). At about 9 p.m., on this day while accused, two other soldiers, some women and some civilian men were dancing in the bar, "a shack about twelve by fifteen feet", First Lieutenant Jose E. Bengoa, 123rd Separate Coast Artillery Battalion (AA), and a noncommissioned officer, both of accused's battery, came to the vicinity of the bar in a command car (R. 8, 10, 12). The noncommissioned officer recognized accused while the latter was within the building, by means of a cap he was wearing (R. 12) and by his "built" and "face" (R. 15). The officer and noncommissioned officer "jumped" from the car and at about the same moment accused, followed by the other soldiers, "jumped out of the window" of the building (R. 10, 12, 14). The three started to run away but the companions of accused were seized. Lieutenant Bengoa, at a distance of ten to twenty-five yards (R. 8, 13) shouted (R. 8) to accused in a "very clear" (R. 13) and "loud" (R. 10) voice to halt. Accused continued to run and the order was repeated once or twice but accused did not stop (R. 8, 12). Lieutenant Bengoa testified that he did not recognize accused during the transaction except as a soldier in uniform (R. 9). The noncommissioned officer testified that Lieutenant Bengoa used accused's name in ordering him to halt (R. 14). A "music box" was being played for dancing within the building (R. 9, 13). Upon being asked whether he was sure accused knew who he was Lieutenant Bengoa testified:

> "I wouldn't swear to it, but I expected them to know who I was. I was their battery commander once." (R. 11)

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NAVY DEPARTMENT

For the purpose of proving that accused "was punished for the same charge for which he is being tried here" the defense introduced testimony to the effect that when accused returned to camp he was given company punishment by Lieutenant Bengoa, senior company officer in the regularly detailed battery commander's absence, the punishment consisting of restriction to the battery area and marching or walking for four hours (R. 16, 18). Lieutenant Bengoa testified that this punishment was administered for "all the offenses that in my opinion he had committed" (R. 17).

Accused declined to testify or make an unsworn statement.

4. There is in the evidence proof that at the place and time alleged in the Specification, Charge I, Lieutenant Bengoa, a superior officer, addressed to accused a lawful command to halt and that accused did not obey the command. There is no substantial evidence, however, that accused received the command, that is, that he knew the command was in fact given or, if he knew that it was given, that it was given by his superior officer. There was testimony that the command was uttered in a loud, clear voice but it is established that at the moment the command was given accused was in flight, was at a considerable distance from the officer, and was in a position where the noise of the "music box" would tend to neutralize other sounds. The transaction occurred at night and there is nothing in the circumstances proved which justifies an inference that accused knew that an officer was present or that an officer addressed him. While in the light of the bar room accused was recognized by the noncommissioned officer but accused did not have a similar opportunity to recognize a person at least ten yards away and hurriedly approaching in darkness. Any conclusion that accused heard the command or that he knew Lieutenant Bengoa gave it would be merely conjectural. The evidence is not legally sufficient to support the findings of guilty of Charge I and its Specification.

5. With respect to Charge II and its Specification, alleging breach of restriction on December 27, 1941, the evidence shows that Lieutenant Bengoa imposed disciplinary punishment for the breach of restriction alleged. The offense was a minor one (par. 105, M.C.M.; sec. 462 (2), Dig. Op. J.A.G.,1912-1940) and Lieutenant Bengoa, as temporary battery commander, had authority, under Article of War 104,

to impose punishment therefor. To hold otherwise would deprive a temporary commander of an attribute of the position he holds for the time being and would to that extent defeat the purpose of Article of War 104 to provide summary disciplinary powers as incidental to the command power. There is nothing in that article to indicate that the disciplinary powers conferred are limited to permanently assigned commanding officers. The punishment imposed under Article of War 104 was in effect pleaded in bar of trial and the plea should have been sustained (par. 69c, M.C.M.; CM 204275, Lichtenfels).

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.

_____, Judge Advocate.

_____, Judge Advocate.

(On Leave), Judge Advocate.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General
Washington, D. C.

SPJGK
CM 220931

APR 25 1942

UNITED STATES)	ICELAND BASE COMMAND
)	
v.)	Trial by G. C. M., convened at Camp Pershing, Iceland, March 12, 1942. Dismissal.
)	
First Lieutenant JOHN S. BRIDGEMAN (O-320329), Quartermaster Corps.)	

OPINION of the BOARD OF REVIEW
HOOVER, VAN BENSCHOTEN and KOTRICH, Judge Advocates.

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

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

CHARGE I: Violation of the 85th Article of War.

Specification: In that First Lieutenant John S. Bridgeman, Company "B", Three Hundred and Ninety-Second Quartermaster Battalion (Port), Camp Haggi, Iceland, was, at Camp Halogoland, Iceland, on or about February 24, 1942, found drunk while on duty as Company Commander, Company "A", Two Hundred and Forty-First Quartermaster Battalion (Service), Camp Halogoland, Iceland.

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

Specification: In that First Lieutenant John S. Bridgeman, Company "B", Three Hundred and Ninety-Second Quartermaster Battalion (Port), Camp Haggi, Iceland, having received a lawful order from Lieutenant Colonel H. A. Cooney, G-3, Headquarters, Iceland Base Command, to move his Company, Company "A", Two Hundred and Forty-First Quartermaster Battalion (Service) from Camp Halogoland, Iceland to Camp Lambton Park, Iceland, Lt. Col. H. A. Cooney being in the execution of his office, did, at Camp

Halogoland, Iceland, on or about February 24, 1942, fail to obey the same.

He pleaded not guilty to and was found guilty of the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial stating: "pursuant to the provisions of Articles of War 48 and 50½ further action is withheld."

3. The evidence shows that accused, a first lieutenant of the 392nd Quartermaster Battalion (Port), was, on February 23 and 24, 1942, in command of Company A, 241st Quartermaster Battalion (Service) (R. 12), stationed at Camp Halogoland, Iceland. On February 23, Lieutenant Colonel Harold A. Cooney, General Staff Corps, G-3, Iceland Base Command, issued a field order in reference to the movement of troops between certain camps and in his office on that day held a meeting of all unit commanders involved in the movement. Accused was present and asked several questions in connection with the orders then being explained (R. 6) and received a copy of the orders (R. 13). The written orders were secret. They directed the moving of Company A, 241st Quartermaster Battalion, from Camp Halogoland to Camp Lambton Park on February 24, 1942, to make space for other troops moving in. The orders required full coordination between units and the exercise of extreme vigilance during the movements (R. 9, 10). Accused discussed the orders with Major William L. Dooley, Quartermaster Corps, his next superior in command, immediately after the conference and with him went to the office of G-4 of the Iceland Base Command to arrange for transportation for the move next day. Accused asked to move his company at 5 p.m. This was agreed to and arrangements were made for trucks to be on hand. Details of men of the company were released for the move at that hour on February 24 (R. 14, 28, 29).

On February 24, at about 5 p.m., accused gave to one of his company officers some instructions to the end of preparing the company for the move at 9 a.m., the following morning (R. 22). Shortly thereafter two officers met accused in the camp day room at Camp Lambton Park and were with him from fifteen minutes to a half hour. To both officers accused appeared normal although one testified that he "could smell traces of liquor" (R. 17) and the other testified that he noticed that accused "swayed a bit" (R. 18). Another officer, First Lieutenant Hugh Smith, 50th Signal Battalion, met accused at about 5:10 p.m., in the Headquarters of the 50th Signal Battalion at Camp Lambton Park. Accused, after making a telephone call, accepted an invitation to

remain for supper at the officers' club. At the club, between 5:25 and 5:40 p.m., he had "two drinks". Lieutenant Smith left for a time and upon his return "shortly after 6" p.m., found accused asleep in a chair (R. 19). He awakened accused and arranged for his return to Camp Halogoland by truck. Lieutenant Smith testified that accused,

> "appeared to be somewhat under the influence of liquor; however, I could not say whether he was drunk or not. From the time I returned to the club until he left, I did not speak to Lieutenant Bridgeman."

He also testified that the actions of accused were not "exactly normal" and "When he was awakened we helped him on with his coat, but he proceeded from the officers' club to the vehicle without assistance." (R. 20) At about 7 p.m., accused was observed in the mess hall at Camp Halogoland by the company officer to whom he had earlier given the instructions about the movement of his company. This officer testified that accused invited him to "sit down and have some chow", stated that he would take care of the move of the company and told witness "not to worry any more". Accused's speech was not wholly natural (R. 23, 24) and it was "evident" that he had "had something to drink" (R. 23). His "physical sensibilities were impaired" and witness believed that within the definition of paragraph 145 of the Manual for Courts-Martial accused was drunk (R. 25). Lieutenant Colonel James R. Hamilton, Infantry, G-4, Iceland Base Command, visited accused at about 7 p.m., to assure compliance with instructions as to types of property to be taken by the company and to be left behind. The company had not been moved at this time (R. 29) and accused stated that he intended to move on the following day (R. 30). Colonel Hamilton testified that accused talked coherently (R. 27) but appeared to be "somewhat excitable" or "jumpy". In view of his manner and his failure to fulfill his responsibilities in connection with the troop movement witness believed accused "had been drinking" (R. 28). Major Dooley saw accused in his room at Camp Halogoland at about 7:50 p.m. (R. 14) Upon being questioned as to why he had not moved his company at 5 p.m., accused stated that he had gone to Camp Lambton Park where he had found that "some minor arrangements were not suitable to him" and thought it better to move at 9 o'clock the next morning. At about this time Major Dooley was ordered to relieve accused of his command. Major Dooley testified that accused appeared at this time to be "tired and sleepy" but otherwise normal. He talked clearly and coherently (R. 15).

For the purpose of determining whether accused was drunk two medical officers interviewed him in his quarters at about 8:45 p.m., February 24 (R. 33). One of the medical officers testified that he believed accused "had been drinking" and was

> "somewhat under the influence of alcohol, but he was able to walk, and talk rather coherently ***. I cannot say that the man was drunk at the time I saw him." (R. 32)

The other medical officer testified that at the beginning of the interview accused did not appear to be "entirely normal" and that

> "His movements were somewhat sluggish, but coordinated; his speech was rather slow, but coherent; he appeared tired",

but that as the interview progressed accused became "perfectly alert and wide awake" (R. 34).

Accused declined to testify or make an unsworn statement.

A witness for the defense testified that the movement of Company A, 241st Quartermaster Battalion (Service) was in fact completed on February 24 (hour not stated); and that accused had been in Iceland about one month prior to February 24 (R. 38).

4. The evidence shows that as alleged in the Specification, Charge II, accused received a lawful order issued by Lieutenant Colonel Cooney, G-3, Iceland Base Command, to move his company from Camp Halogoland, Iceland, to Camp Lambton Park, Iceland, on February 24, 1942, and that, as alleged, he failed to obey the order. He was relieved from command of the company at about 7:50 p.m., February 24. The movement should have been made several hours prior to his relief. No sufficient reason for his failure to comply with the order was proved. His failure to obey was apparently the result of his drunkenness.

The evidence also shows that on February 24, 1942, while accused was on duty as company commander of Company A, 241st Quartermaster Battalion (Service), following the hour which had been designated for movement of his company, he drank intoxicants and was soon thereafter found asleep in a chair at an officers' mess. When awakened and subsequently, prior to his relief as company commander, he exhibited

evidences of intoxication. One officer testified that from his appearance and actions he believed accused was under the influence of liquor. Another officer testified that he believed accused was drunk. From all the evidence, including the opinions of the officers who observed him and the testimony as to his behavior, the Board of Review is convinced that accused was in fact drunk within the meaning of paragraph 145, Manual for Courts-Martial. Violation of Article of War 85, as alleged in Charge I and its Specification, is established.

5. War Department records show that accused was 32 years of age at the time of the commission of the offenses. He was appointed a second lieutenant, Field Artillery Reserve, on July 21, 1934, promoted to a first lieutenant on September 24, 1937, and entered on active duty December 15, 1941, at Camp Lee, Virginia.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence. A sentence of dismissal is mandatory upon conviction of violation of Article of War 85 and is authorized upon conviction of violation of Article of War 96.

Robert W. Hoover, Judge Advocate.

Charles M. Van Deusen, Judge Advocate.

(On Leave), Judge Advocate.

1st Ind.

War Department, J.A.G.O., APR 29 1942 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant John S. Bridgeman (0-320329), Quartermaster Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence. Accused was found drunk at a time at which, as company commander, he was specially charged with the duty of moving his company at a designated hour, in coordination with other units, within an important military area in Iceland. His drunkenness was not extreme but was of such degree that as a result of it he wholly failed to perform the duty with which he was specially charged. I recommend that the sentence be confirmed and carried into execution.

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

Myron C. Cramer.

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

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

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General
Washington, D. C.

SPJGK
CM 220946

MAY 1 4 1942

UNITED STATES	)	3RD INFANTRY DIVISION
v.	)	Trial by G. C. M., convened at Fort Lewis, Washington, March 25, 1942. Dishonorable discharge (suspended) and confinement for six (6) months. Fort Lewis, Washington.
Private JOHN J. FRANK (6580089), Battery A, 41st Field Artillery Battalion.	)	

OPINION of the BOARD OF REVIEW
HOOVER, RITER and VAN BENSCHOTEN, 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 and the Board submits this, its opinion, to The Judge Advocate General.

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

CHARGE: Violation of the 58th Article of War.

Specification: In that John J. Frank, Battery A, 41st Field Artillery Battalion, did at Bandon, Oregon, on or about 10:00 PM, March 1, 1942, desert the service of the United States by absenting himself without proper leave from his organization with intent to shirk important service, to wit: avoid duty at the guns employed along the beach at Bandon, Oregon for protection against threatened invasion, and did remain absent in desertion until he surrendered himself on or about 7:00 PM, March 2, 1942, at Bandon, Oregon.

The defense entered a special plea in bar of trial upon the ground that accused had "already been punished under Article of War 104" (R. 9). The plea was denied (R. 21). Accused thereupon pleaded not guilty to the Charge and Specification. He was found guilty as charged. 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 six months. The reviewing authority approved the sentence, directed its execution but suspended the execution of that portion thereof adjudging dishonorable discharge and designated Fort Lewis, Washington, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 22, Headquarters 3rd Infantry Division, April 9, 1942.

3. The evidence shows that on Sunday, March 1, 1942, accused, while quartered with a platoon of his battery in a high school building in Bandon, Oregon (R. 25, 29), a seacoast town of about one thousand inhabitants (R. 23, 32), was given a verbal pass good until 10 p.m. of that day, authorizing him to leave the high school building and go about the town (R. 25, 26, 29). Passes were also given to other men of the platoon (R. 25). Accused was absent from quarters on the morning of March 2, apparently at about the time of reveille (R. 36, 38, 39). He returned to his quarters at about 7 p.m., on March 2 (R. 33). He had been detailed for twenty-four hour tours of guard duty at the battery motor park in Bandon beginning at 1 p.m., on alternate days. A tour commenced on March 2 but inasmuch as accused was then absent another soldier was detailed in his stead (R. 24, 31).

Sometime prior to March 1 (date not otherwise specified) accused's platoon had been sent with two guns to Bandon for the purpose of defending the town and some oil tanks near it from possible enemy seaborne attack. Submarines had recently shelled some seacoast oil installations near Santa Barbara, California, and the possible presence of enemy submarines near Tillamook Light, Oregon, in the general locality of Bandon but not within the platoon's defense area, had been reported. Suspicious light signals had been observed in the vicinity of the town and fifth column activity was suspected (R. 22-24). The men of the battery were advised of the possibility of enemy attack. The company commander testified in this connection:

> "I talked to the battery for about fifteen minutes and explained all I knew of the situation; that is, that the battery was being ordered to the coast to defend the towns of Bandon and Marshfield against submarine attacks. I further explained that submarines had been attacking the coast and told of

> the Santa Barbara incident which happened two days before. I told them we were going down to do a job, and as far as I was concerned we were actually on the firing front ***." (R. 19)

The two guns were emplaced about three quarters of a mile or more from the town (R. 26, 29). It was not the duty of accused to be present with the guns at any time during his absence (R. 27, 31) but his combat assignment was with an observation post in the immediate vicinity of the guns (R. 24, 25, 30, 34). It was the plan of the battery commander that in case of attack "the trucks would have gone around town and gathered men up and taken them out to the guns" (R. 26). The platoon was relieved from its station at Bandon about March 4 (R. 31).

4. If in fact accused absented himself without leave with intent to shirk service with his battery which might entail the hazards of combat, he was properly convicted of desertion for such service was certainly to be classed as important service within the meaning of Article of War 28. Intent to shirk could, of course, be proved by circumstantial evidence. On the other hand, mere absence without leave during a period in which combat might occur did not amount to desertion unless there was a specific intent to shirk the important service.

There is no substantial evidence that accused intended to avoid service with the platoon during combat. He knew that his platoon was in a precautionary defense position, but there is nothing to show that during his absence he left the immediate vicinity of the small town where the platoon was stationed or that he actively concealed himself. The cause of his absence does not appear but the only certain duty assignment of which he was apprised and which actually fell to him during his absence was ordinary guard duty. He returned of his own volition while the possibility of combat continued. The circumstance that he and other members of the battery were given passes within the town must have indicated to accused that his constant presence in the vicinity of his quarters was not vital, and that contact with the enemy was not actually imminent. Specific intent to avoid duty at the guns employed for protection against threatened invasion, as charged in the Specification, is not established.

The evidence is legally sufficient to establish only so much of the offense charged as involves absence without leave from about

6 a.m., March 1, 1942, to about 7 p.m., of the same day, in violation of Article of War 61. The maximum punishment authorized by paragraph 104c of the Manual for Courts-Martial for this offense is confinement at hard labor for three days and forfeiture of two days' pay ($2.66).

5. In connection with the plea in bar of trial the evidence shows that about March 4, 1942, at Roseburg, Oregon (R. 10, 15, 18, 31), as a result of his absence without leave on March 2, accused was placed in arrest, reprimanded as one of a group of several offenders, and required to perform considerable fatigue (R. 11, 13-16). He was also told he was to be tried by court-martial (R. 14, 17, 19). A witness for the defense testified that the fatigue required of accused was extra duty (R. 12). The officer who placed accused in arrest testified that he did not intend to impose punishment under Article of War 104 (R. 19) and did not require "extra duty" of accused (R. 20, 21), but upbraided accused and other offenders in the presence of the assembled battery, explained to the battery the seriousness of the offenses the men had committed, and took action to separate accused and other offenders from the remaining men of the battery (R. 19, 20).

Upon the evidence the court was justified in concluding that punishment was not imposed under Article of War 104. The plea in bar of trial was properly overruled.

6. 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 Specification as involves findings that at the place alleged accused absented himself without leave from his organization at about 6 a.m., March 2, 1942, and remained absent without leave until he surrendered himself at about 7 p.m., March 2, 1942, in violation of Article of War 61, and legally sufficient to support only so much of the sentence as involves confinement at hard labor for three days and forfeiture of $2.66 of his pay.

Herbert A. O. Haase, Judge Advocate.

Benjamin F. Riter, Judge Advocate.

[illegible], Judge Advocate.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General.
Washington, D. C.

SPJGH
CM 220947

MAY 20 1942

UNITED STATES)	3rd INFANTRY DIVISION
)	
v.)	Trial by G.C.M., convened at Fort Lewis, Washington, March 25, 1942. Dishonorable discharge and confinement for six (6) months. Fort Lewis, Washington.
)	
Private WARREN B. CALVIN)	
(6578042), Battery A, 41st)	
Field Artillery Battalion.)	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and HALE, 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 and sentence, has been examined by the Board of Review, and the Board submits this, its opinion, to The Judge Advocate General.

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Warren B. Calvin, Battery A, 41st Field Artillery Battalion, did at Bandon, Oregon, on or about 10:00 PM, March 1, 1942, desert the service of the United States by absenting himself without proper leave from his organization with intent to shirk important service, to wit: avoid duty at the guns employed along the beach at Bandon, Oregon for protection against threatened invasion, and did remain absent in desertion until he surrendered himself on or about 7:00 PM, March 2, 1942, at Bandon, Oregon.

The accused pleaded not guilty to and was found guilty of the Charge and its Specification. He was sentenced to dishonorable discharge,

forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months. The reviewing authority approved the sentence, ordered its execution but suspended the dishonorable discharge, and designated Fort Lewis, Washington, as the place of confinement. The result of his trial was published in General Court-Martial Orders No. 23, Headquarters 3rd Infantry Division, April 9, 1942.

3. The evidence shows that on March 1 and 2, 1942, a platoon of Battery A, 41st Field Artillery Battalion, of which the accused was a member, was stationed at Bandon, Oregon, for the purpose of protecting certain oil tanks and the town of Bandon (R. 10-11) from a possible Japanese submarine attack. The evidence does not reveal how long the platoon had been stationed at Bandon, but there is evidence that the commanding officer knew that the organization was to be relieved, and that on March 2, 1942, he made numerous trips about the town in preparation for such anticipated departure (R. 13).

The town of Bandon is a small town of about one thousand inhabitants located on the Oregon coast. On the date the accused is alleged to have deserted the service, the guns of his platoon were located on the ocean front about three-quarters of a mile southwest of the town (R. 13), and the platoon was quartered in the Bandon high school gymnasium about one-half mile in the opposite direction (R. 13). The command post and headquarters of the platoon were located in the American Legion hall in the center of the town (R. 13), and the platoon mess hall was about three blocks from the platoon headquarters (R. 13).

Prior to the arrival of the platoon in Bandon, Lieutenant Robert E. Coffin, the commanding officer of the platoon, had explained to his men, including the accused, the nature of their mission in Bandon. He had told the men that they were going to protect the installations there against possible submarine attack (R. 11-12), that a submarine attack had already been made on the California coast, that the danger of such an attack at Bandon was great, and that they would have to work long and hard in order to prepare their positions for defense (R. 12).

On Sunday, March 1, 1942, the accused was on guard duty (R. 14). It appears that in the evening of that day the

accused obtained permission to be absent from his organization within the limits of Bandon until 10 p.m. Lieutenant Coffin testified that he gave the accused a written pass limited to Bandon and that the limitation on the pass was shown by the fact that "the name Bandon was written right on the pass" (R. 15). On the other hand, both First Sergeant Edward Clawson (R. 18) and Sergeant Henry A. Hester testified that written passes were not being given at that time but that oral permission to be absent within the town of Bandon was extended to seven men at a time. These men were required to sign their names upon the platoon bulletin board (R. 24).

The accused was absent on the morning of March 2, 1942 (R. 22). There is no evidence that he was seen during that day, although Lieutenant Coffin testified that since the accused had been reported absent, he looked about the town for him while about other duties (R. 12). At about 7 p.m., the accused voluntarily returned to his barracks and reported to the Sergeant in Charge of Quarters that he was in quarters (R. 20-21).

Where the accused was or what he did on March 2nd, is not shown, but the evidence does show that had he been with his organization he would probably have performed work in connection with the preparation of a new barracks (R. 15). The evidence shows further that the tactical duties of the accused in the event of a submarine attack would have been to carry ammunition from the ammunition dump to the guns.

4. In order to sustain the finding of guilty in this case, it is necessary that the evidence support the conclusion that the accused deserted the service by absenting himself from his organization with the intent to shirk important service (par. 130 a, p. 142, M.C.M., 1928). An analysis of the evidence fails to produce such support. The evidence shows that the accused left his organization with permission, and that he voluntarily returned in less than twenty-four hours. The exact length of the time the accused was absent and his whereabouts during such absence were not shown. The evidence presents no facts from which a trustworthy inference can be drawn that the accused intended by his absence to shirk important or hazardous duty. The probability of a submarine attack appears to have been equally as great at the time the accused returned to his organization as during the time of his absence. Furthermore, there is no evidence that the accused had showed any fear of such an at-

tack or any desire to avoid his duties in connection therewith. On the contrary, the fact that permission was given to seven men at a time to be on pass in the town, together with the fact that the commanding officer was engaged in activities incident to the relief of the organization, indicates that the organization was probably under less apprehension of an attack on March 2nd, than when it assumed the defense of Bandon. This fact in turn tends to repudiate the existence of fear on the part of the accused of an impending, hazardous military duty or the existence of an intent to avoid such duty. Considered in its entirety, the record fails to present any evidence that the accused absented himself from his organization with the intent to shirk important service. The evidence is legally sufficient to establish only so much of the offense as involves absence without leave from about 6 a.m., to about 7 p.m., March 2, 1942, in violation of Article of War 61. The maximum punishment authorized by paragraph 104 c of the Manual for Courts-Martial for this offense is confinement at hard labor for three days and forfeiture of two days' pay.

5. 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 its Specification as involve findings that the accused, at the place alleged, absented himself without leave from his organization at about 6 a.m., March 2, 1942, and remained absent without leave until he surrendered himself at about 7 p.m., March 2, 1942, in violation of Article of War 61, and legally sufficient to support only so much of the sentence as involves confinement at hard labor for three days and forfeiture of two days' pay.

Lester S. Hill Jr., Judge Advocate.

Chas. L. Cresson, Judge Advocate.

Horace O'Hale, Judge Advocate.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General.
Washington, D. C.

SPJGH
CM 221071

APR 27 1942

UNITED STATES v. Private NOLLIE F. HOOD (20417653), Headquarters Detachment, 3rd Battalion, 167th Infantry, Camp Blanding, Florida.	31st INFANTRY DIVISION Trial by G.C.M., convened at Camp Bowie, Texas, March 30, 1942. Dishonorable discharge and confinement for one and one-half ($1\frac{1}{2}$) years. Reformatory.

HOLDING by the BOARD OF REVIEW
HILL, CRESSON and HALE, Judge Advocates.

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

2. The only question requiring consideration is the designation of a Federal reformatory as the place of confinement.

Confinement in a Federal correctional institution or reformatory is not authorized under the letter dated February 26, 1941 (AG 253 (2-6-41)E), from The Adjutant General to all Commanding Generals, subject: "Instructions to reviewing authorities regarding the designation of institutions for military prisoners to be confined in a Federal penal or correctional institution", except in a case where confinement in a penitentiary is authorized by law (CM 220093, Unckel). Confinement in a penitentiary is not authorized under Article of War 42 for peacetime desertion, nor for the embezzlement of property of the value of less than $50, the two offenses of which accused was found guilty.

3. 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 and one-half years in a place other than a penitentiary, Federal correctional institution or reformatory.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General
Washington, D. C.

SPJGK
CM 221073

APR 25 1942

UNITED STATES v. Private RUSSELL J. FOUT (20417096), Company K, 167th Infantry (R).	31ST INFANTRY DIVISION Trial by G. C. M., convened at Camp Bowie, Texas, March 23 and 25, 1942. Dishonorable discharge and confinement for one (1) year and one (1) day. Federal Reformatory, El Reno, Oklahoma.

HOLDING by the BOARD OF REVIEW
HOOVER, VAN BENSCHOTEN and KOTRICH, Judge Advocates.

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

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

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

Specification 1: In that Private Russell J. Fout, Company "K", 167th Infantry (R), did, at Camp Blanding, Florida, on or about January 3, 1941, desert the service of the United States and did remain absent in desertion until he surrendered himself at Camp Blanding, Florida, on or about December 17, 1941.

Specification 2: *** did, at Camp Blanding, Florida, on or about December 24, 1941, desert the service of the United States and did remain absent in desertion until he was apprehended at Birmingham, Alabama, on or about January 6, 1942.

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

Specification: *** having been duly placed in confinement in Stockade Number One (1), Camp Blanding, Florida, on or about December 17, 1941, did, at Camp Blanding, Florida, on or about December 24,

1941, escape from said confinement before he was set at liberty by proper authority.

He pleaded not guilty to Charge I and its Specification and guilty to Charge II and its Specification. He was found guilty of the Charges 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 two and one-half years. The reviewing authority approved the sentence, reduced the period of confinement to one year and one day, designated the Federal Reformatory, El Reno, Oklahoma, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The record of trial is legally sufficient to support the findings of guilty of Charge I and Specification 1 thereunder and of Charge II and its Specification. The only question requiring consideration in this holding is whether the record of trial is legally sufficient to support the finding of guilty of Specification 2, Charge I, and is legally sufficient to support so much of the sentence as involves confinement in a Federal reformatory.

4. The evidence, other than that relating exclusively to Specification 1, Charge I, alleging desertion on January 3, 1941, terminated by surrender on December 17, 1941, is substantially as follows:

Prior to the departure of accused's organization from Camp Blanding, Florida, en route to Camp Bowie, Texas (R. 4), following the return of accused to military control and his confinement on December 17, 1941 (R. 8), accused was heard to remark to other prisoners that "If they go through Birmingham they will be minus a prisoner when the train leaves". As a result precautions were taken to prevent any escape from the train (R. 4). The first sergeant of accused's company, after testifying that the company morning report showed that accused was dropped as a deserter on January 29, 1941, and was "picked up" as in confinement on December 17, 1941 (R. 6), testified further as follows:

"Q. Do you have any entries in your Morning Report on December 24, 1941, concerning Private Fout?
A. No, sir.
Q. During January, 1942, concerning him?
A. Yes, sir. <u>January 7, 1942</u>.
Q. What is that entry?
A. Private Fout, <u>erroneously shown as present in arrest to desertion</u>.

Q. Any entries prior to that?
A. No, sir.
Q. Did he return to the service on January 6, 1942?
A. No, sir. Don't have an entry on Morning Report to that effect.

CROSS EXAMINATION

Questions by the defense:
Q. Do you make out the morning report?
A. Yes, sir.
Q. In two instances, January 29, 1941, and January 7, 1942, his status changed. I believe on January 7, 1942, he was erroneously shown as present to desertion. Was there any reason to change his status?
A. On the 29th the Company Commander got permission from the Regimental Commander.
Q. There was no evidence to show that he had deserted, other than being AWOL?
A. No, sir, not that I know of.

REDIRECT EXAMINATION

Questions by the prosecution:
Prosecution: If the court please, the court will notice that after a period of thirty days and certain letters are written, the commanding officer is permitted to drop an absent soldier from the rolls as a deserter. (Underscoring supplied). (R. 6, 7)

This witness testified also that accused had not been on duty with his company since his return in "January" and that he was apprehended in "Birmingham" (date not stated) (R. 7, 8).

5. No evidence was introduced which proved that accused absented himself without leave or deserted on or about December 24, 1941, the specific date of the desertion alleged in Specification 2, Charge I. Through references in the cross-examination of the first sergeant to changes in the status of accused, including the erroneous dropping of accused as a deserter on January 7, 1942, there was a tacit suggestion by the defense counsel that accused had been in a status of absence without leave in January, 1942. The testimony concerning the morning report entry to the effect that accused had been erroneously dropped as a deserter also suggests that accused may have been absent without leave. There is no definite and certain proof of such absence in the testimony concerning the morning report entries or otherwise. Escape was not proved, and it is patent from the record that

the court based its finding of guilty of desertion as alleged in Specification 2, Charge I, wholly on the pleas of guilty of escape on December 24, 1941.

It is true that in pleading guilty to Charge II and its Specification accused admitted that he escaped from confinement on December 24, 1941, but this admission, from its nature, went no further than to admit the offense or act of escape as charged (Winthrop's Military Law and Precedents (Reprint), p. 277). It did not admit or supply proof of a desertion the commission of which had been put in issue by the plea of not guilty to the Specification alleging that offense. As stated in paragraph 64a of the Manual for Courts-Martial,

> "Except as to matters covered by a plea of guilty, a plea admits nothing as to the jurisdiction of the court and nothing as to the merits of the case."

A close analogy is found in the rule that a plea of guilty of absence without leave only under a charge of desertion is not in itself sufficient basis for a conviction of desertion, and that the acts admitted by such a plea of guilty are not a proper basis for an inference of the commission of an offense denied by pleas of not guilty (par. 130a, M.C.M.; CM 191422, Dragoon; CM 151647, Wright; CM 151386, Wilson; CM 144470, Bruce; CM 143989, Wall).

6. Confinement in a penitentiary is not authorized by Article of War 42 for either of the offenses of which accused was properly found guilty. Confinement in a Federal reformatory is not in any case authorized by the War Department letter dated February 26, 1941 (AG 253 (2-6-41)E), subject: "Instructions to reviewing authorities regarding the designation of institutions for military prisoners to be confined in a Federal penal or correctional institution", except when confinement in a penitentiary is authorized by law (CM 220712, Brennan; CM 220093, Unckel).

7. For the reasons stated the Board of Review holds the record of trial legally insufficient to support the finding of guilty of Specification 2, Charge I, and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year and one day in a place other than a penitentiary, Federal correctional institution or reformatory.

_____, Judge Advocate.

_____, Judge Advocate.

(On Leave) _____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., APR 30 1942 - To the Commanding General, 31st Infantry Division, Camp Bowie, Texas.

1. In the case of Private Russell J. Fout (20417096), Company K, 167th Infantry (R), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the finding of guilty of Specification 2, Charge I, and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year and one day in a place other than a penitentiary, Federal correctional institution or reformatory, which holding is hereby approved. Upon vacation of the finding of guilty of Specification 2, Charge I, and designation of a place of confinement other than a penitentiary, Federal correctional institution or reformatory you will have authority to order the execution of the sentence.

2. In view of the nature of the offenses and in order that accused may be held in the Army for further possible military service, it is recommended that the execution of that portion of the sentence adjudging dishonorable discharge be suspended.

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 221073).

Myron C. Cramer.

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

1 Incl.
Record of trial.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General.
Washington, D. C.

SPJGH
CM 221153

APR 30 1942

UNITED STATES	)	31st INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Camp Bowie, Texas, April 8 and 13, 1942. Dismissal and confinement for six (6) months. Reformatory.
First Lieutenant THOMAS R. HARDIN (0-404396), Company M, 156th Infantry.	)	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and HALE, Judge Advocates.

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

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

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

Specification: In that 1st Lieutenant Thomas R. Hardin, Company M, 156th Infantry, 0-404396, did, without proper leave, absent himself from his organization at or near Great Falls, South Carolina, from about the 9th of November, 1941 to about the 28th of March, 1942.

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

Specification 1: In that 1st Lieutenant Thomas R. Hardin, Company M 156th Inf did at Tampa, Florida, on or about the 21st day of June 1941, with intent to defraud wrongfully and unlawfully make and utter to Hotel Floridan a certain check, in words and figures as follows, to wit: A check for the sum of $25.00, dated June 21, 1941, drawn on the Florida Bank at Starke, Starke Florida, and by means thereof, did

fraudulently obtain from the Hotel Floridan Twenty-Five ($25.00) Dollars, he the said Thomas R. Hardin then well knowing that he did not have and not intending that he should have sufficient funds in the Florida Bank at Starke, Starke, Florida, for the payment of said check.

Specification 2: In that 1st Lieutenant Thomas R. Hardin, Company M 156th Infantry did at Camp Blanding, Florida, on or about the 28th day of July, 1941, with intent to defraud, wrongfully and unlawfully make and utter to the Camp Exchange, Camp Blanding, Florida, a certain check in words and figures as follows, to wit: A check for the sum of $5.00, dated July 28, 1941, drawn on The Calcasieu Marine Bank of Lake Charles, Louisiana, and by means thereof did fraudulently obtain from the Camp Exchange, Camp Blanding, Florida, fifty cents in cash and credit on his account with said Exchange in the sum of $4.50, he the said Thomas R. Hardin knowing that he did not have and not intending that he should have sufficient funds in the Calcasieu Marine Bank of Lake Charles, Louisiana, for the payment of said check.

Specification 3: In that 1st Lieutenant Thomas R. Hardin, Company M 156th Infantry being indebted to The Morris Plan Savings Bank, Jacksonville, Florida, in the sum of $50.00, being two monthly installments of $25.00 each and being due on the 2nd day of July and August, 1941, said installments being due as payments on a note of $150.00 given said Morris Plan Bank on May 20, 1941, did at Jacksonville, Florida, from July 2, 1941 to August 2, 1941 dishonorably fail and neglect to pay said debt.

Specification 4: In that 1st Lieutenant Thomas R. Hardin, Company M 156th Infantry did at Jacksonville, Florida, on or about the 22nd day of October, 1941, with intent to defraud, wrongfully and unlawfully make and utter to Donaldson, Inc., a certain check, in words and figures as follows, to wit: A check for the sum of $25.00, dated October 22, 1941, drawn on the Calcasieu Marine Bank of Lake Charles, Louisiana, and by means thereof did fraudulently obtain from

Donaldson, Inc., $25.00, he the said Thomas R. Hardin, then well knowing that he did not have and not intending that he should have sufficient funds in The Calcasieu Marine Bank of Lake Charles, Louisiana, for the payment of said check.

Specification 5: In that 1st Lieutenant Thomas R. Hardin, Company M 156th Infantry did at Charlotte, North Carolina, on or about the 8th, 9th and 11th of November, 1941, with intent to defraud, wrongfully and unlawfully make and utter to The Selwin Hotel three certain checks in words and figures as follows, to wit: A check for the sum of $10.00 dated November 8th, 1941 drawn on the First National Bank of Lake Charles, Louisiana; a check for the sum of $20.00 dated November 9th, 1941, drawn on the First National Bank of Lake Charles, Louisiana, a check for $10.00 dated November 11th, 1941, drawn on the First National Bank of Lake Charles, Louisiana, and by means of said checks did fraudulently obtain from The Selwin Hotel $40.00, he the said Thomas R. Hardin, then well knowing that he did not have and not intending that he should have sufficient funds in The First National Bank of Lake Charles, Louisiana, for the payment of said checks.

Specification 6: In that 1st Lieutenant Thomas R. Hardin, Company M 156th Infantry did at Beaumont, Texas, on or about the 15th day of December, 1941, with intent to defraud, wrongfully and unlawfully make and utter to the First National Bank of Beaumont, Texas, a certain check, in words and figures as follows, to wit: A check for the sum of $20.00, dated December 15, 1941, drawn on The Florida Bank at Starke, Starke, Florida, and by means thereof did fraudulently obtain from The First National Bank of Beaumont, Texas, $20.00, he the said Thomas R. Hardin then well knowing that he did not have and not intending that he should have sufficient funds in The Florida Bank at Starke, Starke, Florida, for the payment of said check.

Specification 7: In that 1st Lieutenant Thomas R. Hardin, Company M 156th Infantry, did at Savannah, Georgia, on or about the 14th and 17th of February, 1942, with intent to defraud, wrongfully and unlawfully make and utter to The Savannah Hotel, two certain checks in words and figures as follows, to wit: A check for the sum of $15.00 dated February 14th, 1942 drawn on The Florida Bank at Starke, Starke, Florida; a check for the sum of $15.00 dated February 17th, 1942 drawn on The Florida Bank at Starke, Starke, Florida, and by means thereof did fraudulently obtain from The Savannah Hotel the sum of $30.00, he the said Thomas R. Hardin, then well knowing that he did not have and not intending that he should have sufficient funds in The Florida Bank at Starke, Starke, Florida, for the payment of said checks.

Specification 8: In that 1st Lieutenant Thomas R. Hardin, Company M 156th Infantry having on or about the 3rd of September, 1941 become indebted to the following persons and business establishments, to wit:

M. T. Cappel,	for the sum of	$15.00
H. G. Schopfer	for the sum of	$20.00
Bentley Hotel	for the sum of	$95.00
Evangeline Hotel	for the sum of	$45.00
Guaranty Bank	for the sum of	$15.00
Liggets	for the sum of	$20.00
Rapides Drug	for the sum of	$10.00
Mayflower Hotel	for the sum of	$50.00
Seminole Hotel	for the sum of	$15.00
Roosvelt Hotel	for the sum of	$25.00
Floridan Hotel	for the sum of	$25.00
Mess Bill	for the sum of	$74.00
Levy's	for the sum of	$40.00
Morris Plan Savings	for the sum of	$75.00
Misc. Bills Lake Charles	for the sum of	$75.00
	Total	$599.00

and having failed without due cause to liquidate said indebtedness, and having on or about September 3, 1941 promised in writing to The Commanding Officer 156th In-

fantry that he would in September, 1941 settle such indebtedness in full, did without due cause, near Alexandria, Louisiana, and Great Falls, South Carolina, dishonorably fail to keep said promise.

The accused pleaded and was found guilty of all Charges and Specifications. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for six months. The reviewing authority approved the sentence, designated the Federal Reformatory, El Reno, Oklahoma, as the place of confinement, and forwarded the record of trial for action under the 48th Article of War.

3. No testimony was introduced either by the prosecution or by the defense. The accused elected to remain silent.

4. The offenses to which he pleaded, and of which he was found guilty, include absence without leave for four months and nineteen days; making and uttering eight checks, aggregating $145, without having sufficient funds in the bank for payment thereof; dishonorable failure to pay two installments of $25 each upon a note; and dishonorable failure to keep his promise made to his regimental commander to settle in full his indebtedness upon fifteen accounts, aggregating $599.

5. Confinement in a Federal correctional institution or reformatory is not authorized under the letter dated February 26, 1941 (AG 253 (2-6-41)E), from The Adjutant General to all Commanding Generals, subject: "Instructions to reviewing authorities regarding the designation of institutions for military prisoners to be confined in a Federal penal or correctional institution", except in a case where confinement in a penitentiary is authorized by law (CM 220093, Unckel). Confinement in a penitentiary is not authorized by law unless the period of confinement authorized and adjudged is more than one year (A.W. 42). Confinement in a Federal reformatory is not authorized in this case in which the period of confinement adjudged is six months.

6. The accused is twenty-eight years old. The records of the Office of The Adjutant General show his service as follows:

Federally recognized as Second Lieutenant, Company L, 156th Infantry, National Guard of Louisiana, Novem-

ber 12, 1940; active duty November 25, 1940, pursuant to order of the President dated November 16, 1940; appointed Second Lieutenant, Infantry, National Guard of the United States, November 25, 1940; promoted, temporarily, to First Lieutenant, Infantry, Army of the United States, June 23, 1941.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. A sentence of dismissal is mandatory upon conviction of a violation of the 95th Article of War and is authorized upon conviction of a violation of the 61st Article of War. Confinement in a Federal reformatory is not authorized under the sentence adjudged in this case.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General.
Washington, D. C.

SPJGH
CM 221170

MAY 13 1942

UNITED STATES	)	IV ARMY CORPS
v.	)	Trial by G.C.M., convened at Camp Livingston, Louisiana, April 4, 1942. Dishonorable discharge and confinement for five (5) years. Disciplinary Barracks.
Private RAY HEMMITT (36004873), 60th Ordnance Company (AM).	)	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and HALE, Judge Advocates.

1. The record of trial in the case of the soldier named above, having been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings and sentence in part, 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 64th Article of War.

Specification: In that Private Ray Hemmitt, 60th Ordnance Company (AM), did, at Camp Livingston, Louisiana, on or about March 4, 1942, wrongfully strike First Lieutenant Elbert F. Frederick, his superior officer, who was then in the execution of his office, on the face with his fist.

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

Specification: In that Private Ray Hemmitt, 60th Ordnance Company (AM), did at Camp Livingston, Louisiana, on or about March 4, 1942, with intent to do him bodily harm, commit an assault

upon First Lieutenant Elbert F. Frederick, by willfully and feloniously striking the said First Lieutenant Elbert F. Frederick on the face with his fist.

He pleaded not guilty to and was found guilty of the Charges and Specifications. He was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for five years. The reviewing authority approved the sentence and ordered its execution, but suspended the execution of the dishonorable discharge, and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. The result of the trial was published in General Court-Martial Orders No. 23, Headquarters IV Army Corps, Camp Beauregard, Louisiana, April 22, 1942.

3. The only question requiring consideration is whether First Lieutenant Elbert F. Frederick was in the execution of his office when the accused struck him.

4. a. The evidence shows that Lieutenant Frederick came from the rifle range (R. 4) on the afternoon of March 4th and arrived at Post Exchange No. 11, 353rd Regimental Area, Camp Livingston, about three o'clock. He was dressed in field uniform, leggins, campaign hat, and raincoat (R. 1). He entered the Exchange (R. 2), in which there were about four white attendants (R. 9) and about ten or twenty colored soldiers (R. 5, 9), and made some "joking remarks" to all concerned as he progressed from the hamburger stand to the tobacco stand and to the drink stand (R. 2). This "joking" apparently continued for about five minutes, when the accused, whom the Lieutenant had not known previously, made some remark to the Lieutenant which he did not understand (R. 3). As the Lieutenant turned around to ask what the remark was, the accused struck him twice on the face and head "pretty hard", making his nose bleed and knocking him down against the counter (R. 2). The accused then walked out the front door (R. 6, 8, 13) before the Lieutenant could get his senses together (R. 2).

It is not clear exactly how the Lieutenant was uniformed at the time of the assault upon him. His olive green raincoat was a lighter and greener shade than an enlisted man's raincoat (R. 1); it had a belt and shoulder straps; it was buttoned completely and the belt was fastened (R. 2), but the collar was not buttoned around the neck (R. 3, 6), nor was there insignia of rank on the shoulder

straps (R. 3). He had a cut-out "U.S." and crossed cannon on the collar of his shirt (R. 4), but no necktie (R. 4, 6), and his shirt was open at the top button (R. 6). The Lieutenant didn't believe he had his hat on when attacked, as he had taken it off and laid it on the counter (R. 4). The Exchange attendant who was serving the Lieutenant at the time of the assault stated thatthe Lieutenant was wearing a campaign hat (R. 8), and that his garb was clearly that of an officer (R. 9).

A similar uncertainty surrounds the Lieutenant's "joking remarks". The Lieutenant couldn't recall his words, but said that they concerned the soldiers having a good time and "that they should have been in the woods with us. * * *" (R. 2). He stated that he did not "ride" them or make fun of them (R. 5), and asserted that the subject of his speech was their probable enjoyment because they were not on the range (R. 6).

Nor did the testimony determine whether the accused knew that Lieutenant Frederick was an officer of the Army of the United States. The remark of the accused that preceded the assault was not addressed to Lieutenant Frederick by his rank or name (R. 3). The Lieutenant did not recall whether he was addressed as Lieutenant by the Exchange employees (R. 6). The Exchange attendant who was serving Lieutenant Frederick at the time he was struck stated that he called him "Lieutenant" when he asked him what he would have (R. 8), and the attendant at the tobacco counter also so addressed him when he served the Lieutenant (R. 11).

The enlisted men who frequented the Exchange were apparently exclusively colored, though the officers of Lieutenant Frederick's regiment patronized it regularly, and Lieutenant Frederick frequented it once a day, or oftener (R. 3).

Following the assault, Lieutenant Frederick, an attendant at the canteen (R. 4), and a soldier (R. 7), went to the 60th Ordnance Company area and identified the accused (R. 5). The identity of the accused as the soldier who assaulted Lieutenant Frederick was also established by three other Exchange attendants (R. 8, 11, 13).

b. Three defense witnesses testified to the general effect that the accused was not at the Exchange at the time of the assault upon Lieutenant Frederick, but their statements were not convincing either as to accuracy, to thoroughness, or to truthfulness (R. 12-28).

The accused testified that he was not in the Exchange when Lieutenant Frederick was assaulted, and specified his movements in detail on the afternoon of March 4th (R. 29).

c. The prosecution in rebuttal called the commanding officer of accused to testify about a conversation he had with accused about March 6th, in the course of which the accused admitted it was he who struck Lieutenant Frederick, that the Lieutenant was not wearing his hat and that he did not know the Lieutenant was an officer, and that the occasion of the assault was a remark the Lieutenant made about "black niggers" (R. 32). The statement of the warning which he gave accused prior to this conversation leaves much to be desired, but the admission at least shows a reason, lacking in the preceding testimony, why the assault was committed.

5. Winthrop defines, "In the execution of his office", as -

> "* * * in the performance of an act or duty either pertaining or incident to his office, or legal and appropriate for an officer of his rank and office to perform. An officer is deemed to be in the execution of his office when engaged in any act or service required or authorized to be done by him, by statute, regulation, the order of a superior, or military usage. * * *." (Winthrop's Military Law, reprint, p. 571.)

The Manual for Courts-Martial, 1928, states -

> "An officer is in the execution of his office 'when engaged in any act or service required or authorized to be done by him by statute, regulation, the order of a superior, or military usage.' (Winthrop.) It may be taken in general that striking or using violence against any superior officer by a person subject to military law, over whom it is at the time the duty of that superior officer to maintain discipline, would be striking or using violence against him in the execution of his office." ,

and that the term, "in the execution of his office", is used in the 65th Article of War in the same sense as in the 64th Article, to which the language of the Manual quoted above pertains (M.C.M.,

1928, p. 148, 149; Dig. Ops. JAG 1912-30, sec. 1522; JAG 250.46, Apr. 3, 1929; CM 203718, Adams).

The Board of Review has held that an officer in command of a Civilian Conservation Corps camp was constantly on duty and was in the execution of his office when he was struck while asleep in his bed, citing an opinion of The Judge Advocate General (JAG 250.46, Apr. 3, 1929) with respect to a noncommissioned officer (CM 203718, Adams).

But the evidence in this case fails to establish that Lieutenant Frederick was the commanding officer of the area involved, or of the accused, or that he was Officer of the Day, or that he was at the time of the assault performing any act or duty pertaining or incident to his office or executing any authority legal or appropriate to his rank, and in consequence "in the execution of his office", as alleged. Such a status is an essential element of the offense inhibited by Article of War 64, under which Charge I is laid, and must be proved before an accused legally may be found guilty of that offense (CM 150434, Pace; CM 156431, McSwain; CM 218883, Long).

On the contrary, the evidence affirmatively shows that Lieutenant Frederick was not in the execution of any official duty, that he went into an Exchange patronized practically exclusively by colored soldiers, that he joked with the attendants and soldiers present, and that his remarks provoked the attack upon him by a soldier unknown to him, and to whom Lieutenant Frederick was unknown. Lieutenant Frederick's insignia of rank were not visible and apparently his hat was not on his head.

6. It is the opinion of the Board of Review that Lieutenant Frederick was not in the execution of his office when the accused struck him, and that upon the failure to establish that essential element of the offense alleged, the record is legally insufficient to support the findings of guilty, in violation of Article of War 64.

7. The maximum authorized punishment under the Specification, Charge II (assault with intent to do bodily harm), is dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year.

8. For the reasons stated, the Board of Review is of the opinion that the record of trial is not legally sufficient to support the findings of guilty of Charge I and its Specification, and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year.

Since the conviction in this case is not of an offense involving moral turpitude or affecting the civil status of the accused, remedial action may be taken in the War Department in compliance with the policy directed by the Secretary of War in his approval of the opinion of The Judge Advocate General of April 13, 1923 (250.404 Review 4-13-23), relative to action under Article of War 50½.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General
Washington, D. C.

SPJGH
CM 221195

MAY 9 1942

UNITED STATES v. Private First Class ARVIL LUNSFORD (15054572), Medical Detachment, 168th Station Hospital, Camp Laugarnes, Iceland.	ICELAND BASE COMMAND Trial by G.C.M., convened at Camp Pershing, Iceland, February 25 and 27, 1942. Confinement for six (6) months and forfeiture of $30.50 per month for a like period. Iceland Base Command Prison Stockade.

OPINION of the BOARD OF REVIEW
HILL, CRESSON and HALE, 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 and the Board submits this, its opinion, to The Judge Advocate General.

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

CHARGE: Violation of the 94th Article of War.

Specification: In that Private First Class Arvil Lunsford, Medical Detachment, 168th Station Hospital did, at Sea, aboard U.S.S. Heywood, on or about September 15, 1941, knowingly purchase from Private John J. Putt, Medical Detachment, 168th Station Hospital, in the forces of the United States, one Colt .45 Caliber Automatic Field Pistol of the value of about $26.97, property of the United States, the said Private Putt not having the lawful right to sell the same.

He pleaded not guilty to the Charge and its Specification. He was found guilty of the Specification except the words "purchase" and "sell", substituting therefor, respectively, the words "receive in pledge for

an obligation" and "pledge", of the excepted words not guilty, of the substituted words, guilty, and guilty of the Charge. He was sentenced to be confined at hard labor for six months and to forfeit $30.50 per month for a like period. The reviewing authority approved the sentence and directed its execution. The proceedings were published in General Court-Martial Orders No. 20, Headquarters Iceland Base Command, April 11, 1942.

3. The only pertinent proof of the transaction is the testimony of Private Putt and the confession of accused.

The evidence shows that Private Putt, while aboard the U.S.S. "Heywood" bound for Iceland, had a conversation with accused about an Army colt .45 automatic pistol; Putt requested accused to take it ashore for him, agreed to pay the accused $20 after getting ashore for doing so, and delivered the pistol to accused; accused carried the gun ashore; Putt did not have the money to "redeem it"; and that accused revealed during "the investigation" that he had a gun and turned it over to the investigating officer (R.7-10; Ex. 1).

4. A pledge is defined as:

> "A bailment of personal property as security for some debt or engagement." (Bouvier's Law Dictionary Rawles 32nd revision, 2604.)

> "A bailment of goods to a creditor as security for some debt or engagement. A bailment or delivery of goods by a debtor to his creditor, to be kept until the debt be discharged." (Black's Law Dictionary (3rd ed.) 1368.)

The evidence shows that accused agreed to take the pistol ashore and that Putt agreed to pay him $20 for doing so. The transaction contains none of the elements of a pledge of the pistol by Putt or the receipt of it in pledge by accused. The accused did not loan Putt any money for which accused was to hold the pistol as security, nor is it shown that Putt was under any obligation to accused.

It follows that the record fails to support the finding of the court by exception and substitution that accused received the pistol in pledge for an obligation.

5. The accused was charged with knowingly purchasing the pistol. The court by exception and substitution found the accused guilty of knowingly receiving the pistol in pledge for an obligation. The finding in question was not legally authorized. It has been repeatedly held that the offense of unlawful sale is distinct from that of unlawful or wrongful disposition by pawning and that the offense of unlawful pawning is not a lesser offense included within that of unlawful sale (CM 220693, Dye; CM 220455, Kennedy). Similarly the offense of unlawful purchase is distinct from that of unlawful receiving in pledge, and the offense of unlawful receiving in pledge is not a lesser offense included within that of unlawful purchase.

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.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General
Washington, D. C.

SPJGK
CM 221266

MAY 23 1942

UNITED STATES	40TH INFANTRY DIVISION
v.	Trial by G. C. M., convened at Los Angeles, California, April 10, 17 and 18, 1942. Dismissal, total forfeitures and confinement for one (1) year.
First Lieutenant EUGENE JANZ (0-302184), 213th Field Artillery Battalion.	

OPINION of the BOARD OF REVIEW
HOOVER, RITER and VAN BENSCHOTEN, Judge Advocates.

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that First Lieutenant Eugene Janz, 208th Field Artillery, was, at Los Angeles, California, on or about January 11, 1942, in a public place, to-wit, a tavern at or near Los Angeles, California, drunk while in uniform.

Specification 2: (Finding of not guilty)

ADDITIONAL CHARGE I: Violation of the 64th Article of War.

Specification: In that First Lieutenant Eugene Janz, 208th Field Artillery Battalion, having received a lawful command from Lt. Colonel Ruel M. Eskelsen, Field Artillery, Comdg. 208th Field Artillery Battalion, to proceed at once to Headquarters 40th Division Artillery at Los Angeles, California, did at San Diego County, California, on or about March 20, 1942 willfully disobey the same.

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

Specification: (Finding of not guilty)

Accused pleaded not guilty to the Charges and Specifications. He was found guilty of the Charge and Specification 1 thereunder and of Additional Charge I and its Specification, and not guilty of Specification 2 of the Charge and of Additional Charge II and its Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for one year. The findings and sentence were not announced. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence relating to the Charge and Specification 1 thereunder shows that at about 11 p.m., January 11, 1942, in response to a call from a bartender of a tavern or cafe located at 4800 Vermont Avenue, Los Angeles, California, members of the military police stationed in Los Angeles went to the tavern and there found accused sitting at a table in a booth in the rear of the place, asleep (R. 11, 12, 19, 21, 22). He was leaning over the table with his head embowled within his arms. He wore an enlisted man's shirt with two silver bars and the insignia "U.S." on his collar but wore no other insignia. He had on an officer's field cap, an enlisted man's Field Artillery boots and an enlisted man's trousers. He wore a web belt, holster and loaded pistol (R. 12, 17). The military policemen took the pistol (R. 12) and talked to accused for the purpose of awakening him. Accused "was very slow in arousing" (R. 18). He had an odor of alcohol on his breath (R. 13, 18) and when awakened had difficulty in walking (R. 13). Two of the military policemen, one supporting him on each side, assisted him in leaving the building and entering a quarter ton truck in the street (R. 12, 18, 19). One of these military policemen testified that "if we would have let him go he would have fallen over on the street" (R. 13). He was taken in the truck to military police headquarters (R. 13, 18). En route he asked the military policemen to "turn right here and let me off at the Fort Worth stockyards", and asked "are we in California" (R. 13). The night was cold (R. 13, 16, 19). The distance from the tavern to the military police headquarters was about nine miles (R. 15). The truck was "open" (R. 19). During the trip accused "snapped out of it a little bit" but upon

alighting had difficulty in finding the entrance to the headquarters and the military policemen had "to steer him in through the gate" (R. 13, 18). During the trip or later at military police headquarters accused said he had "stopped off to have a few drinks" and asked "where the two girls were" (R. 14, 19). Two of the military policemen who were present testified that in their opinion accused was very drunk (R. 14, 18). On January 12 accused told the commandant of a school where he was on duty that on the day previous he had "a drink" and later had "another drink" (R. 22).

Accused testified in his own behalf but did not testify or make an unsworn statement at the trial concerning the incidents related above.

There can be no doubt that at the time and place alleged accused was drunk while in uniform in a tavern, a public place, as alleged in Specification 1 of the Charge. His conduct was plainly of a nature to bring discredit upon the military service and was violative of Article of War 96.

4. The evidence as to Additional Charge I and its Specification shows that on March 19, 1942, accused was a member of the 208th Field Artillery Battalion (designation later changed to 213th Field Artillery Battalion), of which Lieutenant Colonel Ruel M. Eskelsen, Field Artillery, was the commanding officer (R. 23, 26, 49). Headquarters of the battalion was at El Cajon, California (R. 23). Accused was on detached service (R. 30) in command of an anti-sabotage detachment at the Rohr and Solar Airplane Plants at Chula Vista, California (R. 24, 52). The officers and men of this detachment performed their duties under supervision of the San Diego, California subsector of the Southern California sector of the Western Defense Command. Colonel Eskelsen had authority, however, to change the officers of the detachment without prior authorization of the subsector, but it was the custom to notify the subsector when a change was made (R. 31, 32, 40). On March 19 Colonel Eskelsen advised accused to be prepared to move, possibly within the next twenty-four hours, to a new special duty assignment at the artillery headquarters of the 40th Division (R. 24). Although Colonel Eskelsen had not received a copy (R. 27), the 40th Division had on March 18 issued special orders (par. 8, S. O. 77, 1942) as follows:

> "1st Lt Eugene Janz 0302184 FA is reld fr asgmt with the 208 FA Bn, is atchd unasgd to 208 FA Bn and detailed on SD with HQ 40 Div Arty."

On March 20 Colonel Eskelsen learned by telephone that the division orders had been issued and, before receiving a copy but after securing approval by the subsector of the change in personnel (R. 24, 27), dispatched 2nd Lieutenant Sam Long, 208th (213th) Field Artillery Battalion (R. 24, 35) to Chula Vista with instructions that he was to relieve accused and that "Lieutenant Janz was to report back in the vehicle that had taken Lieutenant Long" (R. 24, 25). Lieutenant Long arrived by motor vehicle at Chula Vista at about 3:30 p.m., found accused and repeated the instructions to him (R. 35). Accused asked if Lieutenant Long had written orders "sending him up to Los Angeles", and upon receiving a negative answer stated that he would not leave until he received such written orders (R. 35, 53). He further requested Lieutenant Long to reduce the orders conveyed to writing. Lieutenant Long refused (R. 53, 55). Thereupon accused suggested that Lieutenant Long "just wait and possibly written orders" would be received later (R. 35). About 5:30 p.m., accused left the airplane plant where he and Lieutenant Long had conversed. Accused returned at about 7 p.m., but no written orders had then been received (R. 36, 53). Thereupon Lieutenant Long or accused put in a telephone call for Colonel Eskelsen. Over the telephone accused inquired of Colonel Eskelsen whether written orders had been received. The reply was negative (R. 25, 55). Accused then said in substance, "Well in as much as these written orders have not been received I am not going, I am sorry but I am not going to go" (R. 25). Colonel Eskelsen advised accused of the paragraph and number of the division special orders which Colonel Eskelsen had just received, and told accused "that he better get up there unless he wanted to get in trouble" (R. 25, 29), but accused insisted upon having written orders. Colonel Eskelsen then told him to send Lieutenant Long and the vehicle back to battalion headquarters (R. 25, 55). Lieutenant Long returned to El Cajon (R. 36).

Later in the evening Colonel Eskelsen delivered to Lieutenant Long a letter (R. 25) as follows:

"HEADQUARTERS
208th Field Artillery Battalion

El Cajon, California
March 20, 1942.

Subject: Special Duty

To: 1st Lt. Eugene Janz

In accordance with Special Order No. 77, Paragraph 8, Headquarters 40th Infantry Division and San

Pedro Subsector, dated March 18, 1942, Lt. Janz is directed to proceed at once to Headquarters 40th Division Artillery, Los Angeles, California. Upon arrival he will report to the Commanding General Headquarters 40th Division Artillery for duty. Government transportation will be furnished.

By ORDER OF COL ESKELSEN

RUEL M. ESKELSEN
Lt. Col. 208th FA Bn
Commanding",

and instructed Lieutenant Long to deliver the letter, together with a copy of the division order, to accused (R. 25). Lieutenant Long returned to Chula Vista, arriving about midnight, March 20-21 (R. 36), and located accused at a place where he and his wife were staying. The letter and a copy of the order were delivered to accused at about 1 a.m., March 21 (R. 36, 56). Lieutenant Long stated to accused in substance that he "was to proceed immediately that night, by the transportation provided, to Los Angeles to be on hand for business the following day", and that accused was to instruct the driver of the motor vehicle to remain in Los Angeles the rest of the night and return at his convenience (R. 37, 58). Lieutenant Long also stated to accused that the driver and a vehicle "would be available for him at the detachment quarters" (R. 38). The driver was not present at this time (R. 40, 47) and Lieutenant Long took the vehicle to the guard detachment in Chula Vista and left it there (R. 47). Accused called the driver at about 9:30 or 10 a.m., the next morning (R. 41, 44) and after stopping at a bank (R. 42), left Chula Vista, with his wife, at about 11 a.m., or 12 m., Saturday, March 21 (R. 37, 41, 56). He reported for duty at Headquarters 40th Division Artillery in Los Angeles at 4:35 p.m., Sunday, March 22 (R. 33, 58). The distance between the two points was from 130 to 135 miles (R. 48).

Accused testified that on the afternoon of March 20 when Lieutenant Long transmitted to him the verbal instructions of Colonel Eskelsen to proceed to Los Angeles and when, a little later in the day, Colonel Eskelsen gave him similar instructions over the telephone, accused requested written verification of the instructions for the reason that he had found from experience that "verbal orders were not always the

exact orders that should have been given" (R. 53, 55). Specifically, about March 3, 1942, accused had attempted to secure a physical examination at a station hospital without first presenting to the hospital a written communication from the commanding officer of his organization and, as a result, his actions had been questioned by the hospital authorities and he had been considerably inconvenienced (R. 54, 56). When the written division orders for his transfer were received he noted that they were dated March 18. He asked Lieutenant Long (R. 56) "if he had the driver and the beep out there, he didn't. I had everything packed and ready to go, I said if he would tell the driver to come early in the morning I would go to Los Angeles then". The driver came to accused's quarters the following morning at about 8:30 and accused loaded his effects in the car but delayed his departure until he could cash a check at a local bank and thus procure needed funds for use by his wife. He started for Los Angeles a few minutes after 10 a.m. (R. 57) and arrived in Glendale (a part of the Los Angeles area) at about 7 p.m. (R. 59) In Glendale he went to the home of friends through whom he hoped "to make arrangements for some place for my wife to stay" (R. 57). He reported to Headquarters 40th Division Artillery on the following day, Sunday, at about 4:35 p.m., believing he would not be expected earlier (R. 60). In view of the delay in transmission of the division orders and his experience on a previous occasion in reporting for duty at Camp San Luis Obispo, California, at a time earlier than was expected of him, "I was almost certain nothing would be done until Monday morning and I was almost certain that I would not be expected. When I did report in it was as I expected." The officer to whom he reported at Headquarters 40th Division Artillery remarked, "You are late" and accused replied "No sir" (R. 61).

5. The Specification, Additional Charge I, alleges willful disobedience by accused of an order by Lieutenant Colonel Eskelsen to proceed at once to Headquarters 40th Division Artillery at Los Angeles, California. Violation of the orders issued by headquarters of the 40th Division placing accused on special duty with Headquarters 40th Division Artillery is not charged. The allegation of the Specification conforms to the wording of the written order conveyed by Colonel Eskelsen in letter form and it must be assumed that the charges allege disobedience of this written order. The circumstances in evidence leave no doubt that Colonel Eskelsen accepted as well taken the protest of accused concerning the form of the previous oral orders or instructions and that in fact Colonel Eskelsen, with the knowledge of all concerned, withdrew these oral orders.

As the battalion commander Colonel Eskelsen was authorized to relieve accused from duty with the anti-sabotage detachment, but he was without authority to assign accused to special duty with another unit, that is, with Headquarters 40th Division Artillery. This assignment was a function which was properly exercised by the division commander (par. 16, AR 605-145, Mar. 6, 1940; W.D.Circular No. 30, Feb. 2, 1942, as changed by sec. I, W.D.Circular No. 35, Feb. 4, 1942, and sec. I, W.D.Circular No. 43, Feb. 12, 1942). The journey directed by Colonel Eskelsen was not to be performed in furtherance of duties of the battalion which that officer commanded and he did not have authority to issue any order for accused's travel to his new place of duty (AR 605-180, June 24, 1938; sec. I, W.D.Circular No. 147, 1941, and sec. IV, W.D.Circular No. 187, 1941). It is presumed that Colonel Eskelsen knew the limitations of his own authority in this respect. From the circumstances and the language of the letter it is apparent that the order was intended only as indicating the time of performance of the division order in accordance with applicable regulations and as authorizing the use of Government transportation.

Exact dates and hours of departure and arrival were not specified in the letter relating to the travel. Lieutenant Long told accused that he was to proceed "immediately that night" but Lieutenant Long had no power by virtue of his own official position to give such instructions and there is no evidence that the instructions emanated from Colonel Eskelsen. In any case, accused was entitled to rely on the written communication rather than on oral instructions. The letter directed him to "proceed at once". Inasmuch as Colonel Eskelsen's authority in the premises was limited as indicated above his specific direction was valid only insofar as it required compliance with the rule stated in Army Regulations that:

> "When an officer is ordered without troops from one post of duty to another, he will proceed without unnecessary delay except where orders direct performance of travel on a specific date." (Par. 1a (1), AR 605-180, June 24, 1938)

Did accused proceed without unnecessary delay?

It would have been physically possible for accused to have reached his new place of duty early on Saturday, March 21. Instead, he reported at Headquarters 40th Division Artillery at 4:35 p.m., Sunday, March 22. His testimony that the additional time was reasonably required in attending to his personal affairs is not contradicted. His attitude toward the orally expressed wishes of his battalion commander was not

commendable, but he was justified in availing himself of the flexibility of the governing regulations. In the light of these regulations and the custom of the service in such cases, the Board of Review is not convinced that the time consumed by accused was unreasonably excessive or that he failed to proceed to his new place of duty "without unnecessary delay". Neither disobedience of nor failure to obey the order is established beyond reasonable doubt.

6. War Department records show that accused was 32 years of age at the time of the commission of his offense. He was an enlisted man of the National Guard of Oklahoma from May, 1925, to September, 1928, and from May, 1931, to June, 1934. He entered the Naval Academy on September 1, 1928, and resigned on January 31, 1931, on account of deficiency in studies. He was graduated in 1933 from the University of Oklahoma with a degree of Bachelor of Science. On January 31, 1933, he was commissioned a second lieutenant, Field Artillery Reserve (Army of the United States), and on September 20, 1938, was promoted to first lieutenant, Field Artillery Reserve. From May 15, 1939, to September 30, 1939, he was on active duty with the Civilian Conservation Corps and thereafter was employed in a civilian status with the Civilian Conservation Corps until about November 7, 1941. He entered upon active duty with the Army on December 26, 1941.

The War Department records contain a report by the Federal Bureau of Investigation to the effect that accused was -

a. Arrested in Oklahoma City, Oklahoma, on August 3, 1933, upon charges of vagrancy and for investigation and released on bond;

b. Convicted in a police court of Oklahoma City, Oklahoma, on April 30, 1936, upon charges of carrying a concealed weapon and fined $20; and

c. Convicted at Greensburg, Pennsylvania, on December 11, 1939, of violation of the Uniform Firearms Act, sentenced to pay the costs of prosecution and placed on probation for six months.

Following an investigation by War Department agencies while accused was employed with the Civilian Conservation Corps, the War Department directed, on August 14, 1941, that no further action be taken concerning this police record of accused.

7. By letter to The Adjutant General dated March 31, 1942, accused withdrew a resignation as an officer of the Army which he had submitted on March 28, 1942.

8. The sentence is legally authorized and dismissal is warranted for the offense of drunkenness of which accused was properly found guilty. Imposition of confinement and forfeitures for this offense is not warranted under the circumstances proved.

9. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed at the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of the Charge and Specification 1 thereunder, legally insufficient to support the findings of guilty of Additional Charge I and its Specification, and legally sufficient to support the sentence and to warrant confirmation of so much of the sentence as involves dismissal only. Dismissal is authorized upon conviction of violation of Article of War 96.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General.
Washington, D.C.

SPJGH
CM 221307

MAY 22 1942

UNITED STATES	PANAMA CANAL DEPARTMENT
v.	Trial by G.C.M., convened at France Field, Canal Zone, March 13, 1942. Dishonorable discharge and confinement for five (5) years. Disciplinary Barracks.
Private ROBERT W. STOLWORTHY (6980100), 51st Pursuit Squadron, 32nd Pursuit Group, Air Corps.	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and HALE, Judge Advocates.

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

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

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

Specification 1: In that Private Robert W. Stolworthy, 51st Pursuit Squadron, 32nd Pursuit Group, did at Santiago, R. de P., on or about November 2, 1941, feloniously take, steal and carry away Ninety dollars ($90.00) in United States currency, the property of Technical Sergeant John A. Harmon.

Specification 2: In that Private Robert W. Stolworthy, 51st Pursuit Squadron, 32nd Pursuit Group, did, at Santiago, Republic of Panama, on or about November

2, 1941, feloniously embezzle by fraudulently converting to his own use Ninety dollars ($90.00) in United States currency, the property of Technical Sergeant John A. Harmon, taken from said Sergeant Harmon while he was asleep by said Private Stolworthy into his custody for safekeeping for said Sergeant Harmon to be returned to the latter when he awakened.

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

Specification: In that Private Robert W. Stolworthy, 51st Pursuit Squadron, 32nd Pursuit Group, did, at Rio Hato, R. de P., on or about November 4, 1941, desert the service of the United States and did remain absent in desertion until he was apprehended at Santiago, R. de P., on or about February 5, 1942.

The accused pleaded not guilty to all Charges and Specifications. He was found not guilty of Charge I, Specification 1, guilty of Charge I, Specification 2, and of Charge II and its Specification. He was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for five years. The reviewing authority approved the sentence and ordered its execution, but suspended the dishonorable discharge, and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. The sentence was published in General Court-Martial Orders No. 46, Headquarters Panama Canal Department, April 17, 1942.

3. The only question requiring consideration is whether the record of trial is legally sufficient to support the finding of guilty of Charge I, Specification 2.

4. The only evidence received upon the trial was that of the prosecution. On Sunday morning, November 2, 1941, Technical Sergeant Harmon met Staff Sergeant Hughes on a street in Santiago, Panama. They had a few drinks together, and then went to the room of Hughes' in the Campana Hotel, where they met the accused and Corporal Stickle, Privates Powell and Tackett. After they had a few more drinks, Sergeant Harmon lay down and went to sleep (R. 5, 9, 12). He had previously displayed and then had $90 in bills in his possession, but when he awoke the money was gone. Somewhat

later the accused had $90, which he said belonged to Harmon, in his possession, counted it in the presence of others, and stated that he was going to give it back to Harmon. The proof does not show how it came into the possession of the accused. There had been some discussion as to what should be done with Harmon's money when they left him in the room. The accused volunteered to take it for safekeeping. Corporal Stickle alone of the five men in the room when the money was counted, stated that he saw someone take the money from Harmon but did not remember who did it. None of the others saw anyone take the money from Harmon. The accused left the room to eat and absented himself without leave. When Harmon awoke and found the money gone, his companions searched unsuccessfully for the accused. No part of the $90 has been returned to Harmon (R. 5-15).

5. The Manual for Courts-Martial, 1928, paragraph 149 h, states as to embezzlement -

> "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."

The Supreme Court of the United States, in Moore v. United States (160 U.S. 268) held that -

> "Embezzlement is the fraudulent appropriation of property by a person to whom it has been entrusted, or into whose hands it has lawfully come; and it differs from larceny in the fact that the original taking of the property was lawful, or with the consent of the owner, while, in larceny, the felonious intent must have existed at the time of the taking."

The record does not establish how the $90 came into the possession of the accused. It is not shown that the money came lawfully into the possession of the accused, nor that Sergeant Harmon entrusted his money to the accused or to anyone else. There is no fiduciary relationship or agreement shown to have existed between the owner of the money and the accused.

6. In the opinion of the Board of Review the record fails to establish that the money came into the possession of accused lawfully, or with the consent of the owner, or that any fiduciary relationship was created between accused and Harmon. It follows that proof fails to support the allegation of embezzlement.

The maximum authorized punishment under the Specification, Charge II (desertion terminated by apprehension), in this case, is dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement for two and one-half years.

7. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Specification 2, Charge I, and of Charge I, and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for two and one-half years.

Kristin S. Helt, Judge Advocate.

Chas. C. Cresson, Judge Advocate.

Horace C. Hale, Judge Advocate.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General
Washington, D. C.

SPJGK
CM 221336

JUN 12 1942

UNITED STATES v. Private ARVIL TUCKER (7083525), and Private RONALD R. CLARK (7082717), both of Company M, 33rd Infantry.	TRINIDAD BASE COMMAND Trial by G. C. M., convened at Fort Read, Trinidad, B. W. I., March 18 and 19, 1942. Tucker: Dishonorable discharge (suspended) and confinement for two (2) years. Clark: Dishonorable discharge (suspended) and confinement for one (1) year. Fort Read, Trinidad, B. W. I.

OPINION of the BOARD OF REVIEW
HOOVER, RITER and VAN BENSCHOTEN, Judge Advocates.

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

2. Accused were jointly tried, with their consent (R. 3), upon separate charges.

Accused Clark was tried upon the following Charge and Specification:

CHARGE: Violation of the 94th Article of War.

Specification: In that Private Ronald R. Clark, Company "M", 33d Infantry, Fort Read, Trinidad, B.W.I., did, at Trinidad, B.W.I., on or about February 13, 1942, knowingly and willfully apply to his own use, United States Government one and one half ($1\frac{1}{2}$) ton Chevrolet truck No. 320834, model 1941, of the value of or about $1175.03, property of the United States, furnished and intended for the military service thereof.

Accused Tucker was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 83rd Article of War.

Specification: In that Private Arvil Tucker, Company "M", 33d Infantry, Fort Read, Trinidad, B.W.I., did, at Trinidad, B.W.I., on or about February 13, 1942, through neglect suffer a one and one half (1½) ton Chevrolet truck No. 320833, model 1941, of the value of or about $1175.03, military property belonging to the United States, to be damaged by turning over and burning.

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

Specification: In that Private Arvil Tucker, Company "M", 33d Infantry, Fort Read, Trinidad, B.W.I., did, at Trinidad, BWI, on or about February 13, 1942, knowingly and willfully apply to his own use, United States Government one and one half (1½) ton Chevrolet truck No. 320833, model 1941, of the value of about $1175.03, property of the United States, furnished and intended for the military service thereof.

Each pleaded not guilty to and was found guilty of the Charges and Specifications pertaining to him. No evidence of previous convictions was introduced. Each was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor, Clark for one year and Tucker for two years. The reviewing authority approved the sentences and directed their execution, but in each case suspended the execution of the dishonorable discharge and designated Fort Read, Trinidad, British West Indies, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 25 (Clark) and No. 24 (Tucker), Headquarters Trinidad Base Command, April 15, 1942.

3. The evidence shows that on February 13, 1942, each accused was the regularly assigned driver of a Chevrolet truck, property of the United States, furnished and intended for the military service,

value about $1175.03, and maintained in the motor truck pool of Company M, 33rd Infantry, Fort Read, Trinidad, British West Indies. The truck of which accused Clark was driver was numbered 320834 and the truck of which accused Tucker was driver was numbered 320833 (R. 9, 13, 23).

At about 11:40 a.m., February 13, the two accused drove their trucks to a gasoline station on the military reservation for refueling. Tucker was alone in his truck and Clark was accompanied by Private David Murray, Company M, 33rd Infantry. As the two trucks reached the immediate vicinity of the gasoline station the truck driven by Tucker stalled and Clark, using his truck for the purpose, undertook to push the stalled vehicle in order to get the motor started. This movement took both trucks a short distance beyond the gasoline station. The motor of the stalled truck started and the driver was about to turn around when the motor stopped again, whereupon Clark again used his truck to start it. When the motor started this time Tucker continued along the roadway and Clark followed in his truck to give further aid if needed. Tucker's truck stalled several times more as they proceeded and Clark assisted Tucker in the same way each time it stalled. In the meantime the trucks had reached a highway leading from the military reservation and after they traveled along this highway for some distance Tucker stopped his truck with the motor rapidly running in what appeared to be a satisfactory manner. The truck driven by Clark then passed and took the lead (R. 9).

Both trucks proceeded at about 30 or 35 miles per hour "looking for a place to turn around in". Clark suddenly slowed down or stopped quickly at a point about three miles from the boundary of the reservation (R. 9, 34). The vehicle driven by Tucker, following behind, struck the right rear wheel of Clark's truck and turned over (R. 9-12, 42-44), caught fire and was burned to such an extent that it became a total loss (R. 15). Private Murray, the only eyewitness who testified, stated that he did not know whether Clark "signalled for a turn or not" (R. 42). The highway was straight but narrow (21 feet in width), wet and slippery (R. 19, 23, 34). It was not sufficiently wide to permit ready turns. Officers testified that they had driven along it in the direction in which accused traveled but did not find a place convenient for turning until they had gone beyond the scene of the collision (R. 24, 34).

Under standing instructions effective within the motor pool no vehicle was permitted to leave the military reservation without

permission (R. 22, 23). Accused did not have such permission (R. 31). The driving rules effective in the pool did not permit drivers to use trucks to push stalled vehicles unless "it is necessary, and if it is, the mechanics should do the pushing" (R. 14). Standing instructions required truck drivers to keep their gas tanks filled at all times and drivers were permitted to take the trucks to be gassed without obtaining special permission to do so (R. 28, 29, 46). Eight or nine trucks in the pool had been inspected at 11 a.m., February 13, and insofar as the gauges showed all gas tanks were found to be full (R. 30).

The two trucks left the military reservation by a road which was not extensively used but which connected with the highway on which the collision occurred (R. 37-40). The point at which they left the military reservation was not marked by a sign and there was no gate or military police station there (R. 9, 19). An investigating officer testified that Clark, in a sworn statement, in describing the route traveled by the two trucks, said "in that way we missed the M. P. Gate" (R. 38).

Accused did not testify or make unsworn statements.

4. The evidence thus shows that at the place and time alleged in the Specifications charging misapplication of the two trucks, in violation of Article of War 94, accused drove their trucks some three miles beyond the military reservation where they were stationed, that thereupon they collided and that as a result of the collision Tucker's truck was destroyed. The taking of the trucks beyond the boundaries of the reservation without specific authority was violative of standing instructions and was unauthorized. It is proved without contradiction, however, that the trucks were first driven for the legitimate purpose of securing gasoline and, later, for the purpose of starting the engine in Tucker's truck and for the purpose of keeping it in operation. The use of Clark's truck to push and put in motion the other truck may also have been inconsistent with existing instructions but it was not without reasonable justification under the circumstances. There is nothing in the record of trial which directly shows that either accused drove his truck from the military reservation for the purpose of devoting it to his own use for pleasure or other personal benefit. Neither does the evidence establish facts from which such improper purpose may reasonably be inferred. The gravamen of the offense of misapplication as charged is the devotion of Government property to an unauthorized purpose which purpose is "for the party's

own use or benefit" (par. 150i, M.C.M.). The evidence is legally insufficient to support the findings of guilty of misapplication under the Charge and Specification pertaining to accused Clark and the findings of guilty of misapplication under Charge II and its Specification pertaining to accused Tucker.

5. As to Charge I and its Specification relating to accused Tucker, alleging that through neglect he suffered the truck described to be damaged, in violation of Article of War 83, the evidence shows only that Tucker's truck collided with the vehicle driven by Clark when the latter vehicle suddenly slowed down or stopped. It does not appear from the evidence that either truck was traveling at an excessive speed, that accused was heedlessly close to Clark's vehicle, that accused was inattentive, that he failed properly to use his brakes or that in any other manner he was guilty of negligence. Insofar as appears the collision may have been due wholly to the fault of Clark or to mechanical failures or other factors not within the control of accused Tucker. There is no substantial evidence of any omission by accused "to take such measures as were appropriate under the circumstances to prevent a probable loss, damage, etc." (Par. 143, M.C.M.) It is clear that Tucker drove his truck on the highway in technical disregard of standing instructions but the collision and damage were only the remote and not the proximate result of such violation of orders.

Negligence by Tucker in the operation of his truck may not be presumed. The special rule stated in paragraph 144b of the Manual for Courts-Martial permitting a presumption of negligence in the injury or loss of property issued to an accused is limited to the particular class of property described in the rule and may not with legal propriety be extended to establish criminality with respect to property received and possessed by an accused under other and basically divergent circumstances as in the present case.

The evidence is legally insufficient to support the findings of guilty of Charge I and its Specification pertaining to accused Tucker.

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 sentences.

[signature], Judge Advocate.

[signature], Judge Advocate.

(On Leave), Judge Advocate.

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

SPJGN
CM 221426

MAY 3 1943

U N I T E D S T A T E S	)	NINTH SERVICE COMMAND ARMY SERVICE FORCES
v.	)	Trial by G.C.M., convened at Fort Huachuca, Arizona, January 18 and 19, 1943. Dishonorable discharge and confinement for life. Penitentiary.
Corporal WILLIAM E. SHANNON (35201740), Company E, 368th Infantry.	)	

REVIEW by the BOARD OF REVIEW
CRESSON, LIPSCOMB and SLEEPER, Judge Advocates

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

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

CHARGE : Violation of the 92nd Article of War.

Specification: In that Corporal William E. Shannon, Company E, 368th Infantry did, at Desert, California, on or about February 9, 1942, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Sergeant Earl W. Martin, a human being, by shooting him with a rifle.

He had been previously tried upon the same Charge and Specification by a General Court-Martial, found guilty of both, and sentenced to be hanged by the neck until dead. The sentence was disapproved and a rehearing before another court ordered. Upon such rehearing, he pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated the Federal Penitentiary, Leavenworth, Kansas, 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, from about the first of February, 1942, until he was shot to death on the ninth day of the same month, Sergeant Martin was the ranking noncommissioned officer in charge of a permanent guard detachment of thirteen enlisted men belonging to Company E, 368th Infantry, quartered in two boxcars spotted on a railroad siding, at Desert, California. The only other noncommissioned officer with the detachment was the accused, who kept the guard roster, and customarily detailed, posted and relieved the sentinels, and furnished them with ammunition when they went on guard. Members of the detachment were armed, and had ammunition in their possession, but, with the exception of the deceased, none of them customarily kept their rifles loaded (R. 33, 35, 48-49, 61-63, 66, 76, 85, 89).

On the afternoon of February 8, the accused, the deceased and the detachment cook went by rail to Las Vegas, Nevada. There they separated. At about 11:30 that night, the cook joined the noncommissioned officers at the railroad yards, in the caboose of a freight train which departed for Desert shortly thereafter. According to the cook's testimony:

> "while the train was in the yard they had a couple of fights, Sergeant Martin was trying to take Shannon home, he said he wasn't going, they were arguing and Sergeant Martin told him he would take his razor and cut his throat. * * * he told him he would take him home or kill him, and the man in the caboose told him to shut up. They had a couple of fights and broke out a window in the caboose."

After the cook had stopped the fights, the three soldiers fell asleep. They were awakened at Desert, where they got off the train. There was no further altercation between the accused and the deceased at this time. When the deceased reached his bunk, he remarked that he and the accused "had a fight and he didn't know if he messed up the other fellow or not" (R. 19-21, 26-27).

At 6 o'clock the next morning, a private, who had been on guard since midnight, woke the accused to tell him the time had arrived for the posting of the next relief. While the accused was getting up, two other members of the guard came in, and the soldiers who had been sleeping in the car with the accused, "began to raise up" in their bunks. Then, one of these latter testified, "we looked at Corporal Shannon, and he had a black eye and someone asked him where he got the black eye, and he replied * * * Sergeant Earl Martin give me a black eye last night in Las Vegas * * * 'I am going to fix him this morning'" (R. 37-38). "'This morning'", the accused continued, "'we are going to eat cream of wheat, and I am going to eat the cream and he is going to eat the wheat'" (R. 39).

There were seven or eight soldiers in the car at the time, only one or two of whom were still asleep. Practically every one who was awake "didn't do anything but raise up and tell him, 'Don't go over there, don't go'. * * * and one of them said, 'You won't kill Sergeant Martin', and he (the accused) said 'Yes, I am going to kill him this morning'". After the accused loaded his gun, "he didn't do anything but walk out of the door" and over to the kitchen car where the deceased was sleeping (R. 39-44).

Still carrying his rifle, the accused entered this car through the door in the center of its south wall, and turned west past the stove (about 2½ feet by 2¼ feet in dimension) to within four feet of the lower bunk in the southwest corner, occupied by the deceased. As the accused entered, he called the deceased by name. The deceased awoke, responded by calling the accused by name, reached for his rifle which was leaning against the wall beside his bunk, threw one leg out of bed, and was almost sitting up, when the accused commenced firing, holding his gun across the middle of his body, pointed at the deceased. A lull, not over a second, followed the first shot; then the accused fired seven more, in rapid succession, exhausting his eight-round clip of ammunition (R. 53-58, 73-75).

There was a lamp, turned low, beside the dawn-lit window of the car. Private Reginald Shepherd, Company E, 368th Infantry, from his upper bunk in the northwest corner, opposite the deceased's, having been awakened by the accused calling the deceased's name, saw the accused when he first came into the car. It was not unusual for him to come in at that time with his rifle, for if any of the privates who slept there were going on guard, the accused, who was corporal of the guard, would get them up, and he generally carried his rifle with him when he posted the guard. The other two occupants of the kitchen car, Private 1st Class Robert L. Barrow, the cook, who slept below Shepherd, and Private Gaither F. Smith, both of Company E, 368th Infantry, who slept above the deceased, were awakened by the shooting (R. 22, 54-55, 61, 64, 83-84, 86).

As soon as it was over, the accused, turning on his heel without uttering a word, walked slowly out of the car. The deceased, groaning and bleeding, lay in the narrow aisle between the bunks. He asked the others to move him, but they thought, because he was shot, they were not "supposed to touch him". He managed, somehow, to pull himself up on to the cook's bunk, which was opposite his. There one of the men put a blanket over him; and, in a little while, he died (R. 25, 31, 58-59, 88).

A medical officer who examined the body of the deceased, about three hours after his death, found sixteen bullet wounds of exit or entrance. A part of the small bowel, about eight inches in length, was protruding from an opening in the left lower quadrant of the body, and there were numerous bone fractures. One bullet or fragment severed the mesentary arteries, causing a copious abdominal hemorrhage, the shock from which was the immediate cause of death (R. 10).

This same medical officer examined the accused shortly after nine o'clock on the morning of the shooting, and found him sober and in full possession of his faculties (R. 7).

4. The evidence for the defense consists of the testimony of Private Shepherd, who had testified for the prosecution, and was recalled by the defense; and of the sworn testimony of the accused himself, adduced after he had been fully advised of his rights in open court. Private Shepherd's testimony as a defense witness did not add to or detract from any of the evidence previously adduced from him as a witness for the prosecution (R. 106-109).

The accused testified that when he was first awakened on the morning of the shooting, he stated to Private Walker that the deceased had hit him in the eye. Then, he testified:

> "* * * He asked me what I was going to do about it and I told him that Sergeant Martin was a good boy and that we would get together that morning at breakfast and talk it over. I then got my rifle and went out to the door and across the track, where the guard I had sent out had been posted. I left there and went directly to car Number One. As I got to the door I took my right hand and pulled myself up in it, and at the same time I hollered, 'Sergeant Martin.' As I went in the door, past the stove, I saw Sergeant Martin grab a rifle up, with his left hand, and, at the same time, with his right hand, try to knock the safety off. I then backed up until I backed into the stove, which was on my left. At that time I heard the click of the rifle, and I opened fire, in self defense of myself. Finally the clip jumped out of my rifle, after the clip jumped out of my rifle, I turned and ran around the stove, out of the door, and across to the telegraph office. There I called my company commander and told him to send a doctor down, that Sergeant Martin had been shot. I then came back and told the boys to do what they could for Sergeant Martin * * *." (R. 111-112).

He also testified on cross-examination, that he had gone by car Number One to get the guard roster and wake the cook. "I took my rifle", he continued, "as I usually did any time I placed a man on guard, * * * because the alert was on. Those orders were given by Sergeant Martin, to keep your rifle with you at all times". When he had passed the stove, approaching the deceased's bunk, he saw the deceased bringing his rifle up pointing in the accused's direction. "He wasn't in bed, sir", the accused testified; and, in response to the question, "Was he partly in bed", replied, "Not as I know of, sir." The accused, at that time, had only one hand on his gun. When he saw the deceased knock the safety off his, he ran back into the stove. The deceased had his gun up before the accused apprehended danger, and yet the accused fired first. Asked if the deceased dropped his gun after the

first shot, the accused testified, "I couldn't say: I never remember him dropping the gun; I never seen him fall; when I ran out of the car Sergeant Martin was still standing there". The accused admitted that just prior to the shooting he had stated he was going to get even with the deceased, but testified that it was his intention to do so by reporting him to the company commander. To an inquiry as to whether or not he knew the deceased's rifle was loaded, at the time he shot him, the accused's ultimate answer was "I will say, 'No sir' to that question". The accused had drunk only a couple of beers on the preceding evening, and was not intoxicated (R. 114-115, 116, 120-126, 128, 130).

5. The Specification alleges that the accused, with malice aforethought willfully, deliberately, feloniously, unlawfully and with premeditation, killed the deceased by shooting him with a rifle. The killing is established by uncontradicted testimony, including that of the accused. Four witnesses for the prosecution testified to statements made by the accused immediately prior to the shooting, indicating his determination to get even with the deceased. One testified to a statement, made as the accused picked up his rifle, that he intended to kill the deceased. An eyewitness to the shooting testified that the deceased was still in his bunk, in the act of rising to a sitting position and reaching for his rifle, when the accused opened fire.

The evidence indicates that the deceased had been the agressor in the physical encounters of the night before, in the course of which he had blacked the accused's eye. But after that, they had ridden peacefully together, slumbering side by side; nor had their quarrel been resumed when they arrived at Desert, where they separated peacefully to go to their respective quarters. Subsequent developments suggest that the accused did not sleep off the sullen resentment which his mauling had aroused, but that it smouldered and flared the next morning, not in the heat of sudden passion, but in the studied consummation of a premeditated plan. The rule is that "where sufficient cooling time elapses between the provocation and the blow the killing is murder, even if the passion persists" (par. 149a, p. 166, M.C.M. 1928).

The testimony of the accused, admitting the killing, raises the sole defensive issue, not of adequate provocation, but of self-defense. The evidence does not support the accused's contention that he went to the deceased's bunk for a legitimate and innocent purpose and that he fired only to prevent the deceased from using his own rifle against the accused.

There is convincing proof that the accused made remarks revealing an intent to harm, and even to kill, the deceased prior to leaving his own quarters, and that he ignored his fellow soldiers' importunities to refrain from going to the car where the deceased was asleep. The eyewitness Shepherd testified that the accused commenced firing while the deceased was rising to a sitting position on his bunk, before he had had an opportunity to do more than seize the rifle leaning by his bed, which Shepherd did not see him even lift up from the floor, and which he certainly could not have brought to bear on the accused (as the accused testified he did) before the latter (according to his own testimony) commenced even to shift to position the rifle he was carrying. The accused's testimony that the deceased had risen from his bunk, and was standing, pointing the rifle at him, with the safety unlocked, before the accused realized it would be necessary for him to shoot in self-defense, is convincingly controverted. The court, which heard and observed the witnesses, did not accept it as worthy of belief. All the evidence considered, the Board of Review entertains no doubt that the accused, goaded by the injuries and indignities suffered at the deceased's hands the night before, went to the latter's bunk with the deliberate purpose of shooting him with a rifle, and that, in pursuance of this purpose, he did, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation, fire upon and kill his victim as charged. This was murder as denounced by Article of War 92.

6. The accused is about 25 years of age. He was inducted at Huntington, West Virginia, February 19, 1941. His record shows 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 and the sentence. A sentence either of death or of imprisonment for life is mandatory upon conviction of murder in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement under sections 273 and 275 of the Criminal Code of the United States (18 U.S.C. 452, 454).

Chas. L. Gresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General
Washington, D. C.

SPJGK
CM 221445

MAY 25 1942

UNITED STATES v. Private WILFRED J. MERNER (20216493), Service Battery, 2nd Battalion, 106th Field Artillery.	SECOND CORPS AREA Trial by G. C. M., convened at Fort Niagara, New York, April 23, 1942. Confinement for six (6) months and forfeiture of $20 per month for a like period. Fort Niagara, New York.

OPINION of the BOARD OF REVIEW
HOOVER, RITER and VAN BENSCHOTEN, 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 and the Board submits this, its opinion, to The Judge Advocate General.

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Wilfred J. Merner, 20216493, Service Battery, 2nd Battalion, 106th Field Artillery, Fort Ord, California, did, at Camp Robinson, Arkansas, on or about September 2, 1941, desert the service of the United States and did remain absent in desertion until he was apprehended at Buffalo, New York, on or about February 25, 1942.

He pleaded guilty to and was found guilty of the Charge and Specification. 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 three years. The reviewing authority approved only so much of the sentence as provided for confinement at hard labor for six months and forfeiture of $20 per month for a like period, and designated Fort Niagara, New York, as the place of confinement. The proceedings were published in

General Court-Martial Orders No. 97, Headquarters Second Corps Area, May 7, 1942.

3. The record of trial shows that the order appointing the court (par. 2, S. O. 38, Hq. 2nd Corps Area, Feb. 11, 1942) did not designate a law member. The requirement of Article of War 8 for detail by the appointing authority of a law member as one of the members of each court-martial appointed has been repeatedly held to be mandatory (CM 159140, Du Temple; CM 159143, Davis; CM 159144, Anderson; CM 159146, Neenan; CM 159147, Reese; CM 159228, Willey; CM 163239, Cunningham; CM 163259, Adkins; CM 166057, Dunn; CM 187098, Henshaw; CM 187201, Bokoski; CM 192877, Butler). It follows that the court in this case was not legally constituted and was without jurisdiction to try accused. The proceedings were null and void, ab initio.

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

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General
Washington, D. C.

SPJGK
CM 221488

JUN 1 1942

UNITED STATES)	FORT KNOX, KENTUCKY.
)	
v.)	Trial by G. C. M., convened at Fort Knox, Kentucky, April 29, 1942. Dismissal.
)	
Second Lieutenant LYTTON C. MUSSELMAN (0-368932), Infantry.)	

OPINION of the BOARD OF REVIEW
HOOVER, RITER and VAN BENSCHOTEN, Judge Advocates.

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Second Lieutenant Lytton C. Musselman, Infantry, Armored Force, did, at Fort Knox, Kentucky, on or about February 11, 1942, with intent to defraud sign the following names, to wit:

Howard R. Hammond, Tank Department, Armored Force School, Fort Knox, Kentucky
Geo. W. Weingart, Tank Department, Armored Force School, Fort Knox, Kentucky,

as endorsers to a note; which said note was a writing of a private nature, which might operate to the prejudice of another.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and "to be confined" for six months. The reviewing authority took initial action upon the record of trial as follows: "pursuant to the provisions of Article of War 51, the

sentence is suspended until the pleasure of the President is known". He subsequently took additional and corrective action whereby he approved only so much of the sentence as provides for dismissal and forwarded the record of trial for action under Article of War 48.

3. The evidence shows that about February 11, 1942, accused, while stationed at Fort Knox, Kentucky, signed and delivered to the Federal Services Finance Corporation, Washington, D. C., his promissory note dated February 11, 1942, in the amount of $300, payable to the finance company in eighteen monthly payments of $17 each (R. 9, 14; Ex. A). On the back of the note as delivered was a printed guarantee of payment, with purported signatures, as follows:

> "The undersigned individually, jointly and/or severally, hereby guarantee prompt payment of within note according to the tenor thereof, and agree that any extension or extensions of time allowed for, or change or changes in the terms or conditions of paying all or any part hereof shall not in any way relieve or release the undersigned as endorsers hereon.
>
> "Presentment for payment, notice of non-payment, notice of change of time and/or terms of each and all are hereby waived.

Endorser's Name	Address
Howard R. Hammond Lt	Tk Dept. A.F.S. Fort Knox, Kentucky
Geo. W. Weingart Lt	Tk Dept. A.F.S. Fort Knox, Ky.

Address." (Ex. B)

Of the two purported signatures, a photostatic copy of which was received in evidence, one was written with light and narrow pen strokes while the other was written with relatively heavy and broad strokes. On account of this difference and differing forms of several of the letters employed, the purported signatures do not, on casual observation, appear to have been written by the same hand (Ex. B). Neither of the officers whose purported signatures were used knew anything of the note, and the respective signatures were not made by or authorized by them (R. 9-12).

Accused testified that he had been a member of the United States Antartica Expedition and, upon the outbreak of the present war, came home

> "without anything - - no salary, and coming on active duty I had to go deeply into debt for uniforms and equipment; in order to pay my bills I applied for this loan" (R. 14).

He signed the two names on the back of the note without the knowledge, permission or authority of either of the two officers whose names were used (R. 9), but had no intention to defraud, having "read the note in great haste" and having only "submitted their names as character references" (R. 14). The two officers were his only friends at Fort Knox. He had no "definite explanation" of the differences in appearance of the two signatures. In writing the names he "used the same pen at the same time, a post-office pen". He deposited with the note an insurance policy to cover in case of his death (R. 15). Accused testified that he had made the payments as stipulated in the note (R. 14) and had sent the finance company a new, substitute, note, relieving Captain Hammond and Lieutenant Weingart "of any responsibility whatsoever" (R. 15).

By stipulations the defense introduced testimony of six witnesses covering, in turn, the services of accused with the Antarctica Expedition, with private enterprises and with the Civilian Conservation Corps, and attesting to his efficiency, honesty and industry while so serving prior to his entrance upon active military duty (R. 16, 17).

4. The evidence is uncontradicted that accused executed the two indorsements on the note, referred to in the Specification, as alleged, and that he did so without the knowledge or authority of the officers whose names were used. Accused denied intent to defraud, but in view of the circumstances appearing it is incredible that accused did not know the significance and legal effect of the purported indorsements. It is established beyond reasonable doubt that the indorsements were falsely made with intent to defraud, and that the instrument thus made was of a nature which might operate to the prejudice of the officers whose names were falsely used. This was forgery, in violation of Article of War 93.

5. The Specification is defective in that it fails to allege that the indorsements were falsely made and in that it fails to set forth the instrument upon which the two names were forged. There is, however, ample proof of falsity and a copy of the forged instrument was introduced in evidence. There can be no doubt that the Specification was sufficient to apprise accused of the offense of forgery

intended to be charged, and there is nothing in the record to suggest the possibility that he was misled to his prejudice. The defects were not fatal (A.W. 37; par. 87b, M.C.M.).

6. War Department records show that accused was 26 years of age at the time of the commission of his offense. He was appointed a second lieutenant, Infantry Reserve, on May 21, 1938. He was on active duty with the Civilian Conservation Corps from August 1, 1938, to September 30, 1939. He accompanied the Antarctica Expedition under command of Admiral Richard E. Byrd, United States Navy (Retired), in 1939, remaining with the expedition until May, 1941. There are on file letters from Admiral Byrd and Mr. Rupert Emerson, Director of the Division of Territories and Island Possessions, Department of the Interior, attesting to his excellent service during this period. He has been on extended active duty with the Army since November 5, 1941.

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

[signature], Judge Advocate.

Benjamin F. Riter, Judge Advocate.

[signature], Judge Advocate.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General.
Washington, D. C.

SPJGH
CM 221491

JUN 6 1942

UNITED STATES	3rd ARMORED DIVISION
v.	Trial by G.C.M., convened at Camp Polk, Louisiana, April 8, 1942. Dishonorable discharge and confinement for three (3) years. Disciplinary Barracks.
General Prisoner FRED PELOQUIN.	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates.

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

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

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

Specification: In that General Prisoner Fred Peloquin, did, at Camp Polk, Louisiana, on or about February 8, 1942, desert the service of the United States and did remain absent in desertion until he was apprehended at Jennings, Louisiana, on or about February 9, 1942.

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

Specification: In that General Prisoner Fred Peloquin, having been duly placed in confinement in the Camp Stockade, Camp Polk, Louisiana, on or about November 8, 1941, did, at Camp Polk, Louisiana, on or about February 8, 1942, escape from said confinement before he was set at liberty by proper authority.

The accused pleaded not guilty to all Charges and Specifications. He was found guilty of all Charges and Specifications. He was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for seven years. The reviewing authority approved the sentence, remitted four years of the confinement imposed, ordered its execution as modified but suspended the dishonorable discharge, and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. The sentence was published in General Court-Martial Orders No. 27, Headquarters 3rd Armored Division, Camp Polk, Louisiana, May 7, 1942.

3. The accused was a prisoner in the stockade at Camp Polk, Louisiana, on the night of February 8, 1942. Between 8:30 and 9 p.m. two prisoners, one of them the accused, approached the gate of the stockade, dressed in Class A uniforms. When Corporal Joseph S. Czehola, on No. 1 post, asked where they were going, they said they were going to the Post Exchange. He told them to "peg out", and let them out of the stockade. When they failed to return the corporal told Captain Miley, the Field Officer of the Day, what had happened. At ten o'clock the prisoners had not returned (R. 6, 7).

As the corporal of the earlier relief had told Corporal Czehola that all trusties could come and go out at any time, the corporal took it for granted that accused and his companion were trusties and passed them out. The accused and his companion, dressed in the white clothes of cooks, had shortly before been passed in through the gate of the stockade (R. 6-10). It had been the custom for two prisoners to go out from six to nine to clean up Headquarters and the Service Club.

Extract copies of the Guard Report for November 1941, showing the confinement of accused in the Camp Stockade on November 8, 1941, and for February 1942, showing his escape at 9 p.m., February 8, 1942, were introduced as Prosecution's Exhibits A and B, without any objection by the accused (R. 10, 11).

The deposition of Dempsey E. Cole, Chief of Police, which was received in evidence with the express consent of the defense (R. 11), states that on February 9, 1942, he apprehended accused at Jennings, Louisiana, approximately fifty miles from Camp Polk, on the request of the Provost Marshal.

The accused, after being warned, stated to Second Lieutenant

Harry B. Dolph, Investigating Officer, that he would not have left the stockade if he had not been under the influence of intoxicating liquor and that he was apprehended in Jennings, Louisiana, at approximately 11 a.m., February 9, 1942 (R. 12).

4. The accused, the only witness for the defense, testified that he had permission from the Corporal of the Guard to leave the stockade and that he went home. The other prisoner, Sonnier, was with his father-in-law, and accused was at Sonnier's sister's, one-half block away, when Cole drove up. Accused went to meet Cole and voluntarily turned himself over to him. The sentinel had the authority and gave accused permission to go out of the stockade, but not to remain away. The sentinel received permission from the corporal, who told the sentinel to let accused and Sonnier out as they were cooks. The corporal well knew that accused was a prisoner. Prisoners were supposed to be in at nine o'clock when the lights go out. Accused intended to return to Camp Polk. When he woke up the next morning he saw that what he had done was wrong and was fixing to come back when the deputy drove up and caught Sonnier, but not the accused. He did not intend to go home when he left the stockade. He had put on his Class A uniform to go to the Service Club, as he told the sentinel at the gate (R. 12-15).

5. The record does not establish the escape of accused from confinement. The accused and his companion presented themselves at the gate and were passed out of the stockade by the sentry upon the authority of the corporal of the guard and thus freed from any physical restraint.

With respect to Charge I, there is no evidence in the record from which a reasonable inference of intent to desert arises. The accused did not escape from confinement, his unauthorized absence was for a period of approximately fourteen hours and his apprehension was at a point approximately fifty miles from his station.

The accused was absent without leave for a period of less than one day, for which the maximum authorized sentence is confinement at hard labor for three days and forfeiture of two days' pay.

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 of Charge II, and its Specification, legally sufficient to support only so much of the findings of Charge I and the Specification thereunder as involves findings of guilty of absence without leave for one day, in violation of the 61st Article of War, and legally sufficient to support only so much of the sentence as involves confinement at hard labor for three days and forfeiture of two days' pay.

Lester Hill Judge Advocate.

Chas. Cressey Judge Advocate.

Abner E. Lipscomb Judge Advocate.

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

SPJGH
CM 221537

JUN 22 1942

UNITED STATES v. Private THOMAS R. HAMILTON (19051497), Company C, 15th Infantry.	)	3rd INFANTRY DIVISION Trial by G.C.M., convened at Fort Lewis, Washington, March 28, 1942. Dishonorable discharge and confinement for six (6) months. Fort Lewis, Washington.

OPINION of the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates.

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

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

CHARGE: Violation of the 94th Article of War.

Specification 1: In that Private THOMAS R. HAMILTON, 19051497, Company C, 15th Infantry, did, at Fort Lewis, Washington, on or about January 14, 1942, knowingly and wilfully misappropriate one pair of O. D. trousers of the value of about three dollars and ninety-nine cents ($3.99), property of the United States, then in the custody of Private First Class GOTTLIEB RUBY, 39375805, Company C, 15th Infantry, furnished and intended for the military service thereof.

Specification 2: (Nolle pros.)

Specification 3: In that Private THOMAS R. HAMILTON, 19051497, Company C, 15th Infantry, did, at Camp

> Hunter Liggett, California, on or about June 1, 1941, knowingly and wilfully misappropriate one pair of O.D. trousers of the value of about three dollars and ninety-nine cents ($3.99), property of the United States, then in the custody of Private FLOYD G. FULKERSON, Company C, 15th Infantry, furnished and intended for the military service thereof.

The accused pleaded not guilty to the Charge and all Specifications. He was found guilty of the Charge and Specifications 1 and 3. He was sentenced to dishonorable discharge, total forfeiture and confinement at hard labor for six months. The reviewing authority approved the sentence, ordered its execution, but suspended the dishonorable discharge, and designated Fort Lewis, Washington, as the place of confinement. The sentence was published in General Court-Martial Orders No. 29, Headquarters 3rd Infantry Division, April 21, 1942.

3. The evidence shows, as to Specification 1, that Corporal Gottlieb Ruby, Company C, 15th Infantry, was, on January 9, 1942, in the lawful possession of a pair of Government issued O. D. trousers of the value of about $4.88 which, on that date, he sent to the laundry. It was customary for such laundry to be returned in four or five days and to be delivered to the charge of quarters. In the present case, however, there is no evidence that they were so returned. About January 28, 19 days after they were sent, the trousers were returned with a slip with the accused's name on it (R. 12-16, 38). During the investigation of this case the accused made the statement that the trousers were "too small in the waist and too long, as he had to roll them up twice" (R. 31).

The evidence shows, as to Specification 3, that Private Floyd G. Fulkerson, while in bivouac in Jolon, California, in June 1941, hung a pair of Government issued O. D. trousers, which were lawfully in his possession, on an improvised rack near his pup tent and that of the accused (R. 19). The trousers were valued at about $4.88 (R. 38). They disappeared from the improvised rack, and were not seen by Private Fulkerson until about January 10, 1942, seven months later, when they were discovered by a Sergeant in the organization of the accused, hanging with the clothes of the accused in the barracks of his organization at Fort Lewis, Washington (R. 19, 20, 38).

4. Both Specification 1 and Specification 3 allege that the accused "* * * did * * * knowingly and wilfully misappropriate * * *" a pair of O. D. trousers, in violation of the 94th Article of War. In

order to sustain the findings of guilty of these two Specifications it is necessary that the evidence show that the property alleged to be misappropriated was, at the time of such misappropriation, in the lawful possession of the accused. The 94th Article of War provides as follows:

> "Any person subject to military law * * *
>
> * * * *
>
> "Who steals, embezzles, knowingly and willfully misappropriates, applies to his own use or benefit, or wrongfully or knowingly sells or disposes of any * * * clothing, or other property of the United States furnished or intended for the military service thereof; * * *
>
> * * * *
>
> "Shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial may adjudge, * * *."

In the case of Private John B. Miotke (CM 199841), a case very similar to the present one, the Board of Review presented an interpretation of the above provision of the 94th Article of War as follows:

> "* * * The words 'knowingly and wilfully misappropriates' were intended to include acts not covered by the previous words 'steals' and 'embezzles', as for example, where a quartermaster uses, to build a floor in the basement of the quarters assigned to him, cement which had been intended by the government to be used in building a road in another part of the post. To give the words 'knowingly and wilfully misappropriates' the same meaning as the word 'steals' or the word 'embezzles' is to eliminate these words from the statutes. This cannot be done. * * *. 'Misappropriating means devote to an unauthorized purpose'. Par. 150 i, M.C.M. One cannot misappropriate that over which he has no control or supervision. Neither can one devote property to a purpose where he exercises no lawful authority respecting such property. * * *. The evidence therefore fails to establish the allegation that the accused misappropriated the shirt, in violation of the 94th Article of War."

In view of the above explanation and the fact that the record presents no evidence that either pair of trousers was ever entrusted to the accused, it is clear that the evidence fails to establish the offenses of

misappropriation as alleged.

5. The question may also be considered as to whether evidence of a wrongful taking of the trousers would support an offense included in the Specifications alleging misappropriation. This point has been so clearly stated in the opinion cited above, that it invites quotation here. The Board on this point made the following statement:

> "The reason for holding that on a trial for larceny an accused may not legally be convicted of embezzlement is because the two crimes are separate and distinct, larceny requiring that possession of the property be obtained by the thief by trespass whereas embezzlement, as defined by the Supreme Court in Moore v. United States, 160 U.S. 268, is the fraudulent appropriation of property by a person to whom it has been intrusted or into whose hands it has lawfully come. This basic distinction applies with equal force to the crimes of larceny and misappropriation, which latter is closely related to embezzlement. Accordingly, the Board of Review is of opinion that the proved wrongful taking of the property is an offense not included in the specification, but is an entirely different offense." (CM 188841, Miotke)

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.

(On leave), Judge Advocate.

Thos. L. Lesson, Judge Advocate.

Abner E. Lifecomb, Judge Advocate.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General
Washington, D. C.

SPJGH
CM 221591

JUL 13 1942

UNITED STATES v. Captain BYRON C. BROWN (O-14363), Infantry.	SECOND CORPS AREA Trial by G.C.M., convened at Fort Jay, New York, April 6 and 7, 1942. Dismissal.

OPINION of the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocate.

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: In that Captain Byron C. Brown, Inf., U.S.A., Ret. was, at Riobamba, Ecuador on or about the 29th day of July, 1941 so drunk and disorderly in the presence and hearing of several persons as to disgrace the military service.

Specification 2: In that Captain Byron C. Brown, Inf., U.S.A., Ret. was, when reporting for duty at the American Legation at Quito, Ecuador on or about the 31st Day of July, 1941 so drunk, in the presence and hearing of several persons, as to disgrace the military service.

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

Specification 1: In that Captain Byron C. Brown, U.S.A. Retired, being on active duty and having received

a lawful order from the Commanding General, Panama Canal Department, to proceed to New York, New York, by commercial water transportation, leaving the Canal Zone on or about November 30, 1941, and upon arrival to report in person to the Commanding General, Second Corps Area, Governors Island, New York, and by radiogram to The Adjutant General, Washington, D.C. (the said Commanding General, Panama Canal Department, being in the execution of his office) did at New York, New York, on or about December 6, 1941, fail to obey said order by failing to report in person to the Commanding General, Second Corps Area, Governors Island, New York.

Specification 2: In that Captain Byron C. Brown, U.S.A. Retired, being on active duty, did on or about December 11, 1941, while in the City and State of New York, render himself unfit for duty by the excessive use of intoxicants.

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

Specification: In that Captain Byron C. Brown, U.S.A. Retired, being on active duty, did without proper leave absent himself from his station at Headquarters Second Corps Area, Governors Island, New York, from about December 6, 1941, to about December 11, 1941.

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

3. Specifications 1 and 2, Charge I -

a. The evidence presented by the prosecution shows that the accused, a retired officer, was placed on active duty on May 25, 1941 (R. 20). Thereafter he was ordered to report to the military attache at Quito, Ecuador, for duty there as an assistant military attache (Ex. 7).

En route to Quito the accused and his wife stopped over at

Riobamba, Ecuador, and on July 30, 1941, ate lunch there in the public dining room of the Metropolitano Hotel (Exs. 1 & 2). On this occasion a Mr. and Mrs. Herbert E. Knapp and their interpreter, Senor Jose E. Guerrero, a native Ecuadorian, were having lunch at another table in the room. During the course of the meal, Mrs. Brown, the wife of the accused, went over to the table at which the Knapps were seated, explained that she and her husband were having language trouble with their waiter and requested assistance. Senor Guerrero responded to the request and accompanied Mrs. Brown to her table. The accused, after shaking hands with Senor Guerrero, accosted him in a rude manner, asking him, "Who the hell are you?" and told him to "Go to hell". Senor Guerrero returned to the Knapp table and advised the Knapps to leave the dining room because the accused and his wife were drunk (Exs. 1, 2, & 3).

As the Knapp party withdrew from the room they were followed into the lobby by the accused and his wife, both of whom engaged in boisterous and insulting language to the Knapps. While Mr. Knapp was leaving the hotel a few minutes later, he was again accosted by the accused in an insulting manner. When Mr. Knapp asked the accused, who was dressed in civilian clothes, if he were in the military service, the accused replied that he was not.

During the meeting in the lobby there were present, in addition to the persons already named, the hotel manager, four or five of the hotel staff, and about ten of the local townspeople. The conversation of accused was incoherent, his body coordination poor, he had an odor on his breath, and difficulty in walking and standing. Mr. Knapp characterized the condition of accused as "disgustingly drunk" (Exs. 1, 2, & 3).

On the morning of July 31st, the day following the events at the Metropolitano Hotel at Riobamba, the accused, accompanied by his wife, entered the office of Mr. Harry C. Reed, Vice Consul of the United States Foreign Service at Quito, Ecuador. The accused was apparently seeking the office of the military attache, but when he discovered that he was in the wrong office he remained for a general conversation. During this conversation his words were thick, his manner overcordial and indiscreet, and his general appearance that of one who was drunk (Exs. 4 & 5).

Following the visit of accused in the office of the vice consul, he reported to Lieutenant Colonel Gilbert Procter, the Military Attache at Quito. At that time he acted and had the appearance of one who was drunk. His speech was incoherent, his language improper for a junior officer reporting to his senior, his breath smelled of liquor, he was unsteady on his feet, he appeared to ignore Colonel Procter's

remarks, and talked on without heeding Colonel Procter. Because of his apparent drunken condition, Colonel Procter considered that it was impossible to present accused to the American Minister, and ordered the accused to return to the hotel and sober up, to drink no more intoxicating liquor until he reported again, and to report for duty as soon as he was able. Furthermore, Colonel Procter warned the accused of the danger of a man of his age drinking intoxicating liquors at the altitude of Quito, approximately 9,500 feet (Ex. 7).

During the visit of accused to the American Legation and to the office of the military attache, he was seen by Mr. Harry C. Reed, Vice Consul, Mr. Howard H. Tewksbury, Commercial Attache, Miss Winona Boughton, secretary, and Colonel Procter, all of whom knew that he was an officer of the Army reporting for duty as assistant United States military attache. Sergeant Parman was also present (Exs. 6 and 7).

b. The evidence presented by the defense tends to show that the accused was not drunk in the dining room or about the Metropolitano Hotel at Riobamba (R. 49-52), and that he had only one small drink before lunch at the hotel. In explanation of his questioned conduct, the accused testified that his wife was very ill and suffering greatly from the effects of the menopause, which made her very nervous and at times difficult to control. He denied that he had asked the interpreter the question "Who the hell are you?" or that he had told him to "Go to hell". He stated that what he really said was "Please go away. Can't you see my wife is going through hell?" He also denied that he had called Mr. Knapp dirty names (R. 51), but on cross-examination he admitted that he had unquestionably called Mr. Knapp names because Mr. Knapp was making himself obnoxious, and that he probably said to him "Get to hell out of here", and that he probably called Mrs. Knapp a "damn fool" (R. 62). He also denied that he had stated that he was not an officer of the Army (R. 51).

In explanation of his unsteady gait, and his appearance of drunkenness, the accused testified as to his previous illnesses and his wounds received in the service. The accused enlisted in the Army in August 1917, and was commissioned a second lieutenant during the following month. Eventually, he went to France with the Fifth Division and was twice wounded in action. He received two wounds about the ankle of his left leg. On the second occasion he received ten wounds in the left foot, six in the left hand, one through the left leg, one through the knee, another through his right hand, six in the abdomen, one through the sternum, some about the elbow, one in the nose, one in the upper part of his head, a fractured skull, and four broken ribs

(R. 39). He was in the hospital from July 22, 1918, to March 31, 1919, when he was discharged from the hospital and retired from the Army because of disability. He testified that he still suffered from the effects of his wounds and that they caused him to walk unsteadily (R. 40, 41).

Following his retirement from the Army, the accused went to South America where he lived at various times in Honduras, Panama, British Guiana, Guatemala, Salvador, Nicaragua, and Puerto Rico. In 1930 he suffered internal injuries which led to the removal of his gall bladder some time later. In 1933, he acquired a fungus growth on his ear which has not been cured (R. 41). During his stay in the tropics he had various tropical diseases, including bacillary, amoebic, diarrhea, malaria, and black fever. Also he was bitten by the "Cabura fly", which resulted in a partial paralysis from which he was still suffering (R. 42). During the Nicaraguan incident he was called to Washington and commissioned to perform a secret mission (R. 43). In 1939 he applied for an assignment of active duty. In December 1940 he was rejected as physically disqualified. In January 1941 he was, however, accepted (R. 43, 44).

The testimony of the accused concerning his sobriety while at the Metropolitano Hotel at Riobamba was corroborated by the deposition of Miguel E. Davila, manager of the hotel and by the barkeeper (Def. Exs. A & B). Each of these witnesses also testified that they knew of no incident between the accused and Mr. Knapp while the accused was at the hotel.

Major M. H. Saffron, a graduate of the Aviation School of Medicine at Randolph Field, testified that an altitude of 9,000 feet would cause a person afflicted as was the accused to give a false impression of intoxication (R. 82).

c. Specification 1 alleges that the accused, on July 29, 1941, was drunk and disorderly in a public place. Specification 2 alleges that the accused, on July 31, 1941, was drunk in the presence of several persons when reporting for duty at Quito, Ecuador. Both Specifications allege that the acts of the accused are in violation of the 95th Article of War.

The record shows that the accused was very drunk, quarrelsome, and disorderly in the public dining room and lobby of the Metropolitano Hotel in Riobamba in the presence of several persons who knew him to be an officer of the United States Army. The evidence shows also that the accused on this occasion uttered such expressions as, "Who the hell are you?" and "Go to hell". Moreover, he denied that he was an officer of the Army. He admitted that he probably called Mrs. Knapp a "damn fool".

Concerning Specification 2, the evidence shows that the accused appeared at the office of the American Vice Consul in a drunken condition, and that thereafter he reported for duty to the Military Attache in the same condition. His speech was incoherent, his breath smelled of liquor, his manner overcordial, and his general appearance was that of drunkenness. Colonel Procter, the Military Attache, considered it impossible, because of the drunken condition of accused, to present him to the United States Minister, and ordered him to return to his hotel and remain there until he was fit for duty. The conduct of accused was observed by persons in the diplomatic and in the military service.

The Manual for Courts-Martial, 1928 (sec. 151, p. 186), defines conduct unbecoming an officer and gentleman as follows:

> "The conduct contemplated is action or behavior in an official capacity which, in dishonoring or disgracing the individual as an officer, seriously compromises his character and standing as a gentleman, or action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the individual personally as a gentleman, seriously compromises his position as an officer and exhibits him as morally unworthy to remain a member of the honorable profession of arms."

Drunkenness and disorderly conduct in a public place have often been held to characterize the conduct contemplated in the above discussion (Winthrop's Military Law and Precedents (2nd Ed.), p. 717). Not only does the proof show that the accused's public drunkenness and disorderly conduct in the hotel were disgraceful, but that his offense was aggravated by the fact that it occurred in a foreign country where he was under an additional responsibility to maintain the dignity and honor of the Army.

The accused had traveled a great distance to perform an important military duty. His conduct in coming into the office of the American Vice Consul, where an enlisted man was also present, and in reporting to the Military Attache for presentation to the American Minister, in a drunken condition and unfit for duty, was behavior in an official capacity disgracing him as an officer and seriously compromising his character and standing as a gentleman.

4. Additional Charges I and II -

a. The evidence presented by the prosecution shows that

following the above-described events, the accused was relieved from his assignment as Assistant Military Attache to Ecuador and assigned, by orders dated August 4, 1941, to duty at Headquarters, Second Corps Area, Governors Island, New York. Thereafter he went to the Canal Zone, and from there sailed to New York under orders, which provided in part as follows:

> "Upon arrival at New York, N.Y., he will report in person to the Commanding General, Second Corps Area, Governors Island, N. Y., and by radiogram to The Adjutant General, Washington, D.C., for instructions. * * *" (R. 24).

The accused arrived in New York on December 6, 1941, and registered on the morning of that day at Hotel St. Moritz (R. 24, 25). He did not, however, report in person to the Commanding General, Second Corps Area on that day or at any subsequent time (R. 36).

On December 11, 1941, First Lieutenant Joseph J. Doltolo, Medical Corps, Station Hospital, Fort Jay, New York, acting under orders, went to the Hotel St. Moritz at about 6:15 p.m., with an ambulance to bring the accused to the Station Hospital. The accused was asleep in bed, but awoke during preparations to take him away on a litter. He was somewhat confused, ataxic, resistive, inclined to be querulous, had the odor of alcohol on his breath, and his speech was thick. In the ambulance the accused kept dropping his cigarette because of muscular incoordination. Lieutenant Doltolo diagnosed the illness of accused as "alcoholic intoxication" and stated that the accused was unfit for duty. The accused clinically showed signs of intoxication. In the opinion of Lieutenant Doltolo the accused was drunk within the definition (MCM 1928, p. 160), that "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". Accused was admitted to the mental ward, Station Hospital, on the evening of December 11. On December 12 he was examined and found not to be in an abnormal psychiatric condition. He was thereafter transferred to the medical ward and treated for a gastro-intestinal condition (R. 27-30, 32, 34, 35).

b. The accused testified that he was ill when he left Panama (R. 57), and ill on the voyage to New York. His ship docked about 10:30 o'clock Saturday morning (Dec. 6, 1941). He went directly to the Hotel St. Moritz in order to place Mrs. Brown and his baggage there. He arrived at the hotel at about noon and went to bed because

he was ill. He did nothing about reporting to the Commanding General, Second Corps Area, although he was not too ill to telephone. He figured that he was ordered to report in person and that it would be useless to telephone. He stated that he was not drunk while at the hotel and that he failed to report because he was ill. Dr. Sackin, the hotel physician, first saw him on Monday or Tuesday (Dec. 8th or 9th) (R. 57, 60, 69, 78).

Dr. David Sackin testified that he called on the accused on December 9th (Tuesday), found him ill with a fever, a quick pulse, a headache, diarrhea, and not drunk. He told the accused to remain in bed. As a result of a conversation concerning the condition of accused, Dr. Sackin promised on December 9th to notify the military authorities regarding the condition of accused (R. 89-90). On December 10th Dr. Sackin sent a telegram to the Commanding General, Second Corps Area, stating that accused was under his medical care suffering from grippe and dysentary and unable to carry out the orders to report in person (R. 97, Ex. D).

Dr. Sackin's testimony concerning the accused's sobriety while at the Hotel St. Moritz was impeached by Captain Edwin N. Berry, a Medical Corps officer, who testified that Dr. Sackin told him in a telephone conversation on December 11th that the accused had been drinking freely and that although he had gotten Captain Brown pretty well straightened out on December 10th, he was again worse on December 11th. He stated that Dr. Sackin had told him that the use of alcohol had delayed the recovery of accused (R. 100-102). Dr. Sackin was recalled to the stand and denied making the above statements (R. 105).

c. Specification 1, Additional Charge I, alleges that the accused, in violation of the 96th Article of War, failed, upon his arrival in New York, to obey a lawful order to report in person to the Commanding General, Second Corps Area, Governors Island, New York. The finding of guilty under this Specification is supported by uncontradicted testimony. The evidence shows that the accused neither reported in person as required by his order, nor notified the Second Corps Area of his arrival in any way. Furthermore, although there is some evidence that the accused was not well upon his arrival, there is no evidence that he was too ill on the day of his arrival to comply with his orders to report.

The Manual for Courts-Martial, 1928 (par. 152, p. 187), in listing instances of disorders and neglects to the prejudice of good order and military discipline which are violations of the 96th Article

of War includes, "* * * Disobedience of standing orders or of the orders of an officer when the offense is not chargeable under a specific article; * * *". It necessarily follows that the record of trial supports the finding of guilty of this Specification.

d. Specification 2, Additional Charge I, alleges that the accused on December 11, 1941, did, while in the City of New York, in violation of the 96th Article of War, render himself unfit for duty by the excessive use of intoxicants. The evidence shows unquestionably that the accused was unfit for duty on December 11th. Lieutenant Doltolo on that day diagnosed the illness of accused as "alcoholic intoxication" and stated that he was unfit for duty. The record supports the finding of guilty of this Specification.

e. The Specification, Additional Charge II, alleges that the accused, in violation of the 61st Article of War, did, without proper authority absent himself from his station at Headquarters, Second Corps Area, Governors Island, New York, from about December 6, 1941, to about December 11, 1941.

The accused, upon his arrival in New York on the morning of December 6, 1941, was under orders to report on that day to his assigned station at Governors Island. Instead of reporting, however, he remained absent without leave at the St. Moritz Hotel until he was taken to the hospital by Lieutenant Doltolo, a medical officer of the Fort Jay Hospital, on December 11th. The accused sought to justify his absence by evidence of sickness. Such evidence does not show that he was unable to report to his commanding officer on December 6th. The accused remained absent until Lieutenant Doltolo took him to Governors Island on December 11th.

Winthrop states that when one

> "* * * deliberately absented himself without authority, the fact that he was detained away longer than he had intended by some agency beyond his control, will be no sufficient answer to the accusation" (Winthrop's Military Law and Precedents (2nd Ed.), p. 608).

Regardless, therefore, of the cause of the absence of the accused from December 7th to 11th, inclusive, his absence cannot lawfully be excused.

5. The accused entered a plea in abatement, that Specification 1, Additional Charge I, be stricken from the record because it alleged the same elements as those complained of in the Specification of Additional

Charge II. Concerning this plea, it should be observed that Specification 1, Additional Charge I, alleges that the accused failed to report in person on December 6, as ordered. On the other hand, the Specification of Additional Charge II, alleges that the accused "did, without proper leave absent himself from his station from December 6, 1941, to December 11, 1941". Obviously the two Specifications cover different periods of time, allege different types of misconduct, and require different proof. The action of the court in overruling the plea in abatement was correct.

6. The Board of Review has given careful consideration to a letter from the Honorable Henry Cabot Lodge, Jr., to The Judge Advocate General, calling attention to the pledge of temperance previously executed and presented to The Judge Advocate General by the accused, and to seventeen affidavits received by The Judge Advocate General, of which sixteen attest generally the excellent business and social reputation of the accused and the fact that the affiants had never seen accused under the influence of intoxicating liquor, and one from a physician with respect to the physical and mental condition of the wife of accused.

7. At the time of his trial the accused was 47 years of age. The Army Register, 1942, shows his service as follows:

> Capt. A.U.S. 3 July 41; accepted 9 July 41. - 2 lt. of Inf. 9 Aug. 17; accepted 24 Aug. 17; 1 lt. 9 Aug. 17; capt. (temp.) 20 June 18 to 29 Mar. 19; retired 31 Mar. 19; capt. ret. 21 June 30 (act 21 June 30); A.D. 25 May 41.

His retirement in 1919 was because of disability from wounds received in action.

The efficiency file of accused contains two efficiency reports rendered upon accused. One dated April 11, 1918, gave him a numerical rating of 80. Another, covering the period from May 25, 1941, to June 30, 1941, gave him a general rating of very satisfactory.

8. All the members of the court joined in presenting the following recommendation for clemency to the reviewing authority:

> "Because of the excellent services rendered by the accused during the World War, and the fact that he was twice wounded in action, and the additional fact that he volunteered for active duty during the current emergency, it is recommended that clemency be extended to the accused and that the sentence be suspended."

9. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. A sentence of dismissal is mandatory upon conviction of a violation of the 95th Article of War, and is authorized upon conviction of a violation of the 61st Article of War.

Dexter S. Hill Jr., Judge Advocate.

Chas. C. Cresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

1st Ind.

War Department, J.A.G.O., [illegible] 7 1942 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Captain Byron C. Brown (0-14363), Infantry.

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

3. All members of the court-martial recommended, in consideration of the wounds received by the accused in his World War service, the extension of clemency by the suspension of the sentence. I concur in that recommendation. I recommend, therefore, that the sentence be confirmed but that the execution thereof be suspended during the pleasure of the President.

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

Myron C. Cramer.

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

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

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General
Washington, D. C.

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JUN 6 1942

UNITED STATES v. Private ANDREW L. LOPER (34005968), Service Detachment (Colored) D.E.M.L., Corps Area Service Command, Fort Benning, Georgia.	FORT BENNING, GEORGIA Trial by G.C.M., convened at Fort Benning, Georgia, April 2, 1942. Dishonorable discharge and imprisonment for life. Penitentiary.

OPINION of the BOARD OF REVIEW
HOOVER, RITER and VAN BENSCHOTEN, Judge Advocates.

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

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

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

Specification: In that Private Andrew L. Loper, Service Detachment (Colored), D.E.M.L., Corps Area Service Command, did, at Fort Benning, Georgia, on or about February 28, 1942, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Bennie L. Coleman, a human being, by shooting him with a rifle.

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

Specification 1: In that Private Andrew L. Loper, Service Detachment, (Colored) D.E.M.L., Corps Area Service Command, did at Fort Benning, Georgia, on or about February 28,1942, with intent to commit a felony, viz, murder, commit an assault upon Private Charles Stathum, by willfully and feloniously shooting him with a rifle.

Specification 2: In that Private Andrew L. Loper, Service Detachment (c) D.E.M.L., Corps Area Service Command, did, at Fort Benning, Georgia, on or about February 28, 1942, with intent to commit a felony, viz, murder, commit an assault upon Private Alfred Segura, by willfully and feloniously shooting at him with a rifle.

Specification 3: In that Private Andrew L. Loper, Service Detachment (c) D.E.M.L., Corps Area Service Command, did, at Fort Benning, Georgia, on or about February 28, 1942, with intent to commit a felony, viz, murder, commit an assault upon Private Dewitt Grady, by willfully and feloniously shooting at him with a rifle.

The accused pleaded not guilty to and was found guilty of the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 50½.

3. The accused, a colored soldier, was on guard duty on the evening of February 28, 1942, at Fort Benning, Georgia. He was posted at 9:30 p.m. on Post No. 16 (R. 13, 51, 66, 78). Privates Charles Stathum, Dewitt Grady and Alfred Segura (hereinafter designated "three sentinels") were on the same detail (R. 13, 53, 66, 79). The posts of the detail were adjoining and had a common meeting point in the proximity of a telephone (R. 14, 53, 66). Under orders, the sentinels reported hourly to the guardhouse by use of this telephone (R. 14, 53, 54, 66) and by common understanding Grady made the report on behalf of the four sentinels. Located near the telephone was the latrine (Ex. 1; R. 53, 66). Each sentinel was armed with a 30-30, 1903 Springfield rifle and each rifle had a clip of five cartridges in the magazine R. 13, 44, 79).

After walking post for about one-half hour, Stathum, Grady and Segura at about 10 p.m., met at the telephone (R. 23, 54, 66). While Grady was telephoning, Stathum and Segura went into the latrine to warm themselves and met the accused therein for the first time that evening (R. 14, 54). The accused appeared to be a "little bit drunk" and

"sleepy" (R. 15, 40, 55, 67). He was reclining on a bench, and apparently had been vomiting (R. 26, 56, 67). Again at about 11 p.m. the three sentinels met at the telephone to make the hourly report and then entered the latrine (R. 28, 55, 66, 67). The accused was asleep on a bench (R. 29, 67) and "was acting kind of funny and looked sleepy" and "looked like he was drunk" (R. 40, 41, 67, 145,146, 148, 149). While in the latrine the soldiers heard the officer of the guard approaching (R. 28, 41). The accused was awakened from his stupor by Grady (R. 28, 29, 41, 75), and the four soldiers departed for their posts. Inspection was made by the officer of the guard (R. 31) and immediately following inspection the accused approached the three sentinels (R. 31) and claimed someone had taken his money (R. 16, 32). The sentinels denied knowledge of accused's loss (R. 31). Soon after the midnight telephone report of the sentinels accused again approached them while on post and asked if they had his money (R. 33). They repeated their denial. Accused pointed his rifle at them. The three sentinels offered to allow the accused to search them and also suggested he report his loss to the officer of the guard (R. 33). Thereupon the accused grounded his rifle and after conversing further with the three sentinels informed them he was returning to the latrine to search for his money (R. 34). Returning in about 15 minutes (R. 34) the accused again demanded his money from the three sentinels and again they denied they had it (R. 35).

At the 1 a.m. report (March 1, 1942) the three sentinels again met at the latrine. An inspection by the officer of the day was about to be made (R. 56, 68). Accused was lying on a bench and appeared to be sleeping (R. 55, 56). He was aroused by Segura (R. 56, 69) and soon thereafter appeared on his post where he challenged the officer of the day (R. 57) before the latter reached accused's post (R. 59). He did not report his loss to the officer of the day (R. 35, 57). The officer "checked" the post (R. 36, 57, 70). After the departure of the officer of the day the accused again resumed the argument with the three sentinels concerning his money (R. 115), and for the second time informed them he was returning to the latrine to search for his money (R. 36). The accused departed but within a short time returned from the direction of the latrine to the location where the three sentinels were standing (R. 36, 38, 59, 70). Again demanding his money, he pointed his rifle at the group (R. 39, 59, 79). The group was standing northeast of the latrine in the vicinity of certain tanks and half tracks (R. 36, 59, 71; Ex. 1). The accused continued to demand his money (R. 39, 58, 71), and immediately thereafter while standing about 15 feet from the three sentinels, discharged his rifle in the general direction of them (R. 37).

Stathum received a bullet through both of his legs (R. 19). In company with Grady he ran about 10 or 15 feet and then fell to the ground (R. 39). Segura fled (R. 39, 59). The accused fired a shot towards Grady and Stathum (R. 39, 60, 62, 72), whidh passed through a leg of Grady's trousers (R. 72, 74). A third shot was fired by accused towards Segura (R. 60). Grady sheltered himself under a mess hall (R. 72); Segura returned to his post (R. 60), and Stathum, being wounded, laid on the ground near a parachute tower. He was thereafter taken to the hospital (R. 19, 39). About five minutes later another shot was heard (R. 60, 72, 73). The sound of the shot appeared to come from the direction of the latrine (R. 60, 73), and this was immediately followed by the sound of a human voice (R. 60, 73, 74) in distress. At this time and place the accused fired the only shots--four in number (R. 62). At the first shot from the accused's rifle, the three sentinels dropped their rifles and fled (R. 62).

Upon being summoned, the officer of the guard arrived at the latrine at about 1:30 a.m., March 1, 1942. He found the body of a colored soldier in the shower room and accompanied it to the station hospital (R. 121), in an ambulance. The corporal of the guard received a telephone call at about 12:50 a.m., March 1, 1942, that a man had been killed at Post No. 16. He went to the post immediately and met the officer of the day who instructed him to place the accused under arrest (R. 80). The accused was found on post by the corporal (R. 82). Upon being challenged and recognized by the accused the following colloquy occurred:

Corporal of the Guard:	"Private Loper, what is wrong with you? You killed a man down there."
Accused:	"I was trying to kill all of those sons- of-bitches. They took my money."

The accused declared to the corporal that "Those sons-of-bitches got his money and had cost him his wife and child" and that the money was all his wife had to live on (R. 85) and that he had shot at all of them and upon being asked the number of shots he fired replied: "I shot four times and there is one round in my gun now and the gun is cocked." The corporal said: "The officer of the day sent me down here to arrest you". The accused thereupon surrendered and delivered his rifle to the corporal (R. 83, 90). The rifle, a .30 Springfield, was identified and admitted in evidence (R. 83; Ex. 4). The accused was taken to the guardhouse (R. 84). When the accused was arrested he was crying and excited, but the corporal testified that he did not appear

to be under the influence of alcohol (R. 84, 85,87).

Private Bennie L. Coleman, Company D, 34th Quartermaster Regiment, on the night of February 28-March 1, 1942, was assigned to the 4th Company, 4th Student Training Battalion, Fort Benning, Georgia, for rations and quarters but was a student at the school for bakers and cooks (R. 11). About 1:15 a.m., March 1, 1942, Private Coleman entered the latrine (R. 115, 116). In the latrine at that time were Private Elton Davis, 367th Infantry, and a Private Burns (R. 116). Following the sound of three shots, Coleman went outside to investigate and then reentered the latrine (R. 116) informing Davis and Burns that he had seen a man run under the mess hall located in the proximity of the latrine (R. 117). Coleman then entered the bath compartment, which was separated from the toilets by a partition which did not reach to the roof, but was high enough to prevent sight over the same (R. 117, 118). Soon after Coleman entered the bath compartment a fourth shot was heard by Davis and Burns (R. 118). Davis heard Coleman exclaim: "Oh, God, I am shot" (R. 118). There was a single electric light in the latrine and it was extinguished by Burns and he and Davis huddled in a corner until the officer of the guard arrived (R. 118, 119, 121) and discovered the body of Coleman in the shower compartment. The body was sent to the morgue (R. 94, 121) and it was identified as that of Coleman (R. 8, 10, 11). Life had expired when a preliminary examination of the body was made by a medical officer at the morgue (R. 95). As a result of an autopsy made the next day (March 1, 1942) it was found that the deceased died as a result of a gunshot wound (R. 97; Ex. 10). The wound was described in the autopsy report as -

"a. Massive Left Hemothorax.
b. Bullet Wound of Chest Penetrating the Pulmonary Artery, Left Coronary Artery, Left Auricle, the Lung, the Aorta, and the 2nd and 11th Left Ribs."

A .30 caliber projectile was found imbedded under the skin of the back of Coleman's body. It was removed (R. 97, 98) and upon being offered in court was admitted in evidence after being properly identified (R. 98; Ex. 3). It was stipulated (accused consenting) that the bullet (Ex. 3) was taken from the body of the deceased and that the bullet was fired from a rifle admitted in evidence (R. 160, 161; Ex. 4). A ballistic expert testified that the bullet taken from the body of deceased was fired from the rifle (R. 45, 46, 47, 48, 49, 50; Exs. 4, 5, 6, 7, 8, 9) which was in possession of accused and delivered by him to the corporal of the guard at the time of his arrest (R. 83). The rifle was delivered to the accused when he went on guard duty at 9:30 p.m., February 28, 1942

(R. 44, 74, 79, 83), and it was then loaded (R. 79). Upon delivery by accused of the rifle to the corporal of the guard at the time of accused's arrest it contained only one cartridge, in the chamber (R. 83).

February 28, 1942, was pay day (R. 78, 134). The accused, accompanied by soldier companions, "went to town" in the afternoon (R. 78, 134). He arrived at the "Liberty Inn" about 1 p. m., and with approximately eight other soldiers procured and consumed about three pints of whiskey (R. 78, 86, 135). Accused drank less than a half pint, but probably secured more liquor (R. 86, 143) before returning to his post. He returned to Fort Benning about 2:30 p.m., or 3 p.m. (R. 89). He was asleep in quarters until 5:30 p.m. (R. 137), when awakened by a companion. At that time he gave the companion $24 "to hold for him" (R. 137). Witnesses for the defense testified that about 5:45 p.m., the accused and a companion went to the Post Exchange where accused consumed some beer. He returned to the barracks about 6:30 p.m. (R. 138), being assisted by two companions. Two colored soldiers testified that he appeared to be drunk at this time (R. 138, 139, 141). Other witnesses testified, however, that when he went on guard duty at 9:30 p.m. (R. 78), accused did not appear to be under the influence of liquor (R. 87, 93). At the time accused went on guard duty the soldier companion returned his $24 to him (R. 139).

In the course of the trial, there was received in evidence a statement of accused made to the field officer of the day on March 1, 1942 (R. 108). The officer (Major Farris) testified (R. 100) that before the statement was made he informed the accused:

> "Andrew, understand anything you say can be used against you. All I am interested in is the facts. I am talking to you just as a friend. You can make a statement or not as you choose" (R. 100, 106).

Another officer (Lt. Bridges) who was present at the interview testified that Major Farris informed the accused that what he said might be used against him (R. 111). The accused, under oath, testified:

> "Major Farris told me *** 'Loper, you can make a statement if you want to *** you don't have to make a statement unless you do want to,' but I did not understand Major Farris say, to the present time I don't remember him saying, that any statement I made at that time could be used against me. I did not understand him to say that." (R. 104-105)

The field officer of the day made longhand notes of the statement of accused (R. 108) at the time of his interview with him and the same were received in evidence (Ex. 11) without objection of the defense (R. 108). The statement of accused, as evidenced by the notes of the field officer of the day, was in substantial accord with the testimony of Grady, Stathum and Segura as to what occurred prior to the firing of the fatal fourth shot. Accused further stated:

> "First fired at Segura. He ran and fell. I then made two shots at Dewitt (sic. Grady) and Stathum. I walked from S.E. corner of Ordnance Bldg. towards my post and when I was about to Edwards road I seen Dewitt and I thought he was going into bath house and I fired at him. I heard some (one) hollor 'Oh'. I went back to my post and went ½ round when O.D. came and ask for my rifle. I told him what happened. I had had one beer in P.M."

Character witnesses on behalf of accused testified that his reputation in his company was "mighty good" (R. 140); that he could be trusted with money (R. 140, 143); that he performed "good service" in the army (R. 152); that he "acted nice and polite and always carried himself nice" (R. 156); that he was "nice and quiet as anybody could be" and has taken care of his wife (R. 151), and that his military service and character were "perfectly satisfactory" (R. 158). It was further shown that accused is married (R. 154, 155); that he has provided for his wife and that she expects to bear a child in June, 1942 (R. 154).

Captain Burton P. Grimes, Medical Corps, officer in charge of the neuropsychiatric service of the station hospital (Fort Benning), testified for the defense that on the day prior to the trial he examined accused by use of a modified Stanford-Binet intelligence test (R. 125) and had found that the score of the accused was -

> "such as to indicate that he had a mental age of about seven years and six months, which when reduced to an I.Q., or intelligence quotient of a fifteen year normal would give him an intelligence quotient of fifty, which is the top figure for the rating made by the imbecile. In other words this man's performance on that test indicated *** that he was a mental deficient to be placed at the border line between an imbecile and a moron",

and that accused was a fit subject to be placed before a board convened under Section VIII, AR 615-360 (R. 126).

There was no evidence of psychosis or insanity in the accused (R. 127). Accused understood parts of the trial proceedings but that a "fair proportion is going over his head"; that he understood what he is alleged to have done, because it was explained to him, but that the taking of another's life "didn't seem to have made any particular impression on him" (R. 131). At the conclusion of the testimony of the medical officer the trial judge advocate suggested (R. 131) proceedings under the provisions of paragraph 63 of the Manual for Courts-Martial (R. 131). The defense counsel declared that they did not raise the defense of insanity and recognized the distinction between mental deficiency and mental disorder (R. 132). The court ruled, in effect, that no issue of insanity had been raised and took no further action in the premises.

4. The accused did not testify under oath in his own defense except as to the statement made by Major Farris to him at the time this officer was conducting an investigation of the case (R. 102, 103, 104, 105). Neither did the accused make an unsworn statement.

5. The record of trial presents for consideration by the Board of Review three questions:

a. Whether the accused's mental capacity at the time of trial was such that he was unable to understand the nature of the proceedings and to intelligently conduct or cooperate in his defense within the provisions of paragraph 63, Manual for Courts-Martial (R. 133).

b. Whether the court acted erroneously in admitting in evidence that part of the testimony of Major Farris, field officer of the day (R. 108), containing a statement made to him by the accused concerning accused's actions prior to the shooting of Private Coleman.

c. Whether the evidence is legally sufficient to support the findings of guilty of the Charges and Specifications.

6. There is nothing in the record of trial to justify a conclusion that accused was not mentally responsible for his wrongful acts or that any mental deficiencies from which he may suffer affected his criminal responsibility or his capacity intelligently to cooperate in his defense. The Board of Review is of the opinion that the court committed no error in its denial of the motion of the trial judge advocate for submission of the status of accused's mental capacity to a board of officers under paragraph 63 of the Manual for Courts-Martial.

7. The statement made by the accused to Major Farris (R. 108) was not a confession of guilt of murdering Private Coleman (Charge I and Spec. thereof), but was an admission of certain facts, which inculpated the accused. There was no intention on his part to speak the truth as to this specific Charge; rather he stated certain facts from which may be implied his guilt of the Charge of murder. An animus confitendi with respect to murder was entirely absent from that statement.

> "A confession is an acknowledgment in express terms, by a party in a criminal case, of his guilt of the crime charged, while an admission is a statement by the accused, direct or implied, of facts pertinent to the issue, and tending, in connection with proof of other facts, to prove his guilt " (Wharton's Criminal Evidence, vol. 2, sec. 580, p. 954).

Treated simply as an admission against interest and applied only to Charge I and the Specification thereof, the statement was admissible in evidence without proof that it was voluntary in nature.

> "In many instances an accused has made statements which fall short of being acknowledgements of guilt, but which, nevertheless, constitute important admissions as to his connection or possible connection with the offense charged. Such statements are called 'admissions against interest' and are admissible in evidence without any showing that they were voluntarily made. Should it, however, be shown that an admission against interest was procured by means which the court believes to have been of such character that they may have caused the accused to make a false statement, the court may either exclude or strike out and disregard all evidence of the statement" (M.C.M., par. 114 b).

However, when considered in connection with the charges of perpetrating assaults with intent to commit a felony (Charge II, Specs. 1, 2, 3) the statement amounted to a confession of guilt. Therefore, it is necessary to consider whether the statement was a voluntary act of accused.

Accused having been advised that any statement he made could be used against him and that he was not required to make a statement, and there being nothing in the record to indicate that the statement was

not voluntarily made, the Board of Review is of the opinion that the court's action in receiving the confession was not erroneous. In any event proof of the guilt of the accused as to both Charges and all Specifications is so convincing independent of accused's statement, that its admission in evidence could not have prejudiced him.

8. "Murder is the unlawful killing of a human being with malice aforethought." (M.C.M. par. 148.)

> "Malice aforethought.-Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed. (Clark.)
>
> "Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: An intention to cause the death of, or grievious bodily harm to, any person, whether such person is the person actually killed or not (except when death is inflicted in the heat of a sudden passion, caused by adequate provocation); knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grevious bodily harm is caused or not or by a wish that it may not be caused; intent to commit any felony. (See 149 d--Burglary.)" (par. 148 a, M.C.M., p. 163.)
>
> "When unintended person is killed by mistake--Offense same as if intended party had been killed. Where A aims at B with a malicious intent to kill B, but by the same blow unintentionally strikes and kills C, this has been held by authorities of the highest rank to be murder, though if A's aim at B was without malice, the offense would have been but manslaughter. Thus A gives poison to B, intending to poison her, and B, ignorant of it, gives it to a child, who eats it and

dies; this is said to be murder in A, but no offense in B; and this, though A who was present at the time endeavored to dissuade B from giving it to the child. So where B, a policeman, is lawfully endeavoring to arrest A, and A shoots at the policeman, and accidentally kills C, this has been held to be murder in A." (vol. 1 Wharton's Criminal Law, sec. 442, & authorities cited.)

The above doctrine is also confirmed by authorities set forth in an annotation in 18 ALR 917.

The evidence in this case is conclusive that accused, without legal excuse and without any adequate provocation fired a fourth shot at Grady (R. 60, 72, 73; Ex. 11) which went wild and killed Coleman as he stood in the shower bath compartment of the latrine (R. 117, 118). It is also self evident that the accused in firing this shot intended "to cause the death of, or grievious bodily harm to" Grady. The killing of Coleman partakes of the quality of accused's original act in shooting at Grady, so that accused's guilt of the crime of killing Coleman is exactly what it would have been had the rifle shot taken effect in the body of Grady, the intended victim instead of that of Coleman, an innocent bystander.

It is, therefore, necessary to consider the question as to whether there is any evidence in the record to sustain the finding of murder or whether it would sustain only a finding of voluntary manslaughter had Grady been the victim instead of Coleman.

"Manslaughter is unlawful homicide without malice aforethought and is either voluntary or involuntary.

"Voluntary manslaughter is where the act causing the death is committed in the heat of sudden passion caused by provocation.

"Involuntary manslaughter is homicide unintentionally caused in the commission of an unlawful act not amounting to a felony, nor likely to endanger life, or by culpable negligence in performing a lawful act, or in performing an act required by law. (Clark.)" (par. 149 a, M.C.M.)

It is obvious that the homicide in this case is not involuntary manslaughter inasmuch as the act of accused in attempting to shoot Grady as he was in the act of seeking shelter under the mess hall was an unlawful act amounting to a felony. It was an assault with intent to commit murder under Article of War 93. Involuntary manslaughter may therefore be dismissed from the case.

"The characteristic element of voluntary manslaughter is that it is committed upon a sudden heat of passion, aroused by due provocation, and without malice. The passion thus aroused must be so violent as to dethrone the reason of the accused, for the time being; and prevent thought and reflection, and the formation of a deliberate purpose. The theory of the law is that malice and passion of this degree cannot coexist in the mind at the same time; and the grade of the offense is fixed by the preponderance of passion, or the legal presumption that the act was malicious and for motives of revenge. Mere anger, in and of itself, is not sufficient, but must be of such a character as to prevent the individual from cool reflection and a control of his actions. Such passion must be produced by due and adequate provocation, and be such that would cause an ordinary man to act upon the impulse of the moment, engendered by such passion, and without due reflection and the formation of a determined purpose. The moving cause of the action of the accused in any given incident under investigation may be either such anger as above described, or fear, or terror of such a character or degree as to render the accused incapable of cool reflection. What may reasonably inspire these feelings is not viewed alike.

"Absence of design to effect death or grievous bodily harm, the homicide is voluntary manslaughter, and not murder, although the act was unlawful and malicious.

* * *

"Assault upon accused, actual or attempted, by the person killed, an attempt to commit serious personal injury, or equivalent circumstances, necessary to reduce a homicide to voluntary manslaughter. A slight assault does not justify killing with a deadly weapon. But neither assault, nor an attempt to commit an assault, is necessary where the evidence shows that the circumstances were such as to justify the excitement of passion to the same extent that an actual assault would have done. Serious and highly provoking injury, sufficient to excite an irritable passion in a reasonable person, or an attempt to kill, or to commit a serious personal injury, is always necessary to reduce a homicide to voluntary manslaughter.

"Belief [of] serious bodily injury about to be inflicted upon the accused by the person killed, which is honestly entertained, but which was held upon insufficient grounds for such a belief, will not reduce a homicide to voluntary manslaughter. Thus, drawing a knife at the distance of a few paces, with a motion or movement to approach, does not put a man in such peril of life or limb as to warrant him in shooting his antagonist.

"Cooling time intervening, giving the reason an opportunity and time to resume its throne, a homicide will cease to be manslaughter and become murder. Cooling time is always a question of reasonable time, and depends upon all the circumstances of the particular case. Where the law has not defined, and cannot, without gross injustice, define, the precise time which shall be deemed reasonable, the question is one for the jury; but where the law has defined what shall be a reasonable time, the question of such reasonable time--the facts being found by the jury--is one of law for the court. Where the question of reasonable time is one of fact for the jury, the court cannot take it from the jury by assuming to decide it as a question of law, without confounding the respective provinces of court and jury." (vol. 1, Wharton's Criminal Law, sec. 426.)

Measuring the situation from the standpoint of the accused in the light of all the surrounding circumstances it is obvious that at the meeting of the accused and the three sentinels immediately following the 1 a.m., report (R. 36, 59, 71) there was no threat of serious bodily injury to accused by the sentinels nor did they assume a provoking or irritating attitude toward him. On the contrary the evidence is indisputable that the accused was the aggressor (R. 39, 58, 71) not only on this occasion but throughout the evening. There is not an iota of evidence that the three sentinels attempted an assault upon accused at any time during the night; rather they assumed a passive, explanatory and non-belligerant attitude (R. 33). There was nothing in their conduct to provoke in accused uncontrollable anger or heat of passion (R. 36, 38, 59, 70). If that existed it was engendered within him by his belief that his month's wages had been stolen and the unbalancing effect of alcoholic stimulation (R. 40, 41, 67, 145, 146, 148, 149).

In order to reduce murder to the status of voluntary manslaughter the anger or passion of the accused at the time of the homicide must be so violent and impulsive as to dethrone reason and exclude the power of deliberation. Passion must take the place of reason; violent anger must be substituted for deliberation. There must be evidence of some actual assault upon accused, or an attempt by the deceased to commit a serious personal injury, or evidence of equivalent circumstances which momentarily struck from the accused's mental processes the power to reason or deliberate.

The circumstances surrounding the act of accused in firing the fatal, fourth shot are completely in opposition to the idea that it was the deed of a man acting in the frenzy of anger and passion.

The evidence on the contrary is clear that when accused aimed the fourth shot at Grady he acted deliberately and with a malignant purpose. Stathum had been wounded by the first discharge of accused's rifle; and both Segura and Grady had fled the scene seeking protective shelter. They had dropped their guns. Prior to the firing of the fatal shot and after wounding Stathum the accused fired two shots; a second shot in the direction of Grady and Stathum, which passed through a leg of Grady's trousers and a third shot directed towards Segura. It was then that the accused saw Grady running in the general direction of the latrine and mess hall. He then discharged the bullet which killed Coleman.

Assuming that accused was in extreme anger and passion (and this assumption is not supported by the evidence which is of such nature as to lead to the opposite conclusion) during the altercation immediately prior to accused firing the first shot, and that such condition of mind was provoked by the three sentinels, there was an interval between the provocation and the killing. It was a question of fact for the court as to whether there was sufficient time for malice to be substituted for passion. There is substantial evidence in the record to support a finding that a reasonable cooling period intervened and that when accused fired the fourth shot at Grady he was actuated by malice and that his deed was deliberate and premeditated.

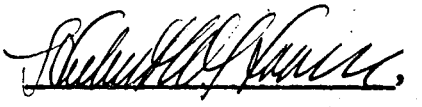
It is clear that when accused for the fourth time discharged his rifle by aiming and shooting at Grady as the latter sought shelter, he intended with malice aforethought willfully, feloniously, unlawfully and with premeditation either to kill Grady or inflict serious bodily injury upon him. The bullet went wild and killed Coleman. Malice

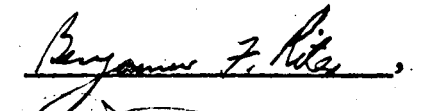
followed the bullet. This was murder condemned by Article of War 92.

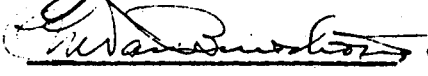
9. Charge II charges violation of Article of War 93 and in three separate Specifications alleges that accused, with intent to commit a felony, viz, murder, did commit separate and distinct assaults upon Privates Stathum, Segura and Grady. In the opinion of the Board of Review there is substantial evidence in the record to prove these distinct offenses. The recital of the facts hereinbefore made is conclusive that the finding of guilty as to the Charge and the Specifications is not only correct, but is the only finding possible. The offenses are denounced by Article of War 93.

10. The accused at the time of the commission of the offenses was 22 years of age. He was inducted into the military service on January 20, 1941. There was no evidence of previous convictions.

11. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. Imprisonment for life is authorized for conviction of violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offenses of murder and assault with intent to murder, recognized as offenses of a civil nature and so punishable by confinement in a penitentiary by Sections 273 and 276 of the Criminal Code of the United States.

 , Judge Advocate.

 , Judge Advocate.

 , Judge Advocate.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General
Washington, D. C.

6/16/42

(211)

SPJGK
CM 221662

MAY 23 1942

UNITED STATES	)	THIRD AIR FORCE
	)	
v.	)	Trial by G. C. M., convened at Barksdale Field, Louisiana, April 28, 1942. Dishonorable discharge and confinement for ten (10) years. Federal Reformatory, El Reno, Oklahoma.
Private MOSES H. KNIGHT (20821662), Troop F, 112th Cavalry.	)	

HOLDING by the BOARD OF REVIEW
HOOVER, RITER and VAN BENSCHOTEN, Judge Advocates.

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

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

CHARGE: Violation of the 58th Article of War.

Specification 1: In that Private Moses H. Knight, Troop F, 112th Cavalry, did, at Fort Clark, Texas, on or about July 5, 1941, desert the service of the United States and did remain absent in desertion until he was apprehended at Kilgore, Texas, on or about January 20, 1942.

Specification 2: In that Private Moses H. Knight, Troop F, 112th Cavalry, did, while enroute from Camp Wolters, Texas, to Fort Clark, Texas, on or about January 31, 1942, desert the service of the United States and did remain absent in desertion until he was apprehended at Tyler, Texas, on or about February 7, 1942.

He pleaded 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, designated the Federal Reformatory, El Reno,

Oklahoma, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The record of trial is legally sufficient to support the findings of guilty. The only question requiring consideration in this holding is whether the record of trial is legally sufficient to support the sentence adjudged.

4. Neither of the desertions in violation of Article of War 58 of which accused was found guilty was committed subsequent to issuance of the Executive Order of February 3, 1942, suspending limitations upon certain punishments, including punishments for violations of Article of War 58, prescribed by the table of maximum punishments set forth in paragraph 104c of the Manual for Courts-Martial. The suspension of limitations upon punishments effected by the Executive Order was, by the terms of the order, made applicable only to offenses committed after the order was issued (Ex. Or. No. 9048, Feb. 3, 1942). It follows that the limitations upon punishments prescribed by the table of maximum punishments, paragraph 104c, Manual for Courts-Martial, are applicable with respect to both offenses of which accused was found guilty. The maximum punishment by confinement authorized by this table for the offense of desertion terminated by apprehension, after more than six months' service, is confinement at hard labor for two and one-half years.

5. 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 five years in the place of confinement designated by the reviewing authority.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General
Washington, D. C.

SPJGK
CM 221670

JUN 2 1942

UNITED STATES	3RD AIR FORCE
v.	Trial by G. C. M., convened at Drew Field, Florida, April 10 and May 5, 1942. Dismissal.
Captain RAYMOND E. MORANG (0-248367), Plotting Company, 553rd Signal Battalion (Separate) AW.	

OPINION of the BOARD OF REVIEW
HOOVER, RITER and VAN BENSCHOTEN, Judge Advocates.

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

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

CHARGE: Violation of the 85th Article of War.

Specification: In that Captain Raymond E. Morang, Plotting Company, 553rd Signal Battalion, (Separate) AW, at Drew Field, Tampa, Florida, on or about March 21, 1942, was found drunk while on duty as Commanding Officer, Plotting Company, 553rd Signal Battalion (Separate) AW.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved "only so much of the findings as involve a finding of guilty of being drunk at the time and place as alleged, in violation of Article of War 96", approved the sentence, recommended that the sentence be commuted to "restriction to the limits of the base for a period of three months and a forfeiture of fifty dollars of his pay per month for a period of six months", and forwarded the record of trial for action under Article of War 48.

3. The evidence shows that on March 20, 1942, accused was on duty at Drew Field, Tampa, Florida (R. 32). His quarters were at Sulphur Springs, Florida, about seven and one-half miles from Drew Field, where he lived with First Lieutenant Henry C. LeFebvre, 503rd Signal Regiment. On the evening of March 20 accused and Lieutenant LeFebvre stopped in the Officers' Club at Drew Field where each had a drink of bourbon whisky with soda after which they proceeded to their quarters at Sulphur Springs (R. 21, 33). At about 10 p.m., they went to Sulphur Springs, purchased a pint bottle of whisky and proceeded to a roadside inn where each had two drinks of the whisky with "7-Up". Leaving the inn they drove to another "place" where each had two more "drinks" of whisky and two glasses of beer (R. 22, 23). At about 2 a.m., accused complained of a pain across the pit of his stomach (R. 22). Shortly thereafter the two returned to their quarters, arriving at about 3 a.m. (R. 22, 23, 33). Accused complained that he did not feel well and he did not immediately retire. Lieutenant LeFebvre called him at 6 a.m., March 21. Accused again said he was not feeling well, and told Lieutenant LeFebvre to ask a Lieutenant Cecil to "take over the command". Lieutenant LeFebvre stated that he would return for accused in time for accused to go on guard at 11 a.m. (R. 23). Accused took another "drink" of the whisky (R. 13, 34). Lieutenant LeFebvre returned to the quarters at about 10 a.m. At this time there was still about an inch or slightly more of whisky in the bottle purchased the night before (R. 23).

At about 11 a.m., March 21, accused attended a staff meeting at Headquarters of the Army Air Base at Drew Field (R. 2, 3). The room was crowded, with twenty-five or thirty officers present (R. 16). The day was a "good, warm, summer day", the temperature being variously described by witnesses as "warm" (R. 14), "rather warm" (R. 26), "quite warm" (R. 17), hot (R. 4) and "extremely warm, humid and oppressive" (R. 20). An officer who observed him at this time testified that he detected the odor of liquor while accused was near him and that accused was "unsteady on his feet" (R. 3, 5). After the meeting accused reported to the adjutant for duty as new officer of the day. The adjutant testified that accused leaned over witness' desk at "a very sloppy angle", with his left hand on the desk, and, before the old officer of the day had reported, saluted "sloppily", reported as new officer of the day, and "blew his breath into" witness' face. Witness asked accused if he had been drinking. Accused replied that he "had a drink every day but that he was not drunk". The adjutant believed accused was drunk and refused to accept him as officer of the day. He reported the matter to the commanding officer (R. 6). The commanding officer, Colonel Melvin B. Asp, Air Corps, testified that

after the adjutant reported accused witness observed him (R. 15) and noted that accused's eyes were "slightly bloodshot", that his appearance was "very untidy" and that "he had some difficulty in turning around" when asked to remove his pistol. Accused's speech was rational but witness was of the opinion that he was drunk within the definition stated in paragraph 145 of the Manual for Courts-Martial. By direction of Colonel Asp accused was immediately examined by a medical officer (R. 11). The medical officer testified that accused complained of being ill (R. 14). He had the odor of alcohol on his breath, his speech was "slightly slurred", he had difficulty in pronouncing the words "Methodist Episcopal", his coordination was "less than normal", he was unsteady in walking, and his face as "flushed and sweating" but he was "pretty well orientated". Witness' diagnosis was that accused was "mildly intoxicated", drunk within the definition set forth in the Manual for Courts-Martial (R. 12). An officer who saw accused at about 1 p.m., testified that accused appeared to be "practically normal", but was "a bit weak. Otherwise steady in his gait" (R. 19).

Accused testified that he felt badly on the morning of March 21 but took one "drink" which made him feel better (R. 34, 36). It was "terribly hot" at the staff meeting. He was not drunk when he reported for duty (R. 35). He testified that he drank habitually evenings but did not become drunk. When examined by the medical officer he was "excited, my mouth was dry and my pronunciation was probably not clear" (R. 35). He served as an enlisted man of the Regular Army during the first World War and entered the National Guard of Maine as an officer in 1927. He was a deputy sheriff for six years and was employed by the Adjutant General's Department of Maine for nine years. He has a wife, three children and a dependent brother (R. 33, 36).

Lieutenant LeFebvre testified for the defense that when he brought accused to Drew Field on March 21 he noted the odor of liquor but did not believe accused was intoxicated (R. 24). Another officer testified for the defense that he saw accused at the staff meeting and "would say that he had had a drink" (R. 27). Four officers testified in substance that accused had been very efficient in the performance of his duties, that they had never seen him drunk, and that his character was excellent (R. 29-31).

4. The evidence leaves no reasonable doubt that accused was found drunk at Drew Field, Tampa, Florida, on the date alleged. He denied drunkenness but the evidence demonstrates that he was under

the influence of intoxicants to an extent sufficient sensibly to impair the rational and full exercise of his mental and physical faculties. See paragraph 145 of the Manual for Courts-Martial. Drunkenness is violative of Article of War 96 (par. 152, M.C.M.).

5. A recommendation that accused be retained in the service, signed by the commanding officer, Air Base, Drew Field, and a recommendation that the sentence be commuted to restriction for three months and a reprimand, signed by all the members of the court and the personnel for the prosecution and the defense, are attached to the record of trial. The commanding officer of the Air Base states that accused's services have been excellent.

6. War Department records show that accused enlisted in the Regular Army May 31, 1916, and served in France in 1918 and 1919 in the grades of corporal, sergeant and regimental supply sergeant. On June 20, 1927, he was commissioned as first lieutenant, Infantry, Maine National Guard. He was promoted to captain March 18, 1929. He was inducted into active Federal service on February 24, 1941.

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 as approved by the reviewing authority and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of violation of Article of War 96, but may properly be commuted to lesser punishment.

[signature], Judge Advocate.

[signature], Judge Advocate.

[signature], Judge Advocate.

1st Ind.

War Department, J.A.G.O., JUN 1 1942 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Captain Raymond E. Morang (0-248367), Plotting Company, 553rd Signal Battalion (Separate), AW.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty as approved by the reviewing authority and the sentence and to warrant confirmation of the sentence. I recommend that the sentence be confirmed but, in view of the previous creditable service of accused and the recommendations for clemency submitted by the reviewing authority, accused's commanding officer and all the members of the court, that it be commuted to restriction to the limits of the post where accused may be serving for three months and forfeiture of $50 pay per month for three months.

3. Inclosed are a draft of a letter for your signature transmitting the record to the President for his action, and a form of Executive action designed to confirm the sentence but commute it to restriction for three months and forfeiture of $50 per month for a like period.

Myron C. Cramer

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

3 Incls.
Incl.1-Record of trial.
Incl.2-Draft of let. for sig. Sec. of War.
Incl.3-Form of action.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General
Washington, D.C.

SPJGH
CM 221686

JUN 20 1942

UNITED STATES v. Captain GEORGE Y. HICKS (0-313260), Medical Corps, Headquarters Detachment, 1st Medical Squadron.	1st CAVALRY DIVISION Trial by G.C.M., convened at Fort Bliss, Texas, April 10, 13, and 14, 1942. Dismissal.

OPINION of the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates.

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

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

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

Specification: In that Captain George Y. Hicks, Medical Corps, Headquarters Detachment, 1st Medical Squadron, did, without proper leave, absent himself from his organization at Fort Bliss, Texas, from about November 19, 1941 to about December 25, 1941.

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

Specification: In that Captain George Y. Hicks, Medical Corps, Headquarters Detachment, 1st Medical Squadron, having been duly placed in arrest at El Paso, Texas, on or about December 25, 1941, did at Fort Bliss, Texas, on or about December 26, 1941, break his said arrest before he was set at liberty by proper authority.

CHARGE III: (Finding of not guilty).

Specification 1: (Withdrawn by prosecution).

Specification 2: (Finding of not guilty).

Specification 3: (Finding of not guilty).

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

Specification 1: (Finding of not guilty).

Specification 2: In that Captain George Y. Hicks, Medical Corps, Headquarters Detachment, 1st Medical Squadron, did, at El Paso, Texas, on or about December 27, 1941, without proper authority, appear in El Paso, Texas in improper uniform.

ADDITIONAL CHARGE I: (Finding of not guilty).

Specification: (Finding of not guilty).

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

Specification: In that Captain George Y. Hicks, Medical Corps, 1st Medical Squadron, did, at El Paso, Texas, at about 1:00 P.M. on or about March 1, 1942, become involved in an automobile accident in which the car which he was driving did collide with an unoccupied parked automobile belonging to Hugh C. Cooper of El Paso, Texas, and after the collision, did leave the scene of the accident without attempting to locate the owner of the other vehicle or report the accident to proper authority.

He pleaded not guilty to all Charges and Specifications. He was found guilty of Charges I and II and the Specifications thereunder, of Specification 2, Charge IV, and Charge IV, and of Additional Charge II and its Specification, and not guilty of Specifications 2 and 3 of Charge III and Charge III, and Specification 1, Charge IV, and of Additional Charge I and its Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and the reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The Specification, Charge I -

a. Evidence Presented by the Prosecution.

The accused was granted a 15-day leave of absence from his station at Fort Bliss, Texas, effective on or about November 4, 1941. He left his organization on November 4, 1941, and did not return until December 25, 1941 (R. 51, 53).

On November 18, 1941, one day before the expiration of his leave, the accused sent a telegram to his commanding officer from his home in Vicksburg, Mississippi, explaining that he was ill with sinusitis and with a painful middle ear infection, that his physician insisted that an immediate operation was necessary and requested instructions (R. 52, Ex. C). His commanding officer replied by a telegram disapproving extension of his leave and directing the accused to report for duty at its expiration (R. 52, Ex. D). The accused did not, however, return to his organization as directed. On December 8, the day Congress recognized the existence of a state of war, the accused sent a telegram to his commanding officer stating that he understood the gravity of the international situation, that he would demand a discharge from the hospital immediately, and report for duty at the earliest possible moment (R. 53, Ex. E). No further communication was received from the accused until he reported to his commanding officer on December 25 (R. 53).

Dr. Augustine J. Podesta attended the accused in Vicksburg on November 14, and found him suffering from an acute attack of influenza (Ex. H). Thereafter, on November 18, he took the accused, who then had a temperature of 104 degrees, to the Vicksburg Infirmary. Dr. Charles J. Edwards, a nose and throat specialist, was called into consultation on November 20, and on November 23, he performed an operation upon the accused which he described as follows:

> "Sub mucous resection; infraction left middle turbinate; puncture and drainage left antrum; local Anesthesia" (Ex. G).

Dr. Edwards gave palliative treatment to accused on November 24, 26, and 28, in the infirmary and, subsequently he saw the accused in his office on December 1, 4, and 8. Neither Dr. Edwards nor Dr. Podesta saw the accused after December 8, 1941 (Exs. G and H).

In the opinion of Dr. Edwards, a journey from Vicksburg to Fort Bliss on November 20 would have aggravated the condition of the accused and jeopardized his health, but it was impossible to state whether it would have endangered the life of accused. In his opinion the accused could have traveled after November 29 (Ex. G).

Dr. Podesta would not have advised accused to undertake the journey to Fort Bliss starting about November 18. In his opinion accused could have traveled to Fort Bliss without serious danger to his health or life three weeks after the operation of November 23 (i.e., December 14, 1941) (Ex. H).

b. Evidence Presented by the Defense.

The accused testified that while on his leave of absence he became ill; that on November 14 while in downtown Vicksburg he met Dr. Podesta whom he had known for many years; that Dr. Podesta observed that he was not looking well, and thereupon invited him to his office for an examination. Following the examination, Dr. Podesta told the accused to go home and to bed. Thereafter, Dr. Podesta attended the accused each day, and on November 18 took him to the Vicksburg Infirmary (R. 205). There Dr. Edwards was called in as a consultant and later performed the operation previously described. The accused testified that the worst part of his illness and operation was the loss of weight and the after effect (R. 206).

The accused explained that he had written and sent telegrams to his commanding officer fully informing him of his condition (R. 204). He testified that the previous statements to the effect that he was discharged from the hospital on December 8 were made in error because he was actually discharged on December 11 (R. 203). He displayed a detailed statement of the medical and hospital expenses of his illnesses (Ex. 11). He also presented copies of letters and telegrams to his commanding officer and other officers (Exs. 8, 9, 10). In addition, he presented an extract copy of the morning report of Troop "A", First Medical Squadron, November 21, 1941, showing change of his status from leave to absent, sick in hospital, as of November 19 (Ex. 7). Furthermore, the accused presented an extract copy of the morning report of his organization of December 25, 1941, with an entry made on that day showing that the status of accused was changed from leave to absent without leave "* * * as of Nov 19, 1941", and from "* * * A.W.O.L to duty to arrest in qtrs * * *" (Ex. 1).

The accused testified that upon leaving the Vicksburg Infirmary he felt weak, sick, had no energy, and could scarcely walk. He was advised by his physician to remain in bed and he remained in his own home until his departure for Fort Bliss on December 23 (R. 207, 208). The accused flew from Jackson, Mississippi, by plane accompanied by his mother and sister (R. 207). He arrived in El Paso on December 23. He was sick on the entire trip and upon his arrival went to bed. Christmas day he forced himself to report to his commanding officer (R. 237).

c. The Specification, Charge I, alleges that the accused absented himself from his organization from November 19, 1941, to December 25, 1941, in violation of the 61st Article of War. The finding of guilty under this Specification is clearly supported by the evidence.

The evidence shows that on November 18 the accused by telegram explained his illness to his commanding officer. The evidence shows equally clearly that his commanding officer, in response to this telegram, directed the accused to report to his organization on November 19. The evidence is uncontroverted that the accused did not report as ordered, and that he did not report until December 25, 1941. Furthermore, the evidence shows that, although the health of the accused would have been endangered by returning to Fort Bliss at the expiration of his leave of absence, he could have returned without danger by November 27, or at least by December 14.

The legal elements of the offense of absence without leave are stated in the Manual for Courts-Martial, 1928 (sec. 132, pp. 145-146), as follows:

> "The article is designed to cover every case not elsewhere provided for where any person subject to military law is through his own fault not at the place where he is required to be at a time when he should be there. * * *.
>
> "* * * the status of absence without leave is not changed by an inability to return through sickness, or lack of transportation facilities, or other disabilities. But the fact that all or part of a period of unauthorized absence was in a sense enforced or involuntary, should be given due weight when considering the punishment to be imposed."

4. The Specification, Charge II, and Specification 2, Charge IV.

a. Evidence Presented by the Prosecution.

When the accused returned and reported to Colonel Patterson on December 25, 1941, Colonel Patterson verbally placed him in arrest, instructed him to go to his quarters at 807 North Campbell Street, and to report for duty on the following morning. Colonel Patterson explained to the accused that his arrest restricted him to his quarters and to his place of duty at Fort Bliss. Colonel Patterson testified that he placed the accused in arrest at his quarters at 807 North Campbell Street, rather than in arrest on the reservation, in order to permit accused to be with his sister, who had returned with him to El Paso (R. 54). Colonel Patterson never extended the limits of accused's arrest except to permit accused to leave on two or three occasions in the custody of Major Page (R. 55-57).

On the morning of December 26 the accused reported for duty as directed. He was told that he needed his field uniform so that he could stand the daily alert with his organization and was directed to procure it during his lunch hour. At about 3:30 p.m. accused called his organization by telephone, explained that he had not yet completed the collection of his field uniform and requested permission to remain in his quarters for the remainder of the day. The commanding officer of his detachment replied that in view of the late hour it was not necessary for him to return to the post that afternoon (Ex. I).

On the following morning, December 27, when the accused failed to report for duty, Colonel Patterson, the squadron commander, directed Captain Hall to apprehend him. Captain Hall did not find the accused in his quarters, 807 North Campbell Street, El Paso. He traced the accused to the Hotel Paso del Norte where he found accused registered and in room 317. Captain Hall immediately placed the accused under arrest and returned with him to Fort Bliss (R. 26). On their return to Fort Bliss, the accused was permitted to stop at his quarters and get certain clothing, including his blouse (R. 28).

At the time the accused was apprehended in his hotel room he was dressed in a wool shirt, riding breeches and boots. When he left his room he was wearing, in addition, an officer's short overcoat and a campaign hat (R. 28, 66). At this time a standing order of Fort Bliss

prescribed the wearing of a "woolen O.D. coat or blouse" for all officers leaving the reservation. The order provided further that the drill uniform might be worn off the reservation by officers going to and from their homes provided they rode in private automobiles and no intermediate stops were made. The order also provided that, "The overcoat or rain coat may be worn in addition to the blouse when required by weather conditions" (Exs. M, N).

b. Evidence Presented by the Defense.

Concerning the alleged breach of arrest on or about December 26, the accused testified that he did not understand from his conversation with Colonel Patterson, on December 25, that he was placed in arrest. He testified that Colonel Patterson told him that since there was not much doing on Christmas day and his mother and sister were in town, he could go back to his quarters and stay with them (R. 232).

The accused admitted that on December 26, at about 10 p.m., he went into downtown El Paso for the purpose of sending a telegram, that while there his car broke down, and he thereupon spent the night at the Hotel Paso del Norte (R. 233, 244). The next morning he waited for the completion of the repairs on his car. In the early afternoon, the work on his car not having been finished, he was preparing to go out to the post in a taxi when Captain Hall came to his hotel room and arrested him (R. 236).

c. The Specification, Charge II, and Specification 2, Charge IV, allege, respectively, that the accused on or about December 26 breached his arrest, and that on December 27 he appeared in El Paso, Texas, in an improper uniform. The findings of guilty under these two Specifications are supported by the evidence.

Since the accused admitted going into downtown El Paso on December 26 and staying there at the Hotel Paso del Norte until the afternoon of December 27, the only factual issue as to his breach of arrest is the issue whether or not he was under arrest and, if so, the limitations thereof. Although the accused denied any clear understanding on these points, the record shows that Colonel Patterson placed the accused in arrest on December 25 and explained to him that he was required to remain in his quarters at 807 North Campbell Street, El Paso, when he was not at his post of duty.

In explaining the offense of breach of arrest the Manual for Courts-Martial, 1928 (sec. 139, p. 153), makes the statement as follows:

> "The offense of breach of arrest is committed when the person in arrest infringes the limits set by orders, or by A.W. 69, and the intention or motive that actuated him is immaterial to the issue of guilt, though, of course, proof of inadvertance or bona fide mistake is admissible in extenuation. Innocence of the offense with respect to which an arrest or confinement may have been imposed is not a defense. * * *."

In view of this authority, the offense of breach of arrest is clearly established.

With respect to the Specification charging the accused with appearing in El Paso in improper uniform, the accused admitted driving into downtown El Paso on December 26 without a blouse. The evidence is clear that he did not, as required by a standing order of Fort Bliss, have on or with him a blouse when he was arrested in his hotel room on December 27, although he did have with him an officer's short overcoat. On the possible issue whether the wearing of the overcoat would excuse the wearing of the blouse, the order provided that, "the overcoat or rain coat may be worn in addition to the blouse when required by weather conditions". It follows, therefore, that the act of the accused in appearing in El Paso without his blouse was an appearance in improper uniform as alleged.

5. The Specification, Additional Charge II.

a. Evidence by the Prosecution.

On March 1, 1942, while driving his automobile along Pershing Drive in El Paso, Texas, the accused ran into or sideswiped a fender of a Chevrolet automobile parked near the curb (R. 120). The damaged car, property of a Mr. Hugh C. Cooper, a traveling salesman of El Paso, Texas, was parked in the usual manner. The accident occurred on a bright Sunday afternoon at about one o'clock. Lieutenant Whitford T. Fry, who witnessed the accident from a filling station across the street, testified that after sideswiping the Cooper car, the accused stopped his car for about one-half minute, looked into his rear view

mirror, and then drove away. Lieutenant Fry remained at the station for about 45 minutes, and during that time the accused did not return to the vicinity of the accident (R. 97-99).

The damage to Mr. Cooper's car consisted of an injury to one fender, the repair of which was estimated to cost $6.00. This sum was paid by the accused to Mr. Cooper and accepted by him as a satisfactory settlement of the matter (R. 119).

b. Evidence Presented by the Defense.

In his testimony concerning his automobile accident on March 1, 1942, the accused admitted sideswiping a car as previously described. He contended in his testimony, however, that after striking the Cooper car he drove two blocks and returned to the damaged car. He stated that upon being told by a boy who happened to be near the Cooper car that the owner of the car did not live on Pershing Drive, he left a note for the owner with the boy to give to the owner when he returned. The next day he reported the matter to the County Clerk's Office and someone in that office promised to call him if any report of the accident was made there (R. 228-231). On the following Wednesday, Mr. Cooper contacted the accused through the Office of the Provost Marshal of the camp and the matter of the damage was settled in a friendly way by the payment of $6.00 (R. 119, 230).

c. The Specification, Additional Charge II, alleges that the accused, after being involved in an automobile accident, left the scene of the accident without attempting to locate the owner of the damaged automobile.

The only part of this offense which the accused did not admit was concerning leaving the scene of the accident without attempting to locate the owner of the damaged car. On this point the evidence for the prosecution shows that after the accident the accused stopped his car for about one-half minute, during which time he looked into his rear view mirror, that he then drove away, and did not return during the next 45 minutes. Despite the testimony of the accused concerning his immediate return to the scene of the accident, there is sufficient evidence in the record to sustain the finding of the court that the accused did leave the scene of the accident without attempting to locate the owner of the damaged car or to report the accident to proper authority.

Although the offense of leaving the scene of an automobile accident without attempting to locate the owner or to report the accident to proper authority is not specifically defined in the Manual for Courts-Martial, the 96th Article of War designates as a military offense, "all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service". It seems quite clear that the conduct of an officer in leaving the scene of an accident in which his automobile has just damaged the automobile of another without attempting to locate the owner of the other car, or to report the accident to proper authority, would be a neglect to the "* * * prejudice of good order * * *" and "* * * conduct of a nature to bring discredit upon the military service".

6. Character Witnesses and related Testimony.

Concerning the credibility of the accused as a witness, the defense presented the testimony of eight enlisted men, one captain, and one first lieutenant, who testified that the general reputation of the accused for truth and veracity in the First Medical Squadron was good (Ex. 4, R. 130, 134, 151, 154, 156, 160, 162, 165, 168). In this connection the prosecution presented a deposition of the home town pastor of the accused which contained the statement that the character of the accused was unstable at times, but which also contained the statement that his general reputation for truth and veracity in Vicksburg was good (Ex. 2).

As evidence of his efficiency as a medical officer, the accused presented an extract from a letter written by the commanding officer, Lubbock Demonstration Unit, Second Division, dated October 23, 1940, commending the accused for his efficiency, part of which stated, as follows:

> "a. 1st Lieut. George Y. Hicks, 2d Medical Battalion. The interest, understanding, and initiative of Lt. Hicks and his prompt preventative action was directly responsible for the return of the 107 officers and men to Fort Sam Houston, <u>all in good health</u>" (Ex. 13).

In addition, he presented the testimony of Lieutenant Colonel H. Jordan Theis, General Staff Corps, Headquarters First Cavalry Division, who stated:

"If I were in command of a unit I would especially desire the services of Captain Hicks as Surgeon. * * *" (R. 128).

First Lieutenant Charles Henry Swift, Medical Corps, also testified that the professional efficiency of the accused in the Army was very good (R. 134). Furthermore, several enlisted men commended the efficiency of the accused as a medical officer (Exs. K, L).

7. The accused is 35 years old. The records of the Office of The Adjutant General show his service as follows:

Appointed first lieutenant, Medical Corps Reserve, January 5, 1934; reappointment January 4, 1939, ineffective through failure to execute and forward oath of office; thereafter reappointed first lieutenant, Medical Corps Reserve, September 21, 1939; extended active duty March 15, 1940; appointed captain, Medical Corps Reserve, March 19, 1941.

8. The Board of Review has given careful consideration to a letter from the Honorable Wall Doxey, United States Senate, to The Judge Advocate General, inclosing a letter from Attorney R. M. Kelly of Vicksburg, Mississippi, to Senator Doxey, outlining the personal history of the accused.

9. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings of guilty and the sentence. Dismissal is authorized upon conviction of a violation of the 61st, the 69th, and the 96th Articles of War.

(On leave), Judge Advocate.

Chas. C. Cresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

1st Ind.

War Department, J.A.G.O., JUN 25 1942 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and opinion of the Board of Review in the case of Captain George Y. Hicks (0-313260), Medical Corps.

2. Captain Hicks was convicted under four specifications: absence without leave, breach of arrest, appearing in improper uniform, and leaving the scene of an automobile accident without attempting to locate the owner of the damaged automobile. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record for action under the 48th Article of War.

3. The records of the War Department show that accused is 35 years of age. He was appointed first lieutenant, Medical Corps, January 5, 1934; reappointment January 4, 1939, ineffective through failure to execute and forward oath of office; thereafter reappointed first lieutenant, Medical Corps Reserve, September 21, 1939; extended active duty March 15, 1940; appointed captain, Medical Corps Reserve, March 19, 1941.

Captain Hicks' efficiency as a medical officer on the 1940 maneuvers was commended by the Commanding Officer, Second Division. Several officers also testified that his professional efficiency as a medical officer was very good.

4. 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.

5. I recommend that the sentence be confirmed, but in view of the extenuating circumstances relative to the illness of the accused and his operation, and because of his apparent capability of rendering useful service in the future, that the execution thereof be suspended during the pleasure of the President.

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

Myron C. Cramer

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

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

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General
Washington, D. C.

SPJGK
CM 221794

JUN 12 1942

UNITED STATES	ALASKA DEFENSE COMMAND
v.	Trial by G. C. M., convened at Fort Greely, Kodiak, Alaska, April 12, 1942. Dismissal.
First Lieutenant MURRAY B. JONES (0-327868), Air Corps (Infantry).	

OPINION of the BOARD OF REVIEW
HOOVER, RITER and VAN BENSCHOTEN, Judge Advocates.

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

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

CHARGE I: Violation of the 63rd Article of War.

Specification 1: In that 1st Lieut. Murray B. Jones, Air Corps (Inf) did, at the Montmartre Club, Kodiak, Alaska, on or about February 21, 1942, behave himself with disrespect toward Major Jay G. Wanner, Medical Corps, his superior officer, by saying to him "Shit on you. You're just a fucking Major, and a God-damn medic at that", or words to that effect.

Specification 2: (Finding of not guilty)

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

Specification: (Finding of not guilty).

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

Specification: In that 1st Lieut. Murray B. Jones, Air Corps (Inf) was, at Kodiak, Alaska, on or about February 21, 1942, in

a public place, to wit, the Montmartre Club, drunk and disorderly while in uniform.

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

Specification 1: (Finding of not guilty)

Specification 2: In that 1st Lieut. Murray B. Jones, Air Corps (Inf) was, at Naval Air Station, Kodiak, Alaska, on or about February 22, 1942, drunk and disorderly in quarters.

Specification 3: (Disapproved by reviewing authority)

He pleaded not guilty to the Charges and Specifications. He was found guilty of Charge I and Specification 1 thereunder, of Charge III and its Specification, and of Charge IV and Specifications 2 and 3 thereunder, and not guilty of Specification 2, Charge I, of Charge II and its Specification, and of Specification 1, Charge IV. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority disapproved the finding of guilty of Specification 3, Charge IV, approved the sentence, and forwarded the record of trial with action as follows:

"Pursuant to Article of War 50½, the order directing the execution of the sentence is withheld pending approval by the Board of Review and the Judge Advocate General, and the confirmation of the sentence by the Secretary of War."

The record of trial has been treated as if forwarded for action by the President under Article of War 48.

3. The evidence shows that on the evening of February 21, 1942, a dinner was given at the Brown Bear Cafe, Kodiak, Alaska, in commemoration of the first anniversary of the arrival in Alaska of the 18th Pursuit Squadron.(R. 14, 26, 39). It was attended by accused and about 15 or 16 other officers (R. 39). Alcoholic drinks were imbibed by accused at the Navy Bachelor Officers' Quarters of the Naval Air Station, Fort Greely, Kodiak, where accused was quartered, before going to dinner (R. 14, 39).

After the dinner, at about 10 p.m., some of the officer guests, including accused, adjourned to the Montmartre Club, a roadhouse or night club in or near Kodiak (R. 6, 14, 26, 39). There accused met a friend, 1st Lieutenant Charles V. Wilson, 37th Infantry, who introduced him to Major Jay G. Wanner, Medical Corps, assigned to the 37th Infantry, Fort Greely, Alaska (R. 9, 39). The two had not met before (R. 41). The accused, Major Wanner and other officers spent about three hours drinking and talking (R. 6, 9, 40). The early part of the evening was spent pleasantly and there was no friction (R. 6, 40). At about 1 a.m., February 22, however, accused commenced "hanging on" the shoulders of some officers and talking in a loud and boisterous manner (R. 11). A little later he grasped a Navy lieutenant "by his blouse near the nape of his neck" and nearly pulled him to the floor (R. 9, 11). Major Wanner and Lieutenant Wilson suggested to accused that they would take him to his quarters (R. 6, 7, 9). At first accused acquiesced in the suggestion and then refused. The two thereupon took accused into a "cloak room" or "vestibule" where accused "pushed Major Wanner around several times". Major Wanner and Lieutenant Wilson warned accused that if he persisted in his conduct he was liable to have charges filed against him and continued to urge him to go home. In the course of the conversation accused said to Major Wanner, "Shit on you, you're nothing but a God-damn Major and a fucking Medic", or words to that effect (R. 6, 9). Accused also struck Lieutenant Wilson in the face and later slapped him in the face (R. 10). Accused and Major Wanner were in uniform. Major Wanner wore the insignia of his grade (R. 6). There were "quite a few" civilians present at the Montmartre Club during the evening but Major Wanner testified that they were not present in the cloakroom when accused used the disrespectful language above set forth. Some of the civilians were drunk (R. 7). Both Major Wanner and Lieutenant Wilson testified that in their opinion accused was drunk (R. 6, 9). Major Wanner testified that he had been drinking himself and did not recall all that occurred, but believed accused was so drunk "he didn't know what he was saying" when he addressed the improper remarks to him (R. 6). Finally, with the aid of club attendants, Major Wanner and Lieutenant Wilson forcibly removed accused from the Montmartre Club, placed him in the rear end of a "jeep" and escorted him to the Bachelor Officers' Quarters at the Naval Air Station (R. 9).

Upon arrival at the Bachelor Officers' Quarters at about 3 a.m. (R. 14) accused went to his room and commenced to undress. Lieutenant Kenneth W. Saxhaug, 18th Pursuit Squadron, joined him and engaged in

conversation there (R. 16). Accused also talked to First Lieutenant Theodore Barbera, 18th Pursuit Squadron. The latter reminded accused that their loud conversation would awaken others (R. 16, 40). Accused then entered a room where a Lieutenant Bowen, who had been at the Montmartre Club but had returned to the barracks (R. 11, 14, 40), was asleep (R. 40). Accused awakened Lieutenant Bowen by shaking the foot of his bed (R. 12, 42). A commotion followed (R. 12, 15, 17, 40). Accused was heard to exclaim, "You can't hit me you son of a bitch" (R. 17). Other officers, including Lieutenants Saxhaug and Barbera and 1st Lieutenant Franklin V. Lanum, 699th Aviation Ordnance Company, entered Lieutenant Bowen's room at about this point (R. 13, 15, 17). Accused struck at Lieutenant Bowen. The swing went wild. Lieutenant Bowen responded by striking accused on the side of the face (R. 17, 19). Accused was thrown to the floor and held by Lieutenants Bowen and Saxhaug (R. 15, 43). Thereafter accused was escorted to his room. In a few minutes he returned to Lieutenant Bowen's room, or attempted to do so, but was persuaded to remain in his own room. At about this time the Marine officer of the day, to whom the disturbance had been reported by a Naval officer who was in charge of the building, placed accused in arrest (R. 15, 17, 20, 28), and took him to the Fort Greely guardhouse (R. 23).

Lieutenant Barbera testified that during the occurrences in barracks witness believed accused "unquestionably was under the influence of intoxicating liquor" (R. 13). Lieutenant Saxhaug testified that accused "was able to walk perfectly straight and talk without hesitation in his speech. He wasn't mumbling but there is no question about it, he had been drinking" (R. 18). Lieutenant Lanum testified that he believed accused was drunk (R. 15). The officer of the guard testified that when accused was brought to the guardhouse he

> "was talking in a loud voice, I could smell liquor on his breath, and it was apparent to me that he had been drinking. He dominated the conversation interupting the Marine Officer of the Day and the other Officer who was with him, a Lt. Larson. This confusion went on for about three or four minutes. I finally asked them again what they wanted over there and if they wouldn't quiet down enough for me to find out that I would be forced to take some action by locking him in the Guard House. Lt. Jones informed me that I could not do this as he had a higher rank than I did. I told him I would find out whether I could, stepped to the phone

> and phoned the Assistant Provost Marshall. As I was on the phone, Lt. Jones and Lt. Hobbs, the Marine Officer of the Day, left." (R. 23)

The Marine officer of the day testified for the defense that when he went to the barracks and placed accused in arrest accused was quiet, courteous and cooperative (R. 28, 29). At the guardhouse he interrupted witness' conversation with the officer of the guard, was a "little boisterous about his questions" (R. 30) and appeared to be "tight" (R. 31). Upon leaving the guardhouse witness took accused to a Naval medical officer for the purpose of having him examined for drunkenness (R. 28, 30, 31). This medical officer testified for the defense that at about 3:30 a.m., February 22, he gave accused a "sobriety test" through questioning him and having him "walk in certain directed areas and certain patterns" and found that accused "had been drinking" but was sober (R. 32). This officer stated that accused "could have been intoxicated" two hours previous to the examination (R. 32). Two officers testified for the defense that they had known accused at Keith Field, Mississippi, prior to his transfer to Alaska, and that he had there performed his duties in an excellent manner, and had borne a good reputation (R. 33-36). These officers also testified that in Alaska accused's duties had been very light (R. 35, 37).

Accused testified that Major Wanner, Lieutenant Wilson and he were very congenial while at the Montmartre Club (R. 40, 43) and that the two officers "offered to carry me home since everybody else in the party I had gone to the Montmartre Club with had already departed". He did not recall having used any disrespectful language to anyone at the club (R. 40). He had normal control of himself, mentally and physically (R. 41). In quarters, subsequently,

> "In the course of waking Lt. Bowen up, instead of being awakened in the spirit that I had expected, he awoke and the first thing I knew he had struck me and a verbal as well as a physical struggle ensued in which Lt. Saxhaug came in and with admonitions of Lt. Saxhaug and Lt. Lanum, I went back to my room. Shortly after I returned to my room, Lt. Hobbs of the Marine Corps came to my room, said he had had a complaint about a disturbance and asked if I would come with him. I dressed and started out to the car in which Lt. Hobbs was riding and I asked why the disturbance had been

> reported, if it were of such a nature that it should have been reported. He said he didn't know about that but Lt. Snyder had called him and said I was drunk. I said, 'Well, if I am being arrested for being drunk I would like to see a Medical Officer'. We proceeded to the Guard House at which place the Officer of the Day was absent at the time. Lt. Hobbs had said he wanted to see the Officer of the Day, but his being absent, Lt. Larson insisted that the Officer of the Guard put me in arrest in the Guard House, until such time as the Officer of the Day returned. I informed the Officer of the Guard and also Lt. Larson that I could not be put in the Guard House. If I was to be confined in the Guard House, I demanded that they call the Commanding General and get the necessary authority to put me in the Guard House. At this point, Lt. Hobbs took me by the arm and said, 'Let's go'. We started back to the Navy B.O.Q. and I reminded Lt. Hobbs again that I had asked to see the Flight Doctor and we then went to the Doctor. The doctor told Lt. Hobbs that in his opinion I was not drunk, at which time I went back to the Navy B.O.Q. and went to bed." (R. 40)

He tried to strike Lieutenant Bowen while in the latter's room, and Lieutenant Saxhaug pushed accused toward the door and later threw him to the floor. He was provoked at Lieutenant Bowen's attitude and it was probable that on this account he went back to Lieutenant Bowen's room (R. 43).

4. The evidence thus shows that on the night of February 21, 1942, at a place known as the Montmartre Club, Kodiak, Alaska, accused addressed to Major Jay G. Wanner, Medical Corps, his superior officer, the disrespectful and obscene remarks set forth in Specification 1, Charge I. Accused testified that he could not recall having uttered the offensive remarks to Major Wanner and suggested that whatever he did at the night club was prompted only by conviviality. Upon all the evidence there can be no real doubt that accused consciously behaved himself with disrespect toward his superior officer, as charged.

The evidence further shows that while at the Montmartre Club, a public place where many persons, military and civilian, were congregated, accused talked generally in a loud and boisterous manner, laid hands upon an officer of the Navy and upon Major Wanner, struck a third officer with his fist and withal behaved so indecorously that he was taken from the place by force. He was in uniform. His behavior indicated, and witnesses who saw him formed the conclusion that he was drunk. Accused contended that he had full control of his mental and physical faculties, but, on all the evidence, it is established beyond reasonable doubt that accused was drunk, as well as disorderly, in uniform, as alleged in the Specification, Charge III. His drunkenness, as evidenced by his behavior, was of aggravated degree. He was conspicuously disorderly. The transaction as a whole displayed such unseemly characteristics in accused as to mark him as unworthy to continue as an officer of the Army. The finding of guilty of violation of Article of War 95 was fully justified.

The evidence also plainly shows that accused's drunkenness continued after his return to his quarters. Here, also, he again became disorderly, precipitating and engaging in a fist fight and causing a disturbance which required the intervention of his brother officers and which resulted in a call for the officer of the guard. A medical officer testified that at about 3:30 a.m., February 22, he gave accused a sobriety test and found him sober, but in view of the uncontradicted history of the events of the night, there can be no reasonable doubt that at the time of the occurrences in barracks accused was drunk, as well as disorderly, as found under Charge IV and Specification 2 thereunder.

5. War Department records show that accused is 31 years of age. He graduated from Wofford College, South Carolina, with the degree of A.B. in 1935. He was originally commissioned as a second lieutenant, Infantry Reserve, on June 1, 1935. He was ordered to active duty under the Thomason Act in July, 1936, and served for one year. He was promoted to the grade of first lieutenant on February 14, 1939. He was on active duty with the Civilian Conservation Corps from August 21, 1937, to September 30, 1937, and was employed with the Civilian Conservation Corps in a civilian capacity from November 4, 1940, to June 24, 1941. His present active military duty commenced June 30, 1941. Copies of correspondence relating to two alleged delinquent accounts of accused, one for $9.60, and one for $2.40, owing to a company fund, Civilian Conservation Corps, appear in his 201 file.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty as approved by the reviewing authority and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of violation of Articles of War 63 and 96 and is mandatory upon conviction of violation of Article of War 95.

_____, Judge Advocate.

_____, Judge Advocate.

(On Leave), Judge Advocate.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General.
Washington, D.C.

SPJGH
CM 221833

JUL 2 1942

UNITED STATES	1st CAVALRY DIVISION
v.	Trial by G.C.M., convened at Fort Bliss, Texas, April 17, 1942. Dismissal.
First Lieutenant CLARK G. TURNER (0-371362), 5th Cavalry.	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: (Not guilty).

Specification 2: (Not guilty).

Specification 3: (Not guilty).

Specification 4: (Not guilty).

Specification 5: (Not guilty).

Specification 6: (Not guilty).

Specification 7: (Not guilty).

Specification 8: (Not guilty).

Specification 9: In that 1st Lt. Clark G. Turner, 5th Cavalry, being indebted to the Post Exchange, Fort Riley, Kansas, in the sum of twenty-two dollars

($22.00) for October 1941 account, which amount became due and payable on or about November 10, 1941, did, at Fort Riley, Kansas, from November 10, 1941 to November 22, 1941, dishonorably fail and neglect to pay said account.

Specification 10: (Not guilty).

Specification 11: (Not guilty).

Specification 12: (Not guilty).

Specification 13: In that 1st Lt. Clark G. Turner, 5th Cavalry, having become indebted to the Nat Frazier Furniture Company in the sum of $202.15 for the purchase of furniture and having failed without cause to liquidate said indebtedness, and having promised the Commanding Officer, 5th Cavalry that his account with the Nat Frazier Furniture Company would be paid on or about December 26, 1941 by money order, did, without due cause at Fort Bliss, Texas on or about December 26, 1941 dishonorably fail to keep said promise.

Specification 14: (Not guilty).

Specification 15: (Not guilty).

Specification 16: In that 1st Lt. Clark G. Turner, 5th Cavalry, being indebted to the Post Exchange, Fort Bliss, Texas in the sum of sixty-four dollars and thirty-nine cents ($64.39) for November 1941 account, which amount became due and payable on or about December 10, 1941, did, at Fort Bliss, Texas, from December 10, 1941 to January 19, 1942, dishonorably fail and neglect to pay said debt.

Specification 17: In that 1st Lt. Clark G. Turner, 5th Cavalry, being indebted to the Post Exchange, Fort Bliss, Texas in the amount of $71.22 for December 1941 account, which account became due and payable on or about January 10, 1942, did at Fort Bliss, Texas, from on or about January 10, 1942 to January 19, 1942, dishonorably fail and neglect to pay said debt.

Specification 18: (Not guilty).

Specification 19: (Not guilty).

Specification 20: (Not guilty).

ADDITIONAL CHARGE I: (Not guilty).

Specification: (Not guilty).

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

Specification 1: In that 1st Lieutenant Clark G. Turner, 5th Cavalry, did at Fort Bliss, Texas, on or about January 10, 1942, borrow from Staff Sergeant Frank J. Housleithner, Troop "B", 5th Cavalry the amount of twenty-five dollars ($25.00), this to the prejudice of good order and military discipline.

Specification 2: In that 1st Lieutenant Clark G. Turner, 5th Cavalry, did at Fort Bliss, Texas on or about January 21, 1942, borrow from Sergeant Edwin Sloan, Troop "B", 5th Cavalry, the amount of forty-one dollars and eighty-five cents ($41.85), this to the prejudice of good order and military discipline.

He pleaded not guilty to the Charge and Additional Charges I and II and all the Specifications thereunder. He was found guilty of Specification 9 of the Charge, except the words "Fort Riley, Kansas," and "dishonorably," substituting therefor, respectively, the words "Fort Bliss, Texas," and "wrongfully," of the excepted words not guilty, of the substituted words guilty; guilty of Specifications 13, 16, and 17 of the Charge, except, in each case, the word "dishonorably," substituting therefor, in each case, the word "wrongfully," of the excepted word not guilty, of the substituted word guilty; of the Charge not guilty of violation of the 95th Article of War but guilty of violation of the 96th Article of War; and not guilty of Specifications 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 14, 15, 18, 19, and 20 thereunder. He was found guilty of Specifications 1 and 2 of Additional Charge II and Additional Charge II, but not guilty of Additional Charge I and the Specification thereunder. He was sentenced to be dismissed

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

3 a. The evidence shows, as to Specification 9 of the Charge, that the accused, during the month of October 1941, cashed a check at the Post Exchange of Fort Riley, Kansas, in the sum of $22. This check was returned to the Post Exchange marked "Insufficient Funds". Thereupon, the obligation thus incurred became immediately due and payable (Ex. B). This obligation, which was created in October 1941, was not paid until November 22, 1941 (R. 26).

b. The record shows, as to Specifications 16 and 17 of the Charge, that the accused owed the Fort Bliss Post Exchange a bill for the month of November in the amount of $64.39, that on November 9, 1941, the accused gave the Post Exchange his personal check on the El Paso National Bank for the $64.39, that payment of the check was refused because of insufficient funds, and that the accused was notified on January 19, 1941, by the Post Exchange through the Commanding Officer of Fort Bliss, Texas, of the refusal of the bank to pay the check (R.47).

The record shows further that the accused owed a bill of $71.22 to the Fort Bliss Post Exchange for the month of December 1941, which became due and payable on January 10, 1942; that when the accused was notified of the dishonoring of his check for $64.39, he then, on January 20, 1942, gave the Post Exchange a check for $135.61 in payment of both the November and the December accounts; that at the time accused delivered his check for $135.61 to the Post Exchange he also gave the Post Exchange a check for $20 for which he received $20 in cash; that both checks were drawn on the El Paso National Bank; that payment of checks was refused because of insufficient funds; that the Post Exchange immediately notified the accused; that the accused requested the Post Exchange to run the checks through again; and that thereupon both checks were again presented and paid (R. 47-48).

c. The record shows as to Specification 13 of the Charge, that on June 10, 1940, and thereafter in July and August 1940, the accused purchased certain furniture at Del Rio, Texas, from the Frazier Furniture Company of Del Rio, Texas, for which accused agreed to pay the sum of $382.05 in monthly installments of $25 each; that he made payments up to and including April 1941; that at the time accused bought the furniture he was stationed at Fort Clark, Texas; that in February 1941, accused moved to Fort Bliss, Texas, with the 5th Cavalry;

that on December 2, 1941, the Nat Frazier Furniture Company of Albuquerque, New Mexico, wrote a letter to the Commanding Officer, 5th Cavalry, Fort Bliss, Texas, informing him that the accused owed a balance of $202.15 on his furniture installment contract; that this letter was referred to the accused with an indorsement directing the accused to take immediate action to settle the account and to reply by indorsement stating the settlement arranged, together with copies of correspondence relating thereto; that the commanding officer further directed the accused to explain the long delay in the settlement of the account and to submit copies of correspondence with the firm; that the accused replied by indorsement stating that the account would be settled by Postal Money Order to be sent on December 26, 1941, and that the accused had received no statement from the company since its removal from Del Rio, Texas; that on January 10, 1942, following the foregoing correspondence, the accused mailed a check drawn on the El Paso National Bank for $202.15 to the Nat Frazier Furniture Company which was dishonored because of insufficient funds; that thereafter the accused, on January 24, 1942, went to Fort D. A. Russell, Texas; and that while there he received a letter dated January 25, 1942, from the Nat Frazier Furniture Company forwarded from his commanding officer, containing the following statement: "Unless we receive attention to this matter within five days we will be forced to take action on this"; and that thereafter, about January 31 or February 1, 1942, the accused paid the balance due the Nat Frazier Furniture Company by Western Union money order in the sum of $202.15 (R. 27-29).

d. The record shows, as to Specifications 1 and 2, Additional Charge II, that on or about January 10, 1942, the accused borrowed $25 from Staff Sergeant Frank J. Housleithner, Troop B, 5th Cavalry; that on or about January 21, 1942, the accused borrowed $41.85 from Sergeant Edwin Sloan, Troop B, 5th Cavalry; and that on or about February 6, 1942, the accused paid these debts (R. 48-49).

4. The accused testified that he entered the military service as a second lieutenant in December 1939, and that he was married on June 17, 1940 (R. 50). His financial difficulties began with the purchase of furniture in June 1940 (R. 50-51), and with his efforts to provide for his wife in the manner of living to which she had been accustomed (R. 56).

Prior to his entering the service the accused had been employed as a clerk in the Geologic Explorations Department of the Stanolind Oil and Gas Company for thirteen months at a salary of about $70 a month. Prior to this employment he had been a student (R. 52).

Concerning his attitude toward his creditors and his obligations generally, he testified that he at all times intended to pay all his debts, that he "just got behind", but that he never had an intention of defeating a single obligation (R. 61). He explained that for the future he had created a special account for his wife who was going to pay the family bills, and that he expected to retain just enough money for his expenses (R. 59).

Accused testified that when he was first placed in arrest Lieutenant Colonel Hoffman presented him with a prepared letter of resignation, and after reminding the accused that he would have to go through a "long period of arrest and all that", suggested that he think the matter over. Such a letter was again presented to the accused when the Additional Charge sheet was preferred. The accused explained that he declined to sign such a letter because he wanted to remain in the service (R. 83).

Concerning Specification 13 of the Charge, the accused testified that when he made the promise to Colonel Truscott to pay the debt to the Nat Frazier Furniture Company, December 26, 1941, he expected to pay it at that time; that he had expected to receive a Christmas present from his father which he had expected to apply on the debt; that when he did not receive such a present he was embarrassed to ask his father for the money (R. 70); but that the debt was subsequently paid on the last of January or the first of February 1942 (R. 63).

As to the Specifications of the Additional Charge II, the accused testified that when he entered the service he knew very little about military offenses, and that he did not know it was against military regulations to borrow money from an enlisted man (R. 57). He testified also that the two sergeants from whom he had borrowed money had guided him in military matters and that he had been very close to them (R. 57).

The accused testified further that all his accounts had been paid in full, including the debts to the two sergeants from whom he had borrowed money (R. 56). Margaret Turner, the wife of the accused, corroborated much of his testimony (Ex. 1).

Regarding the efficiency of the accused as an officer, there was evidence that Lieutenant Colonel William A. Fuller, the former commanding officer of the accused, and First Lieutenant Wilbur M.

Moore, the former troop commander of the accused, regarded his military work as "very satisfactory" (R. 73). There was also evidence showing that the accused graduated from the Fifth Communications Course with a rating of 88 and an efficiency rating of excellent (R. 74).

5. Specifications 9, 16, and 17 of the Charge allege that the accused, "* * * being indebted * * *, did, * * * dishonorably fail and neglect to pay said account", in violation of the 95th Article of War. Similarily, Specification 13 alleges that the accused, "having promised the Commanding Officer, 5th Cavalry that his account with the Nat Frazier Furniture Company would be paid on or about December 26, 1941 * * * dishonorably failed to keep said promise". The court found the accused guilty of each of the above-mentioned Specifications, "except the word 'dishonorably', substituting therefor the word 'wrongfully'", and "Not guilty of violation of the 95th Article of War, but guilty of violation of the 96th Article of War".

In view of the action of the court in excepting the word "dishonorably" from its findings, the question at once arises as to whether such findings constitute an offense against military law. This question has been authoritatively answered in several previous decisions. In the case of First Lieutenant Julius S. Sperti (CM 202601), the Board of Review made the following statement:

> "Dishonorable neglect to pay debts is a violation of the 95th Article of War. But mere neglect on the part of an officer to pay his debts promptly is not of itself sufficient ground for charges against him. It is only where such nonpayment amounts to dishonorable conduct, because accompanied by such circumstances as fraud, deceit or specific promises of payment, that it may properly be deemed to constitute an offense. CM 121209; sec. 413 (3), Dig. Ops. JAG, 1912-30. * * *."

The language of the above-cited decision was cited with approval as recently as January 19, 1942, in the case of Second Lieutenant Byron F. Hendrickson (CM 218970), a case very similar to the present one. In addition, the Hendrickson case, in considering the type of cases in which neglect to discharge pecuniary obligations is regarded as a military offense, quoted Winthrop's Military Law and Precedents (Reprint, p. 715), as follows:

"In these cases, in general, the debt was contracted under false representations, or the failure to pay characterized by deceit, evasion, false promises, denial of indebtedness, &c., and the neglect to discharge the obligation, at least in part, was continued for an unconscionable period. Some such culpable and dishonorable circumstances should characterize the transaction to make it a proper basis for a military charge. A mere failure to settle a private debt, (which may be more the result of misfortune than of fault,) cannot of course properly become the subject of trial and punishment at military law."

In the light of the authority cited, it is apparent that the ancient principle of American law which abhors the practice of imprisoning men for debt is quite as much a part of our military law as of our civil law, and the act or omission of an officer in neglecting to pay a pecuniary obligation is not a military offense unless such act or omission is characterized by "dishonorable conduct".

The same principle applies to the findings that the accused wrongfully failed to keep his promise to his commanding officer, to pay the Nat Frazier Furniture Company on December 26, 1941. On this point the Board of Review, in the case of Second Lieutenant John C. Fanning (CM 220760), made the following statement:

"* * * The mere failure by an officer to keep his promise to pay a debt is not dishonorable unless the promise is made with a false or deceitful purpose, or unless the failure to pay is characterized by a fraudulent design to evade payment (CM 207212, Thompson; CM 217636, Nichols; sec. 453 (14) (15), Dig. Op. J.A.G., 1912-1940; Winthrop's Military Law and Precedents (Reprint), p. 715)."

It necessarily follows that the findings under Specifications 9, 13, 16, and 17 of the Charge are legally insufficient to support a conviction under the 96th Article of War.

6. Specifications 1 and 2, Additional Charge II, allege that the accused borrowed $24 and $41.85, from Sergeant Housleithner and Sergeant Sloan, respectively, "to the prejudice of good order and military discipline". The evidence shows that the transaction occurred as alleged and that the two sergeants extending the loan to the accused were members of his own organization. The act of the accused in so obligating himself

to noncommissioned officers of his organization is conduct which is clearly prejudicial to good order and military discipline within the meaning of the 96th Article of War (Dig. Ops. JAG 1912-40, sec. 453 (5); CM 192128, Strickland).

7. War Department records disclose that the accused was born in Tulsa, Oklahoma, on August 3, 1917, and that he was 24 years of age at the time of the commission of the offenses of which he was found guilty. He was rejected as a flying cadet on July 20, 1937, because of granulated eyelids. He was appointed a second lieutenant, Infantry Reserve, on August 9, 1938, and transferred to Cavalry Reserve, December 1, 1939, and placed on extended active duty. On October 10, 1941, he was temporarily promoted to the grade of first lieutenant.

8. All the members of the court joined in presenting the following recommendation for clemency:

> "In view of the youth of this officer and his lack of experience in handling financial matters and in view of his apparent efforts and good faith in now attempting to remedy the causes of his past financial difficulties, which formed the basis of the charges brought against him, we, the undersigned members of the General Court-Martial, which on April 17, 1942 heard his case, hereby recommend that clemency be granted to Lieutenant Turner."

9. 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 insufficient to support the findings of guilty of the Charge and Specifications 9, 13, 16, and 17 thereunder; legally sufficient to support the findings of guilty of Additional Charge II and Specifications 1 and 2 thereunder; and legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of violation of the 96th Article of War.

Lester T. Hedges, Judge Advocate.

Chas. C. Cresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

1st Ind.

War Department, J.A.G.O., JUL 9 1942 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant Clark G. Turner (0-371362), 5th Cavalry.

2. I concur in the opinion of the Board of Review that the record of trial is not legally sufficient to support the findings of guilty of the Charge and Specifications 9, 13, 16, and 17 thereunder, but is legally sufficient to support the findings of guilty of Additional Charge II, and Specifications 1 and 2 thereunder, and the sentence.

In view of the fact that the record is legally sufficient to support the findings under the two Specifications of borrowing money from an enlisted man, I recommend that the sentence be confirmed. I recommend, however, in consideration of the minor character of these two offenses that the sentence be commuted to a reprimand.

3. War Department records disclose that the accused was born in Tulsa, Oklahoma, on August 3, 1917, and that he was 24 years of age at the time of the commission of the offenses of which he was found guilty. He was rejected as a flying cadet on July 20, 1937, because of granulated eyelids. He was appointed a second lieutenant, Infantry Reserve, on August 9, 1938, and transferred to Cavalry Reserve, December 1, 1939, and placed on extended active duty. On October 10, 1941, he was temporarily promoted to the grade of first lieutenant.

4. Inclosed herewith are the draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action confirming the sentence and directing that it be commuted to a reprimand.

Myron C. Cramer

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

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

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General.
Washington, D.C.

SPJGH
CM 221885

JUN 23 1942

UNITED STATES	)	WESTERN DEFENSE COMMAND
v.	)	Trial by G.C.M., convened at Fort Winfield Scott, California, May 6, 1942. Dismissal.
Captain CHARLES M. BAWSEL (0-294451), Quartermaster Corps, Company D, 86th Quartermaster Battalion.	)	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, 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 Captain Charles M. Bawsel, QMC, Company D, 86th QM. Battalion, (LM), did at Fort Benning, Georgia, on or about December 19, 1941, knowingly, wrongfully and wilfully apply to his own use and benefit, four Goodrich Silvertown Automobile tires of the total value of about $26.80, property of the United States, furnished and intended for the military service thereof.

Specification 2: In that Captain Charles M. Bawsel, QMC, Company D, 86th QM. Battalion (LM), did at Inglewood, California, on or about the 30th day of January 1942, knowingly, wrongfully and wilfully apply to his own use and benefit two Falls Roadmaster Automobile tires of the total value of about $22.76, property of the United States furnished and intended for the military service thereof.

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

Specification 1: In that Captain Charles M. Bawsel, QMC, Company D, 86th QM Battalion, (LM), did at Inglewood, California, on or about the 30th day of January, 1942, loan to Sergeant Alden G. Beasley $100.00 under an agreement whereby he, the said Captain Charles M. Bawsel was to receive for the use of said money for one month, interest at the rate of 20% per month, contrary to good order and military discipline.

Specification 2: In that Captain Charles M. Bawsel, QMC, Company D, 86th QM Battalion, (LM), did at Inglewood, California on or about the 10th day of January, 1942, loan to Sergeant Alden G. Beasley $100.00 under an agreement whereby he, the said Captain Charles M. Bawsel was to receive for the use of said money for one month, interest at the rate of 20% per month, contrary to good order and military discipline.

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

Specification 1: In that Captain Charles M. Bawsel, QMC, Company D, 86th QM Battalion, (LM), did, at the Presidio of San Francisco, California, on or about March 25, 1942, in his testimony before Lieutenant Colonel James B. Muir, Jr., I.G.D., an officer conducting an official investigation, testify under oath in substance as follows:

'135. Q. How many 'Government' tires altogether did you have put on your car?

A. One.

'136. Q. In your previous testimony, Captain, you referred to Government 'tires' on your car and that you decided, after talking with your officers, to keep 'them' on the car. What did you mean by that?

A. There has been quite a bit of talk about tires. I only had one tire on the car,'

which testimony by the said Captain Bawsel was false and untrue and known by him to be false and untrue in that he, the said Captain Bawsel, well knew that he had placed or caused to be placed four, or more, Government tires on his said privately owned automobile.

Specification 2: In that Captain Charles M. Bawsel, QMC, Company D, 86th QM Battalion, (LM), did, at the Presidio of San Francisco, California, on or about March 25, 1942, in his testimony before Lieutenant Colonel James B. Muir, Jr., I.G.D., an officer conducting an official investigation, testify under oath in substance as follows:

'201. Q. There is a further allegation that it has been reported that the Captain had four Goodrich tires put on his car at Fort Benning, Georgia, his previous station. These were Government tires. What can you say regarding that?

A. I don't know anything about that.

'202. Q. Is that true or not true?

A. Not true.'

which testimony by the said Captain Bawsel was false and untrue and known by him to be false and untrue in that he, the said Captain Bawsel, well knew that he had placed or caused to be placed four Government Goodrich tires on his said privately owned automobile at Fort Benning, Georgia.

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

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

As to Charge I - The accused was in command of Company D, Quartermaster Battalion, stationed at Fort Benning, Georgia. Between the 8th and 10th of December, 1941, the motor transport supply sergeant, Robert Gerlach, of Company D, drew for accused from the Motor Maintenance District Warehouse, Fort Benning, four size 600/16 regular tread Goodrich tires and had them put in the basement of his company barracks (R. 7). On February 2, 1942, at Inglewood, California, Private First Class Talmage Collier, saw on the right rear wheel of accused's Pontiac automobile a Falls Roadmaster tire, which came out of the stock pile of Government tires brought from Alabama. There had been four of these tires, wrapped in orange colored paper, two were missing, but parts of

the wrappings and cartons for tubes were found (R. 8, 9). Private Collier got the serial number of the Roadmaster tire which he had seen on the automobile wheel; the other three tires were Goodrich Silvertown. Later in the repair shop he found the second Falls Roadmaster tire in the trunk of accused's automobile. He reported these facts to the Federal Bureau of Investigation, and later to Colonel Vogel, Group Commander, 65th Coast Artillery. There was an inspection, after which he saw the tires which had been on accused's automobile had been changed from three Goodrich Silvertown, each valued at $27.50, and two Falls Roadmaster, each valued at $22.50, to second-hand recapped tires (R. 8-14). These tires were also observed by Sergeant John H. Williams (R. 14-19).

Staff Sergeant Carl H. Stowe, at Inglewood, California, during January or February 1942, mounted a Falls Roadmaster tire and about two days later saw it on the right rear wheel of accused's car (R. 21), and Sergeant Beasley about that time helped Sergeant White to take four tires off this car.

As to Charge II - Sergeant Alden D. Beasley twice during January 1942 borrowed money from the accused, $100 each time, paying him back $120 for each loan. Sergeant Beasley gave no security except signing a bank check although he had no account. The money, which was repaid at the end of the month, he lent to the men. The accused proposed the terms of these loans, Sergeant Beasley was to receive five per cent. He tore up the checks at the end of the month (R. 30-34). After being duly advised of his rights, accused, about March 26, at San Francisco, told Lieutenant Colonel James B. Muir, Jr., Inspector General's Department, about the above described money transactions with Sergeant Beasley (R. 36-40).

As to Charge III - On March 25, 1942, at an official investigation, the accused, after being duly informed of his rights, was sworn and, with the stenographer present, answered the questions of the inspector, Lieutenant Colonel Muir. In reply to the question "* * * how many government tires altogether did you have put on your car?", accused replied, "One" (R. 26). The accused further stated, as to the allegation that he had caused four Government tires to be put on his private automobile, that "It is untrue", that he only had one Government tire on his car. On April 26, 1942, on further investigation, after again being duly advised of his rights, accused stated freely that he had not told the full truth about the matters. He then stated that at Fort Benning, in December 1941, his

organization was ordered to the Pacific Coast, the tires on his personal automobile were not in good condition, he was unable to buy any, so drew four Government tires from the Fort Benning Depot, for use on his automobile. Mrs. Bawsel drove the car to Inglewood, California, and had a puncture in one of the Government tires. After her arrival he drew two tires from the stock of Company D, 86th Quartermaster Battalion, put one on his car and the other in spare. Upon hearing that reports were being made of his having Government tires on his automobile, he removed the six Government tires which were on his car at different times and returned them to the stock of the Supply Platoon of Company D.

4. The only witness for the defense was the accused who testified under oath that on December 15, 1941, his Company D was ordered to the west coast. Since it was impossible to buy tires and it was not unusual at Fort Benning for officers to use Government tires on their personal cars, he then asked Sergeant Gerlach, in charge of the supply platoon, to get him four tires which, on December 19, accused personally put in the trunk of his car.

On January 20, when his wife arrived in California, he found she had swapped the spare, so he went down to the shop, had a tire gotten out of the trailer and put on his spare. He then put one of the Goodrich tires back in stock, kept three of them until about February, when they went back to stock. These tires had been driven from Atlanta, Georgia, to Texas, then up to California, then put back into stock. The Roadmaster tire damaged by his wife had been turned in, he had the three Goodrich tires and one Roadmaster pulled off at the same time and they went back into the company stock; he still had one Falls Roadmaster in the trunk, which he kept until questioned by Colonel Davis, the commanding officer, regarding tires, when accused took it off, returned it to stock, thus putting all tires back in stock.

He talked with Sergeant Beasley relative to the question of lending money to the men at a normal interest rate. Accused used his own personal money, so he thought of the check cashing plan (R. 45-51).

Accused stated, as alleged, "One" in answer to Colonel Muir's question as to how many Government tires he had put on his car, but was referring only to the one tire left on his car, a spare. He was not talking about the four tires from Fort Benning. He had only one tire on his car at the time in question.

In answering Colonel Muir's question whether it was true that he had four tires put on his car at Fort Benning, accused answered that it was not true, he did not, he had nothing to do with putting those tires on his car. At the investigation accused said he was "scared to death. When there was a question that I could answer like that, I

answered like that". There were two tires put on his car at Inglewood, one remained for about two weeks, the other one about a week longer, they "kind of over-lapped one another". He knew it was not authorized to use Government tires on personal transportation. He had been in the service since August 15, 1941, Fort Benning was his first station, but in the Reserve Corps since 1930 (R. 52-56).

5. At the time of trial accused was 34 7/12 years of age.. His service is shown by records of the Office of The Adjutant General as follows:

> Second lieutenant, Cavalry, Officers' Reserve Corps, June 1, 1932; active duty, June 22 to July 5, 1932. First lieutenant, Cavalry, Officers' Reserve Corps, July 2, 1936, active duty, August 4, to August 24, 1940. Reappointed first lieutenant, Cavalry-Reserve, June 6, 1941. Captain, Cavalry, Officers' Reserve Corps, July 22, 1941, active duty for one year, August 5, 1941 to August 4, 1942. Efficiency report, August 5, 1941 to October 3, 1941, "Excellent", report August 5, 1941 to December 27, 1941, "Very satisfactory".

6. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence and warrants confirmation thereof. A sentence of dismissal is mandatory on conviction of violation of the 95th Article of War and authorized on conviction of violation of the 94th or 96th Article of War.

(On leave), Judge Advocate.

Chas. L. Grosson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General
Washington, D. C.

SPJGK
CM 221991

JUN 16 1942

UNITED STATES	THIRD CORPS AREA
v.	Trial by G. C. M., convened at Baltimore, Maryland, May 20, 1942. Dismissal.
Second Lieutenant BRUCE W. P. EDGERTON (0-24090), Quartermaster Corps.	

OPINION of the BOARD OF REVIEW
HOOVER, VAN BENSCHOTEN and IDE, Judge Advocates.

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

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

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

Specification: In that 2nd Lt Bruce W. P. Edgerton, QMC Holabird Quartermaster Motor Base, Baltimore, Maryland, having been restricted to the limits of the Holabird Quartermaster Motor Base, Baltimore, Maryland, did, at Holabird Quartermaster Motor Base, Baltimore, Maryland on or about May 8, 1942, break said restriction by leaving the reservation and going to places unknown.

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

Specification: In that 2nd Lt Bruce W. P. Edgerton QMC Holabird Quartermaster Motor Base, Baltimore, Maryland did, without proper leave, absent himself from his station at Holabird Quartermaster Motor Base, Baltimore, Maryland, from about May 8, 1942, to about May 11, 1942.

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

3. The evidence shows that on May 7, 1942, accused was released from arrest in quarters and restricted to the limits of the post of the Holabird Quartermaster Motor Base, Baltimore, Maryland (R. 5, 6; Exs. A, B). At the same time he was directed to report to the assistant commandant of the Enlisted Men's School on the post for further instructions (R. 7). On May 8 accused failed to report to the school for duty (R. 9). A search for accused was made by the officer of the day but he could not be found (R. 10, 11). At about 1:50 a.m., May 11, 1942, accused returned to the post, entering at one of the gates. He was there held by a sentinel and turned over to the officer of the day (R. 12) who placed him in arrest in quarters (R. 14).

Accused declined to testify or make an unsworn statement.

4. Breach of restriction and absence without leave by accused, as charged, are thus established. The Specification alleging breach of restriction is in the form prescribed by Appendix 4 of the Manual for Courts-Martial for charges alleging that offense as a violation of Article of War 96 (Form 129, App. 4, M.C.M.). Insofar as appears from the evidence accused's breach of restriction did not involve and was not accompanied by any dishonorable, disgraceful or deceitful act on his part. His conduct may not therefore properly be classed as conduct unbecoming an officer and a gentleman within the meaning of Article of War 95. The breach of restriction was violative of Article of War 96.

5. Prior to arraignment the defense challenged a member of the court, First Lieutenant Horace Lehneis, Quartermaster Corps, for cause. This officer was sworn upon his voir dire and testified, in response to a question as to whether he had formed or expressed a positive and definite opinion as to the guilt or innocence of accused, as follows: "I have formed an opinion but don't recall ever having expressed an opinion in this particular case." Asked whether his opinion would prejudice him in any way in determining the guilt or innocence of accused, he replied, "I don't think so". The court denied the challenge and Lieutenant Lehneis participated in the trial as a member of the court.

It is apparent from the record that the court believed that the challenged member had not formed a positive and definite opinion as to guilt or innocence, that therefore he was not disqualified and that he could and would fairly reach his determination as to the guilt of accused. It was the function of the court to determine the relevancy and validity of the challenge for cause (A. W. 18), and, upon the record, there was no error in such determination. In any case, the evidence of guilt is uncontradicted and compelling, and any error in overruling the challenge based on a disqualifying opinion as to guilt or innocence could not have injuriously affected the substantial rights of accused (CM 154752, Reynolds; CM 190127, Hammond; CM 203802, Braman).

6. When the court was opened following the findings the prosecution, in stating that it had no evidence of previous convictions, made reference to a previous trial of accused by court-martial on which the reviewing authority had not taken action. An objection to consideration of these proceedings was sustained by the court. The action of the trial judge advocate in referring to the previous trial was improper, but in view of the action of the court it cannot be said that the substantial rights of accused were injuriously affected.

7. There is attached to the record of trial a letter to The Judge Advocate General from the reviewing authority, dated May 29, 1942, inclosing a letter to the reviewing authority from Major General Glen E. Edgerton, United States Army, Governor of the Panama Canal, the father of accused. The reviewing authority recommends that the sentence be suspended. General Edgerton states, in substance, that accused absented himself without leave for the purpose of getting married and that he took a wedding journey of two or three days during his absence. He also states that accused was previously tried by general court-martial at the Holabird Quartermaster Motor Base and suggests that on this account the members of the court were probably unfavorably disposed toward accused. He states that recent general instructions were given at the Base with respect to unjustified leniency of sentences, and suggests that these instructions probably resulted in an unusually severe sentence.

8. War Department records show that accused was 26 years of age at the time of his offense. He served as a cadet at the United States Military Academy from July 1, 1935, to January 14, 1936, and

from August 28, 1937, to June 11, 1941. On the latter date he was appointed a second lieutenant, Quartermaster Corps.

9. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed at 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 the Specification in violation of Article of War 96, legally sufficient to support the findings of guilty of Charge II and its Specification, and legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of violation of Articles of War 61 and 96.

Robert W. Harris, Judge Advocate.

(On Leave), Judge Advocate.

O. Z. Ide, Judge Advocate.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General.
Washington, D.C.

SPJGH
CM 221993

JUN 17 1942

UNITED STATES	GULF COAST AIR CORPS TRAINING CENTER
v.	Trial by G.C.M., convened at Foster Field, Victoria, Texas, April 28, 1942. Forfeiture of pay of $41.67 per month for three (3) months.
Second Lieutenant CLARENCE T. BAKER (O-427582), Air Corps.	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates.

1. The record of trial in the case of the officer named above, having been examined in the Office of The Judge Advocate General and there found legally insufficient 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 96th Article of War.

Specification: In that Second Lieutenant Clarence T. Baker, Air-Res., on or about April 3, 1942, while acting as flying instructor and leading a student formation in a routine gunnery mission, led his formation in a dive toward the water in the vicinity of Matagorda Island, thereby endangering life and Government property.

The accused pleaded not guilty to the Charge and Specification. He was found guilty of the Specification and of the Charge, with the addition of the word "unauthorized" before the word "dive", and the addition of the word "unnecessarily" before the word "endangering". He was sentenced

"to be suspended from promotion for three (3) months after his promotion would otherwise be due". The reviewing authority approved "only so much of the sentence as provides for a forfeiture of pay of $41.67 per month, for a period of three months" and ordered its execution. The sentence was published in General Court-Martial Orders No. 63, Headquarters Gulf Coast Army Air Forces Training Center, Randolph Field, Texas, May 28, 1942.

3. The only questions requiring consideration are whether the Specification alleges an offense and whether the findings and sentence are legally correct and proper.

4. The Specification on which the accused was arraigned and tried does not set forth any offense, nor the violation of any law, or Article of War, nor does it allege in any manner that the dive was unlawful, wrongful, improper, or "unauthorized". It may have been proper and necessary. Colonel Winthrop, in his discussion of the legal essentials of a specification, makes the following statement:

> "* * * The purpose and province of the Charge are: 1st. To so inform the accused as to the precise offence attributed to him that he may intelligently admit, deny, or plead specially to, the same; and may be enabled to plead his conviction or acquittal upon any subsequent prosecution on account of the same act; 2d. To advise the court and the reviewing authority of the nature of the accusation, and of the Article or other statute upon which it is based, so that the former may rightly and judiciously try, determine, and (upon conviction) sentence, and the latter may understandingly pass upon all the proceedings.
>
> "Such being the nature and object of the Charge, it may be said, generally, as to its requisites--1, that it must be laid under the appropriate Article or other statute; 2, that it must specify the material facts necessary to constitute the alleged offence. * * *" (Winthrop's Mil. Law and Prec., pp. 132-133).

In addition, the court in its findings, by adding the word "unauthorized" before the word "dive" and the word "unnecessarily" before the word "endangering", finds the accused guilty of an offense of which he was not charged and of which he had no notice. As far as the Specification sets out, the endangering of life and Government property

may have been necessary and proper. The finding of guilty of the Specification, with the above additions, is not a finding of a lesser included offense, but is a finding of a greater and different offense. On this point, the Manual for Courts-Martial, 1928(pp. 64, 65), makes the following statement:

> "Exceptions and Substitutions. - One or more words or figures may be excepted and, where necessary, others substituted, provided the facts as so found constitute an offense by an accused which is punishable by the court, and provided that such action does not change the nature or identity of any offense charged in the specification or increase the amount of punishment that might be imposed for any such offense. The substitution of a new date or place may, but does not necessarily, change the nature or identity of an offense."

Furthermore, the action of the reviewing authority is improper in that the sentence approved is not a sentence of a like kind and is not included in that imposed by the court. The Manual for Courts-Martial, 1928 (pp. 76-77), makes the requirement that the sentence imposed by the reviewing authority must be "* * * included in the sentence as imposed by the court * * *." The sentence of a forfeiture of pay of $41.67 per month for three months, which is definite both as to time and amount, is not included in the sentence as imposed by the court. It is not certain that the sentence is a lesser one, and it might be a greater one.

In view of the legal deficiencies in the Specification, in the findings, and in the sentence, a review of the evidence is not deemed necessary.

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

(On leave), Judge Advocate.

Elias L. Bresson, Judge Advocate.

Abner E. Lipscomb Judge Advocate.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General
Washington, D. C.

SPJGK
CM 222093

AUG 4 1942

U N I T E D S T A T E S	)	27TH INFANTRY DIVISION
v.	)	Trial by G. C. M., convened at Kilauea Military Camp, Territory of Hawaii, April 28, 1942. Dishonorable discharge (suspended) and confinement for two (2) years. Federal Correctional Institution, Englewood, Colorado.
Private JOHNNY KISER (34146573), Company C, 105th Infantry.	)	

HOLDING by the BOARD OF REVIEW
HOOVER, BAUGH and SIMPSON, Judge Advocates.

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

2. The only question requiring consideration is the propriety of the designation of a Federal correctional institution as the place of confinement.

Confinement in a Federal correctional institution or reformatory is not authorized under letter dated February 26, 1941 (AG 253 (2-6-41) E), from The Adjutant General to all commanding generals, subject: "Instructions to reviewing authorities regarding the designation of institutions for military prisoners to be confined in a Federal penal or correctional institution", except in a case where confinement in a penitentiary is authorized by law (CM 220093, Unckel). Confinement in a penitentiary is not authorized under Article of War 42 for willful disobedience of a lawful command of a superior officer nor for willful disobedience of a lawful order of a noncommissioned officer in the execution of his office, the offenses of which accused was found guilty.

3. 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 two years in a place other than a penitentiary, Federal correctional institution or reformatory.

Robert W. Hoover, Judge Advocate.
James H. Baugh, Judge Advocate.
Gordon Simpson, Judge Advocate.

1st Ind.

War Department, J.A.G.O., AUG 17 1942 - To the Commanding General, 27th Infantry Division, APO 24, c/o Postmaster, San Francisco.

1. In the case of Private Johnny Kiser (34146573), Company C, 105th Infantry, attention is invited to the foregoing holding by 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 two years in a place other than a penitentiary, Federal correctional institution or reformatory. Upon designation of a place of confinement other than a penitentiary, Federal correctional institution or reformatory, you will have authority to order the execution of the sentence.

2. Inasmuch as you designated, in your action upon the record of trial, dated May 14, 1942, a Federal correctional institution as the place of confinement, you did not have authority, in view of the first sentence of the third subparagraph of Article of War 50½, to order execution of the sentence prior to a holding by the Board of Review, with the approval of The Judge Advocate General, that the record of trial was legally sufficient to support the sentence. The proceedings, including your action, having been published (G.C.M.O. No. 33, Hq. 27th Inf. Div., May 14, 1942), you were without authority to recall and modify your action upon the record (par. 87b, M.C.M.). The recommendation by this office (radiogram dated June 15, 1942) that the place of confinement be changed did not effectively authorize modification of your action on the record, in the absence of action under Article of War 50½. You now have authority, under Article of War 50½, to take corrective action on the record of trial in accordance with the foregoing holding by the Board of Review. As to form of action see Appendix 10 and paragraph 87b (pp. 77, 78) of the Manual for Courts-Martial.

3. It is recommended that a corrected or additional general court-martial order promulgating the proceedings, including your corrective action, be published.

4. When copies of the corrected or additional 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 222093).

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

1 Incl.
Record of trial.

AUG 17 '42 PM

4

DISPATCHED
WAR DEPARTMENT
SERVICES OF SUPPLY
J. A. G. O.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General
Washington, D. C.

SPJGK
CM 222140

JUN 12 1942

UNITED STATES	)	FOURTH CORPS AREA
v.	)	Trial by G. C. M., convened at Fort Moultrie, South Carolina, May 15, 1942. Dishonorable discharge and confinement for one (1) year. Federal Reformatory, Chillicothe, Ohio.
Private ROBERT W. TEAL (6925577), Detachment Medical Department, Corps Area Service Command #1466, Fort Moultrie, South Carolina.	)	

HOLDING by the BOARD OF REVIEW
HOOVER, RITER and VAN BENSCHOTEN, Judge Advocates.

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

2. The only question requiring consideration is the propriety of the designation of a Federal reformatory as the place of confinement. Paragraph 90b, Manual for Courts-Martial, provides:

> "Subject to such instructions as may be issued from time to time by the War Department, the United States Disciplinary Barracks at Fort Leavenworth, Kans., or one of its branches, or a military post, station, or camp, will be designated as the place of confinement in cases where a penitentiary is not designated."

War Department letter dated February 26, 1941 (AG 253 (2-6-41)E), subject: "Instructions to reviewing authorities regarding the designation of institutions for military prisoners to be confined in a Federal penal or correctional institution", authorizes confinement in a reformatory only when confinement in a penitentiary is authorized by law (CM 220093, Unckel). Penitentiary confinement is not authorized in this case by Article of War 42 inasmuch as the period of confinement adjudged is not more than one year (A.W. 42; sec. 399 (5), Dig. Op. J.A.G. 1912-1940: par. 90, M.C.M.).

3. 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 in a place other than a penitentiary, Federal reformatory or correctional institution.

Michael A. Hoover, Judge Advocate.

Benjamin F. Riter, Judge Advocate.

(On Leave), Judge Advocate.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General
Washington, D. C.

SPJGH
CM 222148

JUL 31 1942

UNITED STATES	)	38th INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Camp Shelby, Mississippi, March 25, April 13 and 14, 1942. Dishonorable discharge and confinement for the term of his natural life. Penitentiary.
Private ROBERT E. GRIGGS (20532832), Company A, 152nd Infantry (Rifle).	)	

REVIEW of the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, 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 I: Violation of the 92nd Article of War.

Specification I: In that Private Robert E. Griggs, Company "A", One Hundred Fifty Second Infantry (Rifle) did, at Camp Shelby, Mississippi, on or about March 8, 1942, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Prentice K. Brammer, Company "A", One Hundred Fifty Second Infantry (Rifle), a human being, by shooting him with a rifle.

The accused pleaded not guilty to and was found guilty of the Charge and its Specification. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the rest 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 shows that the accused and a group of men of his company, including Prentice Brammer, the deceased, spent Sunday afternoon and evening of March 8, 1942, loafing and drinking beer in the 152nd Infantry Canteen of Camp Shelby, Mississippi. At about 5:30 in the afternoon, the accused had a conversation with Sergeant Austill of the 152nd Infantry Headquarters Detachment, in which the accused stated, "I have got to go on guard tonight. I'm in a hell of a shape". To this remark Sergeant Austill replied, "You certainly are. You ought to go home and get in bed and sleep it off". Sergeant Austill described the condition of the accused at that time as "pretty drunk" (R. 89-90).

Later, at about 9:30 in the evening, an argument arose between the accused and a soldier named Kolley. (Kolley, a soldier of the 38th Cavalry Reconnaissance Troop, was a friend of the deceased and had been spending the afternoon with him (R. 68).) During this argument Kolley called the accused "a fighting name", and the accused struck Kolley in the face, knocking him down. At this point the deceased stepped in and flat-handed pushed the accused so that he fell backward to the floor. Private Brooks, a hometown friend of the accused, came forward to his assistance and the deceased in turn pushed him flat-handed in the face and onto a bench (R. 38, 89). Private Brown, a friend of both Kolley and the deceased, then led Kolley out of the canteen and directed him to go home (R. 62).

Shortly after this altercation the deceased and Brown left the canteen and returned to their company area and their own tent. The accused, accompanied by Brooks and Cansler, also returned to their company area, but instead of going to their own tent they entered the tent occupied by the deceased (R. 20, 32, 62). The conversation of the group as they returned to their company area was described as just a normal conversation (R. 32). Both Brooks and Cansler testified that they entered the tent occupied by the deceased just to talk and to have something to do.

After the entry of this group into the tent there were ten men there, and a general conversation followed. Several of the men, including both the deceased and the accused, were described as feeling the effects of drinking but not as being "plain drunk" (R. 56). The altercation in the canteen was discussed by the accused and the deceased, as well as a previous altercation which the accused had had with three soldiers on the maneuvers in Louisiana, in which the deceased befriended the accused. The accused admitted that the deceased had not struck him in the altercation in the canteen. The accused, however, made several remarks to the

effect that if he were as big as Bones (a large soldier of his company), he would whip the deceased three or four times a day before meals and that the deceased "was too good to have a bayonet stuck in his belly" (R. 43). The version of one witness was stated thus:

> "Then Griggs said if he was as big as 'Bones' why he would whip him four times before meals and then again after. He told him sometime somebody was going to stick him with a bayonet. He said he wouldn't stick him in the front, he would stick him in the back" (R. 51).

This conversation was described as not being a fighting argument and as not being particularly challenging (R. 41-47).

After the discussion had continued for about twenty minutes, the deceased pulled off his shoes and announced that he was tired. Thereupon the accused, Privates Brooks, and Cansler withdrew and went to their own tents (R. 22-23). When the accused entered his own tent he requested one of his tentmates to move over so that he might get into his locker. The accused then took his gun out of his locker and loaded it. When asked what he was doing, he replied that he was going on guard. He then took his gun and left the tent (Ex. A).

During the time the accused was getting his rifle, the deceased went to the latrine, returned to his tent, and to his bed. Shortly after the deceased had lain down, the accused called to the deceased from the outside of deceased's tent. The accused is variously reported as having called out, "Come out a minute, Brammer", or, "Come out. I want to see you, Brammer", and, "Brammer, come out here". The deceased replied, "Just a minute till I get my shoes on. I'll be right out" (R. 44, 52).

The deceased then started out of the tent door and was about three-fourths of the way out when a shot was fired and the deceased fell. Hollander, a tentmate of the deceased, went outside the tent and saw the accused with a rifle in his hand. The accused handed him his rifle and said "I did it" (R. 53). Hollander then handed the rifle to someone and felt the pulse of the deceased. In his opinion the deceased was dead at that time (R. 53). When Cansler, after hearing the shot, went to the scene of the shooting, the accused said to him "'I've shot Brammer' or something like that * * *" (R. 23). The accused is also reported as having said to Brooks as he came up to the scene, "Tag, I have killed him, I have killed him" (R. 37). Private Keller, a tentmate of the accused, who ran to the scene, testified that the accused said, "I shot Brammer, I killed him, Call the Corporal of the Guard, I'll probably get the firing squad in the

morning" (Ex. A). Cansler testified that shortly after the shooting the accused was questioned in the company orderly room as to why he had shot the deceased, and that the accused had replied, "'I don't know' or something like that", and that the accused also said he would probably get the firing squad in the morning (R. 23). During the time just following the shooting, the accused was crying (R. 28).

The deceased was examined by a medical officer, who testified that the accused was dead at 10:40 p.m., from "an entrance wound on his left jaw and what appeared to be an exit wound in the rear of his head" (R. 71).

The tent door through which the deceased left his tent was described as having tent flaps which had to be spread apart before an exit could be made. An examination of the tent on the day following the shooting of the deceased revealed that the left flap had been perforated. The interpretation of the witness was that the bullet which punctured the tent flap punctured it before the bullet struck the deceased, and that, therefore, the bullet was fired before the deceased had pushed back the flap (R. 145).

4. First Lieutenant Harold B. Mangold, the commanding officer of Company H, testified for the defense that at about 1:30 a.m., on March 9, 1942, he was present at regimental headquarters when the accused was brought there. According to his testimony, the accused seemed dazed and not to recognize Lieutenant Mangold. He stated that Colonel Stilwell told Lieutenant Merritt not to read Article of War 24 to the accused because the accused was in no condition to know what he was saying or what he was doing, and that what he said could not be used against him. Article of War 24 was accordingly not read to the accused (R. 98-102).

Lieutenant Mangold testified further that the accused and the deceased often ran around together and were frequently found visiting in the same tent. He described the deceased as being a little over six feet in height, weighing approximately 210 pounds, and as being very jovial and a practical joker. He was very popular in his organization. Lieutenant Mangold described the accused as being a good soldier and one whom he used as a personal company scout (R. 99).

The accused testified that he enlisted in Company A, 152nd Infantry, his hometown National Guard organization, on October 31, 1939,

and that he became eighteen years of age on March 8, 1942. When he was eleven years of age his parents separated, and when he became thirteen years of age he was placed in a public orphanage. He attended public school and completed the second year of high school (R. 106, 109).

On Sunday morning, March 8, 1942, the accused did a four-hour tour of guard duty. Before entering upon this duty he had been furnished ammunition by his company supply sergeant (R. 110). At 2:30 p.m., when he had finished his tour of guard duty, he returned to his company and placed his cartridge belt and gun in his tent. The accused then went to the 152nd Infantry canteen where he joined several other men from his company, including the deceased. The accused testified that the deceased was his friend and that he had no former occasions drunk beer with him at the canteen. On this occasion the accused started drinking about three o'clock (R. 111).

During the evening, at about 9:30, the accused and Kolley became engaged in an argument about something which the accused did not remember. During this argument Kolley called the accused a "son of a bitch", whereupon the accused struck him. The deceased then shoved the accused down and stated that he did not "want any trouble between us". Brown then took Kolley outside (R. 114).

The accused testified further that he did not leave the canteen from the time he came there at 3 o'clock until the canteen closed at 10 o'clock, and that he did not remember leaving at all. After his quarrel with Kolley, the next thing the accused remembered was his getting his gun to go on guard. He testified that he had no recollection of going into the tent of the deceased. After getting his gun, the accused went to the tent next to that of the deceased and called for the deceased. Upon being told that the deceased was in the next tent, he called there and the deceased replied, "I'll be there in a minute as soon as I get my shoes on". The accused testified further that the deceased came out and "* * * it went off and he fell". The accused described himself as standing with his arms hanging by his side and with his gun across his waist when his gun went off and the deceased fell. He testified that he "* * * had no intentions of harming Brammer in any way. He was a friend" (R. 112-113).

After the shooting, the accused asserted that he remembered going to the orderly tent, and that thereafter he did not remember anything that may have happened until about 2 o'clock when he came to his senses in the stockade headquarters. He did not remember going to regimental headquarters or the making of any statement to Colonel Stilwell (R. 18, 19, 124).

When examined concerning an altercation which he had had while on maneuvers in Louisiana, the accused testified that the deceased had prevented three men from another organization from attacking him all at the same time and that the deceased had told the three soldiers that they could fight the accused but that they would have to do it one at a time (R. 119).

The accused testified that he did not remember making the statement that he wished he were as big as Bones. He described Bones as being a soldier of about the size of the deceased. He did not remember how many bottles of beer he had drunk while at the canteen (R. 126). His guard instructions did not require him to load his rifle in his tent but he had never been instructed not to load it there (R. 126).

5. The accused is charged with murder. The Specification alleges that the accused did "* * * with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill * * *" the deceased by shooting him with a rifle. In order to determine the legal sufficiency of the evidence to support the finding of guilty under this Specification, it is necessary that the evidence support the conclusion that the accused unlawfully killed the deceased with malice aforethought.

Murder is defined as "* * * the unlawful killing of a human being with malice aforethought". The word "unlawful" as used in this definition means "* * * without legal justification or excuse". A justifiable homicide is "A homicide done in the proper performance of a legal duty * * *". Furthermore, an excusable homicide is one "* * * which is the result of an accident or misadventure in doing a lawful act in a lawful manner, or which is done in self-defense on a sudden affray, * * *". The definition of murder requires that the death of the victim "* * * take place within a year and a day of the act or omission that caused it, * * *" (M.C.M. 1928, par. 148 a). It is universally recognized that the most distinguishing characteristic of murder is the element of "malice aforethought". The authorities, in explaining this term have stated that the term is a technical one and that it cannot be accepted in the ordinary sense in which the terms may be used by the layman. In the famous Webster case, Chief Justice Shaw explains the meaning of malice aforethought as follows:

> "* * * Malice, in this definition, is used in a technical sense, including not only anger, hatred, and revenge, but every other unlawful and unjustifiable motive. It is not confined to ill-will towards one or

more individual persons, but is intended to denote an action flowing from any wicked and corrupt motive, a thing done malo animo, where the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty, and fatally bent on mischief. And therefore malice is implied from any deliberate or cruel act against another, however sudden.

* * *

"* * * It is not the less malice aforethought, within the meaning of the law, because the act is done suddenly after the intention to commit the homicide is formed; it is sufficient that the malicious intention precedes and accompanies the act of homicide. It is manifest, therefore, that the words 'malice aforethought,' in the description of murder, do not imply deliberation , or the lapse of considerable time between the malicious intent to take life and the actual execution of that intent, but rather denote purpose and design in contradistinction to accident and mischance" (Commonwealth v. Webster, 5 Cush. 296; 52 Am. Dec. 711).

Similarly, the Manual for Courts-Martial defines malice aforethought as follows:

"Malice aforethought. - Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. The use of the word'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed.(Clark)

"Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not (except when death is inflicted in the heat of a sudden passion, caused by adequate provocation); knowledge that

> the act which causes death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused; intent to commit any felony. * * * (M.C.M., 1928, par. 148 a).

6. The uncontradicted evidence shows that the accused shot and killed the deceased on March 8, 1942. It is equally clear that this homicide was unlawful in that it was done without justification or excuse. Furthermore, an analysis of the evidence reveals ample proof to support the finding that it was done with malice aforethought. The facts show that the accused, after an afternoon of beer drinking, and within thirty or forty minutes of the fatal shooting, had had a quarrel with a friend of the deceased and that he had struck him in the face. This altercation was terminated by the deceased's shoving the accused to the floor. The effect of the deceased's interference upon the attitude of the accused may be measured in part by the fact that he stated shortly thereafter while in the deceased's tent that if he were as big as Bones he would whip the deceased three or four times a day before meals, that the deceased was too good to have a bayonet stuck in his belly, that sometime somebody was going to stick the deceased with a bayonet, and that he wouldn't stick the deceased in the front, he would stick him in the back. These statements, made in loose conversation between soldiers, may have been lightly and innocently intended, but subsequent events tend to interpret their meaning as resentment.

After about twenty minutes of conversation in the deceased's tent, the deceased announced that he was tired and pulled off his shoes. The accused then went to his own tent and procured his rifle. This act was consistent with his duty of going on guard within a few minutes. His act, however, of loading his rifle in his tent was improper, especially since his guard duty was at a considerable distance from his company area. After leaving his tent the accused went to the tent of the deceased and called to him to come out. As the deceased was emerging from the tent, the accused shot him. Such a homicide has the appearance of a diabolical, cruel murder. To the first man who approached him after the shooting, the accused said, "I did it", and to his friend Brooks he said, "Tag, I have killed him. I have killed him". He then added the request, "Call the Corporal of the Guard. I'll probably get the firing squad in the morning". When asked by one of his friends why he did it, the accused

replied, "'I don't know' or something like that". These statements do not reflect the feeling of regret and horror which must overcome the innocent man who has accidentally shot a friend, but rather a mind conscious of guilt and impressed with a feeling of criminal responsibility for the crime. Such evidence, considered in its entirety, clearly meets the standard required for proof of malice aforethought. Furthermore, this evidence indicates that the fatal act of the accused was done "willfully, deliberately, feloniously, unlawfully, and with premeditation" as alleged in the Specification.

7. Shortly after his arrest the accused was taken before his regimental commander and questioned concerning the death of the deceased. Not only was the accused not warned of his right to remain silent, but his commanding officer expressly directed that he not be warned because, as he stated, the accused was in such a condition that he did not know what he was saying. The accused was, nevertheless, asked if he had intended to shoot Brammer. The testimony that accused answered "yes" to that question was conditionally received in evidence over the objection of the defense. Later the law member granted a motion to strike this testimony and admonished the court to disregard it. The legality of this procedure was questioned by the defense (R. 83-85, 87-88). The answer of accused, in effect, confessed that he had intentionally shot deceased. That confession, involving a serious offense, made wholly without warning and elicited by the question of his regimental commander, was clearly not voluntarily made and should not have been received in evidence (par. 114 a, M.C.M., 1928). The error committed in the temporary admission of this particular testimony, was corrected by the ruling of the law member striking the answer and his admonition to the court to disregard it. In view of the action of the law member and of the fact that other competent evidence in the record affords a substantial basis for the court's finding of guilty, it must be concluded that the substantial rights of the accused were not injuriously affected by the conditional admission and subsequent exclusion of that statement of accused.

The record does not expressly show upon the second meeting of the court at 8 a.m., April 13, 1942, that the reporter, who was sworn at the first session, was present (R. 5). The record does, however, state that at 1:15, after a recess, "* * * and the reporter resumed their seats" (R. 48). The record, in the opinion of the Board of Review, satisfactorily accounts for the presence of the reporter at the session of the court on April 13, 1942.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence. A sentence either of death or of imprisonment for life is mandatory upon a conviction of murder in violation of the 92nd Article of War. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement by Sections 273 and 275 of the Criminal Code of the United States (18 U.S.C. 452, 454).

Victor S. Hill, Jr., Judge Advocate.

Chas. C. Cresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General
Washington, D. C.

SPJGK
CM 222418

JUN 2 6 1942

UNITED STATES	31ST INFANTRY DIVISION
v.	Trial by G. C. M., convened at Camp Bowie, Texas, June 1, 1942. Dishonorable discharge and confinement for three (3) years. Disciplinary Barracks.
Private HILBERT MANNING (34033775), Medical Detachment, 167th Infantry (Rifle).	

HOLDING by the BOARD OF REVIEW
HOOVER, SIMPSON and LYNCH, Judge Advocates.

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

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

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

Specification: In that Private Hilbert Manning (NMN), 34033775, Medical Detachment, 167th Infantry (Rifle), did, without proper leave, absent himself from his post and duties at Medical Detachment 167th Infantry (Rifle), Camp Bowie, Texas, from about 8:00 P.M., May 6, 1942, to about 6:30 A.M., May 8, 1942.

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

Specification: In that Private Hilbert Manning (NMN), 34033775, Medical Detachment 167th Inf. did, at Camp Bowie, Texas, on or about May 7, 1942, feloniously take, steal, and carry away sixty dollars ($60.00), the property of John H. Antoine, Private First Class, Medical Detachment, 167th Infantry (Rifle), Camp Bowie, Texas.

Accused pleaded guilty to and was found guilty of the Charges and Specifications. Evidence of two previous convictions by summary courts-martial, one for violation of Articles of War 96 and 65, and one for violation of

Article of War 61, 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 three years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. Immediately following the pleas of guilty and an explanation of the meaning thereof by the law member, accused was asked whether he understood the meaning of his pleas. He replied:

> "Yes, sir. I was drunk when I 'taken' the money, and didn't know what I was doing." (R. 4)

After this statement was made the defense counsel consulted with accused and then announced that accused still wished to plead guilty. No further action in the premises was taken by the court. The prosecution did not introduce any evidence.

4. The only evidence introduced by the defense was the testimony of accused.

After the defense counsel had directed his attention to the pleas of guilty and had asked him to state in his own words what had occurred in relation to the alleged larceny, accused testified as follows:

> "Well, on May 7 I was in town (Brownwood, Texas) and had been drinking a good bit. In fact, I was drunk and that night I went back to camp, where I went into the tent where Antoine slept. His footlocker was there and I got the money out of it. I was drunk at the time and didn't know what I was doing. That's about all, sir. I didn't really intend to steal the money. When the officer investigating it came to me I spoke to him about me making arrangements to return the money to the boy." (R. 5)

He also testified that he occupied the same tent as Private First Class John H. Antoine, Medical Detachment, 167th Infantry (Rifle), that he knew Antoine kept money in his locker and that upon going to the tent accused lifted up the lid of the locker and took money from

a pocketbook lying in the tray. He later spent the money. He did not know how much money he took but recalled that he later rented an automobile and paid $20 hire, $10 at one time and $10 at another time. While he and a companion had the automobile some girls were with them (R. 5-7).

5. At the close of the case, just prior to the time at which the court was closed for its findings, defense counsel stated:

> "The defense wishes to call to the attention of the court again the extenuating circumstances - that the accused was too drunk at the time that offense was committed to realize what he was doing, and that he readily admitted guilt and expressed his desire to repay the money taken." (R. 8)

6. Article of War 21 provides that:

> "When an accused arraigned before a court-martial fails or refuses to plead, or answers foreign to the purpose, or after a plea of guilty makes a statement inconsistent with the plea, or when it appears to the court that he entered a plea of guilty improvidently or through lack of understanding of its meaning and effect, the court shall proceed to trial and judgment as if he had pleaded not guilty."

The statement by accused following his pleas of guilty, as well as his statement in the course of his testimony, was inconsistent with his pleas of guilty to the Charge and Specification alleging larceny for he asserted that in taking the money he was drunk and did not know what he was doing. The effect of these statements was to deny that he had entertained a specific intent to steal, an essential element of the offense charged. In view of the inconsistent statements and the requirements of Article of War 21 it was the duty of the court to proceed to trial and judgment as if accused had pleaded not guilty to Charge II and its Specification. The record of trial must be treated as if pleas of not guilty had been entered thereto.

7. The testimony of accused sufficiently shows that at the place and time alleged in the Specification, Charge II, accused took and carried away money belonging to Antoine. The circumstances as detailed

by accused support an inference that he intended to steal the money, this despite his assertions of drunkenness and lack of knowledge of the nature of his acts. There is nothing in his testimony or elsewhere in the record of trial to show that the amount taken by accused exceeded $20, the sum he admitted having spent for rental of the automobile. It follows that the record of trial is legally sufficient to support only so much of the finding of guilty of the Specification, Charge II, as involves a finding of guilty of larceny of money in an amount not in excess of $20.

The maximum confinement authorized by paragraph 104c of the Manual for Courts-Martial for larceny of property of value not in excess of $20 is confinement at hard labor for six months. The maximum confinement authorized for absence without leave for two days, the offense involved in Charge I and its Specification, is confinement at hard labor for six days.

8. For the reasons stated the Board of Review holds the record of trial legally sufficient to support the findings of guilty of Charge I and its Specification and of Charge II, legally sufficient to support only so much of the finding of guilty of the Specification, Charge II, as involves a finding that accused did at the place and time alleged feloniously take, steal and carry away money in an amount not in excess of $20, the property of Private First Class John H. Antoine, Medical Detachment, 167th Infantry (Rifle), and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for six months and six days.

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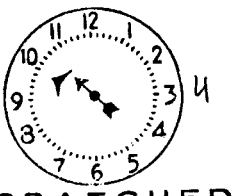

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WAR DEPARTMENT
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J. A. G. O.

Robert D. O'Hearn, Judge Advocate.

Gordon Simpson, Judge Advocate.

Raymond J. Lynch, Judge Advocate.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General
Washington, D. C.

SPJGK
CM 222443

UNITED STATES v. Sergeant ROBERT H. LIEBERHER (6897909), Headquarters Battery, 70th Coast Artillery (AA).	UNITED STATES ARMY FORCES IN NEW CALEDONIA Trial by G. C. M., convened at Noumea, New Caledonia, April 1, 3, 6, 7, 10 and 11, 1942. To be hanged by the neck until dead.

OPINION of the BOARD OF REVIEW
HOOVER, SIMPSON and LYNCH, Judge Advocates.

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Sergeant Robert H. Lieberher, Headquarters Battery, 70th Coast Artillery, anti-aircraft, did at Noumea, New Caledonia, on or about March 16, 1942, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Sergeant Parker C. Kimball, Company E, 182nd Infantry, a human being by shooting him with a Calibre 45 colt automatic pistol.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be hanged by the neck until dead. Two-thirds of the members of the court concurred in the findings of guilty and all concurred in the sentence. The reviewing authority approved the sentence, took further action as follows:

"The Prisoner of War Stockade near Paita, New Caledonia, is designated as the place of confinement. Pursuant to Article of War 50½ the

> order directing the execution of the sentence is withheld",

and forwarded the record of trial. The record has been treated as if forwarded for action under Article of War 48.

3. The evidence shows that during the early part of the night of March 16, 1942, Sergeant Parker C. Kimball, Company E, 182nd Infantry, was senior noncommissioned officer of an interior guard posted about the 109th Station Hospital in Noumea, New Caledonia (R. 8, 22). The guard was charged with clearing the streets about the hospital, after 9 p.m., of all persons who were not patients or residents of the area (R. 22) and had special orders "to be cautious of the natives" (R. 11). The night was dark (R. 13, 63) and a "semi-blackout" with "some lights" was in operation (R. 13). Two or more shots which required investigation were fired at about 9:30 p.m. in the general vicinity of the hospital (R. 61, 64, 70, 124, 129). Private William Hoblet, Company E, 182nd Infantry, a member of the guard, was on duty as a sentinel on a post extending about 150 feet along Rue Georges Clemenceau, a street on one side of the hospital (R. 28, 72).

Shortly before 10:25 p.m., Kimball joined Hoblet and walked with him along the sidewalk on Rue Georges Clemenceau "checking the post" (R. 10, 12, 31, 34). The two were in khaki uniform (R. 12) and were armed with rifles (R. 12, 34). Neither wore any arm band or other clothing which would specially indicate that he was a member of the military police (R. 26). When Kimball and Hoblet had reached a point about 75 feet from the corner of Rue Georges Clemenceau and an intersecting street two men appeared in the center of Rue Georges Clemenceau walking rather rapidly in the same direction (R. 27, 31, 36, 41, 46) and started to pass. When the two men were about five yards distant (R. 27) Kimball and Hoblet turned flashlights on them (R. 12) whereupon they stopped (R. 13). The two thus stopped flashed lights, in turn, on Kimball and Hoblet. Some conversation ensued and the two men asked Kimball and Hoblet to identify themselves, declaring that they were on military police duty (R. 10) - that they were "guards in that area" (R. 12). They talked loudly and had .45 caliber pistols in their hands (R. 10, 11). Kimball told them that he and Hoblet would take them to the hospital guard officer of the day and the two men who had been stopped appeared to understand this statement (R. 10, 13, 25, 28). Bystanders at the street corner heard one (unidentified) man say, "You'll come along with me" or "All right, move along" and heard another (unidentified) man respond, "Sure, I'll come along with

you" or "All right, I'm moving" (R. 112, 119). Kimball assumed charge of one of the men who had been stopped and Hoblet assumed charge of the other. Hoblet, walking behind his man, started along the street (R. 10, 11, 27) with Kimball and his charge standing in the middle of the street about five yards to the rear (R. 10, 11, 34). Hoblet testified that he heard no unusual sound behind him at this time (R. 11, 27) but a non-commissioned officer who was at the street corner testified that he heard noises in the middle of the street "like somebody pushing somebody else around" (R. 112) - "there was a scuffling of feet and things of that sort" (R. 115). A shot was fired (R. 10, 38, 112, 119).

Upon hearing the shot Hoblet turned about and through use of his flashlight saw Kimball lying in the street (R. 10, 13, 27, 38). Kimball was unconscious and had been wounded in the lower jaw (R. 120, 122). A man was running down the street. Hoblet and another sentinel from an adjoining post fired at the running man with rifles (R. 10, 34, 132). The running man returned the fire (R. 40, 44, 45). The man of whom Hoblet had assumed charge, thinking that his erstwhile companion, rather than Kimball, had been wounded (R. 47), fired at the running man with his pistol (R. 39). Kimball was carried into the hospital where he died within a few minutes, death being caused by a .45 caliber pistol bullet which passed through the lower jaw and lodged in the back of his neck (R. 4, 8, 9). This bullet was extracted, identified in court and received in evidence (R. 4; Ex. 1).

Hoblet testified that he did not know or recognize the man whom Kimball took into custody (R. 27). He testified that he had seen the second man about an hour before testifying (R. 13) but did not identify the second man.

Corporal Charles W. Clutter, Headquarters Battery, 70th Coast Artillery (AA), assisted in carrying Kimball into the hospital (R. 40). At the hospital Clutter appeared to be highly excited and hysterical, declared that he had "shot all his bullets in his gun" (R. 93, 94) and "seemed to be under the apprehension" that Kimball, the wounded man, was his "buddy" (R. 95). Clutter testified that during the evening of March 16, prior to 8 p.m., he and accused were together and drank considerable liquor and that witness became drunk (R. 42, 45). At about 10:30 p.m., witness and accused went to the vicinity of the station hospital in Noumea (R. 36). There, at or near a street corner, they met two men in uniform (R. 15, 46, 47, 50) whom witness did not recognize (R. 39). He thought they were armed (R. 46). He did not clearly recall what occurred but remembered that a "shot

was fired right behind. I was right near the corner". He thereupon saw a man lying in the street and thought it was accused (R. 47). Witness saw the man running down the street and when the latter fired in his direction witness returned the fire with his .45 caliber pistol (R. 38, 39, 44, 45). The pistol with which witness fired at the running man was identified in court and received in evidence (R. 39; Ex. 4).

Accused was on duty, on March 16, with an unloading detail working at the docks in Noumea. His first sergeant testified that accused was "at the dock as a guard detail at all times until the job was completed. Sergeant Lieberher was in charge of the full detail" (R. 99). It was his duty to be at the docks except when going to and from his battery, in a distant part of town, for his meals (R. 100-102). Together with other members of the battery he was under orders to carry a rifle or pistol with ammunition at all times for protection against possible attacks by the "Japs and also the Vichies" (R. 101). As was authorized (R. 99, 102) accused had, on March 12 or 13, soon after his organization debarked (R. 55), exchanged a rifle with which he was armed for a .45 caliber pistol (R. 52, 53). The pistol was not returned to the man with whom the exchange was made, Private 1st Class Mack Heatherly, Headquarters Battery, 70th Coast Artillery (R. 53). The pistol was identified in court by Private Heatherly and received in evidence (R. 52; Ex. 6).

At about 10:45 p.m. (R. 63, 64, 66, 69) accused was found by a member of the military police standing "on the side of a prime mover (truck) on the side of the street" (R. 58) about four blocks from the scene of the shooting (R. 60). Accused was "perspiring profusely" and appeared to be out of breath. His clothing was soiled. He was wearing a pistol belt with a torn holster and did not have his pistol (R. 59). He was suffering from a bullet wound in his right thigh (R. 4, 58) caused by a .45 caliber pistol bullet which had lodged in his leg (R. 5). He was taken to the hospital where the bullet was extracted. The bullet was identified in court and received in evidence (R. 6; Ex. 2).

At the time accused was found on the truck the military policeman asked him as to the whereabouts of his pistol and accused replied that he had "lost it while running down an alley where the buildings had tin roofs". He said he thought he could identify the place where the pistol was lost and pointed out an alley for this purpose. A search was made (R. 59, 69) and the pistol accused had secured from Heatherly (R. 59, 71, 74, 75) was found in another alley nearby,

> "standing muzzle and magazine down, standing upright, lodged and leaning against the foundation of a razed building. There was a shot in the chamber. It was at full cock and one shell left in the magazine."

The pistol (Ex. 6) appeared to have been recently fired (R. 59).

Prior to the trial a bullet was fired into burlap for test purposes (R. 75, 76) from the pistol which was in accused's possession on the night of March 16 (Ex. 6) and a bullet was similarly fired (R. 75, 76) from the pistol fired by Clutter at the man who ran from the scene of the homicide (Ex. 4). These bullets were received in evidence (Exs. 8, 9). Staff Sergeant Ralph K. Halterman, 109th Station Hospital, who through a recital of about 8½ years' professional experience with small arms while employed by the Winchester Repeating Arms Company, including laboratory work, qualified as a ballistics expert (R. 82-85), testified that he had compared the test bullets so fired (R. 72, 76, 78; Exs. 8, 9) with the bullet recovered from the body of Kimball (Ex. 1) and the bullet recovered from the leg of accused (Ex. 2). He reached the conclusion, through study of characteristic markings on all the bullets (R. 85, 86) that the bullet taken from the body of Kimball (Ex. 1) was fired from the pistol which was in accused's possession on March 16 (Ex. 6) and that the bullet taken from the leg of accused (Ex. 2) was fired from Clutter's pistol (Ex. 4).

Early in the evening of March 16 accused and Clutter were observed drinking at a bar in Noumea (R. 105, 106). Clutter testified that accused drank gin and "the last three or four drinks we got were double" (R. 42). The military policeman who found accused following the shooting testified that accused appeared to have "been drinking" (R. 58). The medical officer who observed him when he was brought to the hospital at about 10:45 p.m. (R. 6, 17), testified that accused had a distinct odor of alcohol on his breath (R. 5) but did not appear to be so drunk that he could not have performed his ordinary duties and, in this sense, was sober (R. 18). Accused stated, when questioned at the hospital, that he had been drinking (R. 5).

After it had been announced by the defense counsel that accused's rights had been carefully explained to him accused elected to remain silent (R. 130). At the close of the case, however, upon being asked by the trial judge advocate if he had anything further to offer, accused made an unsworn statement as follows:

"No. That is all I know. There was something--I don't even remember that--going on. All I remember is a flash. That's all I know. I don't know nothing. That is all I know." (R. 141)

Four officers of the 70th Coast Artillery (AA), each of whom had at different times commanded a battery of which accused was a member, testified that accused had performed his duties in a creditable manner and was a noncommissioned officer of good character (R. 125-128). Three of these officers testified that they would be willing to have accused as a sergeant in their respective organizations (R. 126-128).

4. Although no eyewitness saw accused fire the shot the circumstances admit of no reasonable doubt that at the place and time alleged accused, without legal justification, killed Sergeant Parker C. Kimball, Company E, 182nd Infantry, by shooting him with a pistol, as charged. Hoblet did not identify accused as present at the scene of the shooting but the testimony of Clutter establishes the presence of accused and unmistakably shows that accused and Clutter were the persons taken into custody by Kimball and Hoblet, respectively. The shot was fired after Hoblet and Clutter had turned away and while accused and Kimball were together. Immediately after Kimball was fired upon accused disappeared from the scene and there can be no doubt that it was accused who was observed running away, firing a weapon as he ran. Pistol shots were fired by Clutter at the running man and accused was presently found some four blocks away showing physical signs of unusual exertion and suffering from a wound by a pistol bullet. His own pistol was missing and he said he had lost it in an alley through which he had run. This chain of circumstances, together with the testimony of the ballistics expert that the bullet which killed Kimball was fired by the Heatherly pistol with which accused was armed at the time of the shooting and that the bullet which wounded accused came from Clutter's pistol, is conclusive of guilt.

An element of murder is malice aforethought (par. 148a, M.C.M.). There is nothing in the evidence indicative of hatred or ill will on the part of accused toward Kimball or of a preconceived plan to injure or kill him. There is nothing to indicate that the shooting was accidental or done in self-defense. The testimony does raise an inescapable inference that Kimball was fired upon in furtherance of an effort and intent by accused to resist and escape from the restraint

which Kimball had imposed, accused knowing Kimball to be a member of a guard lawfully performing his duties. The state of mind of accused involved in this effort and intent amounted to malice aforethought. Among the states of mind amounting to malice aforethought as set forth in paragraph 148a of the Manual for Courts-Martial is:

> "An intent to oppose force to an officer or other person lawfully engaged in the duty of arresting, keeping in custody, or imprisoning any person, or the duty of keeping the peace, or dispersing an unlawful assembly, provided the offender has notice that the person killed is such officer or other person so employed."

Accused had been drinking but from all the evidence the court was fully justified in concluding that he was capable of entertaining the specific intent to murder.

The Board of Review entertains no doubt that accused, with malice aforethought, willfully, feloniously, unlawfully and with premeditation killed Sergeant Kimball, as found by the court. This was murder as denounced by Article of War 92.

5. The record of trial does not clearly show the presence at the trial of two members of the court, Lieutenant Colonel Kenneth G. Hoge and Captain James H. Reiter, both Adjutant General's Department. A radiogram has been received by The Judge Advocate General from the reviewing authority, the Commanding General, United States Army Forces in New Caledonia, dated June 24, 1942, stating that a certificate has been made as required by paragraph 87b of the Manual for Courts-Martial, correcting the omission and setting forth the fact that the members named were present at the trial, and that the certificate has been forwarded to The Judge Advocate General.

6. The record of the proceedings of the first day of the trial is incomplete in that certain questions addressed to witnesses and, in one case, an answer by a witness, were omitted (R. 5, 6, 8, 13,15). All of the witnesses who testified on the first day of the trial were, however, recalled at a subsequent session of the court and repeated their testimony. The record of questions and answers as imperfectly recorded was read in open court and the prosecution, the defense and the witnesses were given opportunity to present such additional matter as might be desired. The irregularity could not have injuriously

affected the substantial rights of accused.

7. All members of the court and the personnel for the prosecution and defense joined in a recommendation for clemency by way of commutation of the death sentence to "Life Imprisonment". The reasons for the recommendation were stated as follows:

> "Sergeant Lieberher has given five continuous years of faithful service to the armed forces of the United States; he has been a soldier of outstanding ability as attested to by his last four Battery Commanders; he has been a soldier of excellent character; he has been a soldier of good moral character as attested to by his Battery Commanders; and all of his Battery Commanders stated in court that they would, even now, be willing to have Sergeant Lieberher back in their organization as a Sergeant."

8. Accused has served continuously as an enlisted man since April 23, 1937, with one discharge as corporal, character excellent.

9. Accused had been drinking quite heavily prior to his offense and his act, though prompted by legal malice, was not the result of any apparent preconceived motive of lawlessness, hatred or personal ill will. His conduct in the premises was manifestly rash and impetuous. Under these circumstances the Board of Review believes that the offense does not fall within the category requiring the penalty of death.

10. In his action the reviewing authority designated the Prisoner of War Stockade near Paita, New Caledonia, as the place of confinement. Confinement not having been adjudged by the court, it is clear that this designation was intended only to fix the place of confinement pending further required action on the record of trial. Should the sentence be commuted to punishment including confinement at hard labor for a term in excess of one year, confinement in a penitentiary will be authorized by Article of War 42 for the offense of murder recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by section 273 of the Criminal Code of the United States (18 U.S.C. 452).

11. The court was legally constituted and had jurisdiction of the person and the offense involved. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence. The death penalty is authorized for conviction of violation of Article of War 92.

Richard D. Hoover, Judge Advocate.

Gordon Simpson, Judge Advocate.

Raymond J. Lynch, Judge Advocate.

1st Ind.

War Department, J.A.G.O., JUL 18 1942 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Sergeant Robert H. Lieberher (6897909), Headquarters Battery, 70th Coast Artillery (AA).

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence. I recommend that the sentence be confirmed. As observed by the Board of Review, the homicide committed by accused, though legally amounting to murder, was a rash and impetuous act not characterized by preconceived lawlessness, hatred or personal ill will. Under these circumstances and in view of the recommendation for clemency submitted by all the members of the court, I also recommend that the sentence to death be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of accused's natural life, that the United States Penitentiary, McNeil Island, Washington, be designated as the place of confinement, and that the sentence as commuted be carried into execution.

3. The certificate referred to in paragraph 5 of the opinion of the Board of Review has now been received and is attached to the record of trial.

4. Inclosed are a draft of a letter for your signature transmitting the record to the President for his action, and a form of Executive action designed to confirm the sentence but commute it to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of accused's natural life, and to direct execution of the sentence as thus commuted, should such action meet with approval.

Myron C. Cramer

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

3 Incls.
Incl.1-Record of trial.
Incl.2-Draft of letter for sig. Sec. War.
Incl.3-Form of action.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General
Washington, D.C.

SPJGH
CM 222489

AUG 11 1942

UNITED STATES	)	ALASKA DEFENSE COMMAND
v.	)	Trial by G.C.M., convened at Fort Greely, Kodiak, Alaska, April 12 and 20, 1942. Dismissal.
First Lieutenant CHARLES A. CUTTING (0-381362), Second Battalion, Medical Section, 201st Infantry.	)	

OPINION by the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates.

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that First Lieutenant Charles A. Cutting, Medical Corps, did, at Headquarters Provisional Battalion, 201st Infantry, Fort Lewis, Washington, on or about January 16, 1942, with intent to deceive, officially state to Lieutenant Colonel Howard P. Shaffer, the Commanding Officer of said Provisional Battalion, 'I have received my divorce, and I am now married to this woman,' or words to the same effect, referring thereby to one Ruth Ruston, who was then and there the subject of an official conversation between the said First Lieutenant Charles A. Cutting and the said Lieutenant Colonel Howard P. Shaffer, which said statement was, by the said First Lieutenant Charles A. Cutting, known to be untrue, in that

the said First Lieutenant Charles A. Cutting well knew that he had not received a divorce from his legally married wife, Alta M. Cutting, of 1824 New Jersey Avenue, Los Angeles, California, and was not, in fact, married to the aforementioned Ruth Ruston.

Specification 2: (Disapproved by reviewing authority).

Specification 3: In that First Lieutenant Charles A. Cutting, Medical Corps, did, at Puyallup, Washington, at a reception tendered to the officers of the Provisional Battalion, 201st Infantry, Fort Lewis, Washington, on or about Feb. 7, 1942, wrongfully, knowingly and publicly introduce as his wife, one Ruth Ruston, the said Ruth Ruston being a woman not his wife, to the officers of said Battalion and their guests, then present at said reception.

The accused entered a plea in bar of trial upon the ground that the investigating officer refused to allow accused more time to prepare for the investigation, which plea was denied (R. 9). Accused entered a plea in bar of trial on the ground that the accused had been punished under Article of War 104, which plea was denied (R. 12). Accused then moved that each of the three Specifications be stricken on the ground (1) that it did not state any crime or offense, and (2) that it did not fairly apprise accused of the offense intended to be charged and accused was actually prevented from making a proper plea or defense, which motions were denied (R. 13).

The accused pleaded not guilty to (R. 13) and was found guilty of all Specifications and the Charge. He was sentenced to be dismissed the service. The reviewing authority disapproved the finding of guilty of Specification 2, approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The evidence upon the Specifications of which the findings of guilty were approved by the reviewing authority shows that on January 16, 1942, Lieutenant Colonel Howard P. Shaffer in command of the portion of the 201st Infantry remaining at Camp Murray, Fort Lewis, Washington, in checking the officers "In and Out" register for that day noted that accused, giving his destination as Fort Lewis Inn, had signed to stay out until 7 a.m., a privilege granted only to those officers who had families present in Washington. Colonel Shaffer sent for the accused to come to his office and officially questioned accused about signing

out. The accused told Colonel Shaffer that he was married, had been divorced from his wife, was married again and, as other men were doing, he signed out until 7 a.m. the next morning. Colonel Shaffer doubted that statement as there had been no indication that accused had been divorced, and no information had come through to Colonel Shaffer about getting married. At a later date, shortly before departure from Fort Lewis, Colonel Shaffer noted, in checking the beneficiary cards which it was necessary for all to fill out, that the accused had given his wife in California as his beneficiary. When questioned by Colonel Shaffer about that matter, accused admitted that he was not divorced and had not remarried (R. 14-17).

At a party at the Officers' Club, Fort Lewis, on or about January 16, 1942, the accused introduced to Second Lieutenant James D. Selder, 201st Infantry, as his wife, a woman who had been introduced to Lieutenant Selder at a previous Officers' Club party as Ruth Cutting. He had never met her as any person other than the wife of accused. He replied in the affirmative when asked whether, to his knowledge, she was the wife of the accused (R. 17-18).

On or about January 25, 1942, the accused informed First Lieutenant Homer L. Hadley, Jr., 201st Infantry, at Fort Lewis, that a lady to whom Hadley had been previously introduced and had known as Ruth Ruston, was now the wife of accused, and the accused introduced her as Mrs. Cutting to the wife of Lieutenant Hadley. Of his own knowledge Lieutenant Hadley did not know and had no proof whether she was Miss Ruston or Mrs. Cutting. He had known her over a period of three months, had met her on numerous occasions, and had one "date" with her (R. 22-23).

At a reception tendered to officers and ladies of the battalion at Puyallup, Washington, about February 7, 1942, the accused and "his lady" came in, sat down across from Colonel and Mrs. Shaffer, and the accused introduced the lady as Mrs. Cutting to the assembled guests at the table. Colonel Shaffer had met this lady and had seen her on different occasions. She was not the woman whom Colonel Shaffer had known in the past as the wife of accused (R. 16). During the dance that evening Captain John C. Varner, Air Corps, started to introduce his dancing partner to accused and a woman whom Captain Varner had

met before as Miss Ruth Ruston. When Captain Varner hesitated because he had forgotten her name, the accused said "Mrs. Cutting" in a joking manner. Captain Varner took it as a sort of a joke and did not pay any attention to it as he had known the girl before (R. 19).

First Lieutenant Glenn R. Rechtine attended the reception about February 7, 1942, at which accused escorted Miss Ruth Ruston. While Lieutenant Rechtine and his wife were dancing, accused and Miss Ruston danced by and Miss Ruston held up one hand showing a ring. Lieutenant Rechtine had known accused about a year. In reply to the question whether to his knowledge Miss Ruth Ruston was the wife of accused, Lieutenant Rechtine stated "To my knowledge, not that I know of" (R. 19-22).

After identification by Second Lieutenant Russell Bush, Finance Department, Acting Deputy Disbursing Officer, Fort Greely, Alaska, of an officer's pay voucher "that I made out", the prosecution introduced in evidence a copy of a pay voucher for April 1942, of First Lieutenant Charles A. Cutting, "201st Med-Res O-381362", certified as a true extract copy by Lieutenant Bush, which shows "(3) Lawful wife Alta M Cutting 1824 N Jersey, Los Angeles, Calif" (Ex. A). Lieutenant Bush testified that he had seen the original, that it was a part of his duty to ascertain whether or not an officer's signature was correct, and that he had identified the signature of Lieutenant Cutting on the original against the "signature card". The original copy of the pay voucher was sent to the Chief of Finance, Washington, D.C. The original pay voucher showed no other dependent than Alta M. Cutting, lawful wife (R. 24-28).

4. The defense rested without introducing any witnesses (R. 30). The accused elected to remain silent (R. 31).

5 a. With respect to the first plea in bar, that the investigating officer refused to allow accused more time to prepare for the investigation, the accused admitted that he was not deprived of calling witnesses, and that he did not specifically ask for any particular witness (R. 6-8). It appears that the investigation of the Charges was expedited and that the accused did not approve of the expediting, but that in itself does not indicate that the investigation was not thorough and impartial. It cannot be said that any of the statutory rights of

accused were denied him at the investigation. The plea was properly overruled.

b. With respect to the second plea in bar, that he had been punished under the 104th Article of War, the accused stated in his plea - but did not testify - that about February 14, 1942, he was limited to the area of his battalion and allowed no visitors for one week, was ordered to report to the camp commander every 30 minutes for a period of 6 hours, and that he acceded to that punishment in the belief that it was administered for his offense (R. 9).

Colonel Shaffer testified that he signed Defense Exhibit No. 2 (letter dated February 14, 1942, to accused); that the false statement referred to in paragraph 1 thereof as made on January 15, 1942, was the same statement upon which Specification 1 of the Charges is based; that the statement referred to in paragraph 1 as made on February 7, 1942, was the statement upon which Specification 3 of the Charge was based; but the introduction of the woman alleged in Specification 2 was not one of the occasions stated in paragraph 2 of Exhibit 2.

Colonel Shaffer testified further that the restriction to the battalion area, and against visitors was given orally prior to the signing of Exhibit 2 and was not imposed as a punishment, but was a restriction pending the investigation and preparation of the charges in order that he be available for the investigation. The order in Defense Exhibit 3, to report every 30 minutes for 6 hours, was issued for the same purpose, i.e., to see that accused stayed on the post. Colonel Shaffer could not say and could not recall why the letter (Ex. 2) was labeled punishment, as it was not intended as punishment at all.

There is nothing in the manner of the giving of the oral or written instruction to indicate compliance with the requirements of the Manual for Courts-Martial with respect to administering punishment under the 104th Article of War (par. 107, M.C.M., 1928). The normal use of the word "punishment" as the subject of the letter, is negatived by the testimony of Colonel Shaffer that he restricted accused until the matter could be investigated and charges preferred, and not as a punishment. It may be added that the making of a false official statement by an officer is not a "minor offense" and within the purview of the 104th Article of War. The plea in bar was properly overruled.

c. The motions to strike each of the three Specifications on the ground that they did not state any offense, did not fairly apprise

accused of the offense intended to be charged, and prevented accused from making a proper plea or motion were properly denied. Each Specification clearly states an offense cognizable under the 96th Article of War.

d. The motion of defense, made when the prosecution rested, for findings of not guilty upon the Charge and all Specifications was properly denied (R. 30), as the record contained prima facie proof under each Specification of the Charge.

e. Any objection to the admission of secondary evidence of the contents of the beneficiary card (R. 15), and of the contents of the pay voucher (R. 25, 28; Ex. A), was waived in the absence of an assertion of such objection by the defense at the time the proffer was made (par. 116 a, M.C.M., 1928).

6. Specification 1 alleges a false official statement to Colonel Shaffer by accused that he had received a divorce and was now married to the former Ruth Ruston, which was known to accused to be untrue in that he had not received a divorce from his legally married wife, Alta M. Cutting, and was not married to Ruth Ruston. Specification 3 alleges that at a reception February 7, 1942, accused introduced to the officers and guests as his wife, one Ruth Ruston, who was not his wife.

The proof shows that Colonel Shaffer, in command of the units of his regiment remaining at Fort Lewis, called accused to his office on January 16, 1942, in investigating a matter pertaining to the administration of his command and that accused in response to a question, made the statement alleged. At a later date, in checking beneficiary cards before turning them in, Colonel Shaffer noted that the accused had given his wife in California as his beneficiary. Upon questioning accused in the matter, accused then admitted that he was not divorced and had not remarried. On January 16, 1942, accused introduced to Lieutenant Selder as his wife, a woman to whom Lieutenant Selder had been previously introduced as Ruth Cutting and whom he had known only as Ruth Cutting, the wife of accused. On January 25, 1942, accused informed Lieutenant Hadley that a woman to whom Hadley had been previously introduced, and had known over a period of three months as Ruth Ruston, was the wife of accused and accused introduced the woman as Mrs. Cutting to Mrs. Hadley.

At a reception tendered to officers and ladies of the battalion at Puyallup, Washington, on February 7, 1942, the accused came in with "his lady", sat down across from Colonel and Mrs. Shaffer and introduced

the lady as Mrs. Cutting to the assembled guests at the table. She was not the woman whom Celonel Shaffer had known in the past as the wife of accused. During a dance that evening, Captain Varner started to introduce his partner to accused and a woman whom Varner had met before as Miss Ruth Ruston. When Captain Varner hesitated because he had forgotten her name, accused said "Mrs. Cutting", in a joking manner. Captain Varner took that as a sort of a joke as he had known the girl before. Captain Rechtine saw accused at that party escorting a woman whom he knew as Miss Ruth Ruston.

7. In the opinion of the Board of Review the evidence establishes beyond a reasonable doubt the falsity of the statement made by accused on January 16, 1942 (Spec. 1), and that accused introduced to the officers and their guests at the reception on February 7, 1942, as his wife, one Ruth Ruston, who was not his wife (Spec. 3).

8. The accused is 30 years of age. The records of the Office of The Adjutant General show his service as follows:

Appointed first lieutenant, Medical Reserve, June 11, 1939; extended active duty February 27, 1941.

Four efficiency reports have been rendered on accused; for the period February 27 to April 1, 1941, with a general rating of satisfactory; for the period March 31 to May 3, 1941, with a general rating as excellent; for the period May 4 to June 30, 1941, with a general rating of very satisfactory; and for the period July 1 to September 12, 1941, with a general rating of very satisfactory.

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

Lester S. Hill, Judge Advocate.

Chas. L. Cresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

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CM 222598

JUL 16 1942

UNITED STATES v. Privates FRANCIS A. O'DAY (38068974), Company D, 90th Training Battalion, and JOHN C. PRUETT (18021347), Headquarters Battery, 53rd Field Artillery Battalion.	EIGHTH CORPS AREA Trial by G.C.M., convened at Fort Sill, Oklahoma, May 27, 1942. As to each: Dishonorable discharge and confinement for four (4) years. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates.

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

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

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

Specification 1: In that Private Francis A. O'Day, Company D, 90th Training Battalion, and Private John C. Pruett, Headquarters Battery, 53rd Field Artillery Battalion, each acting in conjunction with the other, did, at or near Etter, Texas, on or about January 29, 1942, by force and violence and by putting him in fear, feloniously take, steal and carry away from the presence of Albert Clements, two quarts of wine, cigarettes and candy, value about $25.00, the property of the said Albert Clements.

Specification 2: (Disapproved by reviewing authority).

CHARGE II: Violation of the 58th Article of War. (As to Pruett only).

Specification: In that Private John C. Pruett, Headquarters and Headquarters Battery 53rd Field Artillery Battalion, acting alone, did, at Albuquerque, New Mexico, on or about June 11, 1941, desert the service of the United States and did remain absent in desertion until he was apprehended in Dumas, Texas, on or about January 30, 1942.

CHARGE II: Violation of the 58th Article of War. (As to Private O'Day only).

Specification: In that Private Francis A. O'Day, Company D, 90th Infantry Training Battalion, acting alone, did at Fort Sill, Oklahoma, on or about January 24, 1942, desert the service of the United States and did remain absent in desertion until he was apprehended at Dumas, Texas, on or about January 30, 1942.

Each accused pleaded not guilty to all Charges and Specifications. Pruett was found guilty as charged except that in Specification 1, Charge I, the value of the goods stolen was reduced from $25 to $5. O'Day was found guilty of Charge I and Specifications 1 and 2 thereunder, and not guilty of desertion under the Specification, Charge II (as to O'Day), but guilty of absence without leave, in violation of Article of War 61. Pruett was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for seven years, and O'Day to dishonorable discharge, total forfeitures, and confinement at hard labor for five years. The reviewing authority approved the findings as to each accused, excepting Specification 2, Charge I, as to each accused. The sentence of each was approved, but the confinement of each was reduced to four years. The United States Disciplinary Barracks, Fort Leavenworth, Kansas, was designated as the place of confinement, and the record of trial forwarded under Article of War 50½.

3. The only question requiring consideration is the finding of guilty of robbery as to each accused (Spec. 1, Chg.I). The only pertinent evidence with respect to this Specification is contained in an affidavit of Paulus Schroeter (Ex. C), introduced by stipulation (R. 6), and the confessions of each accused.

Paulus Schroeter stated that he is the owner of Eureka Inn, Dumas, Texas. On January 29, 1942, Albert Clements was acting as agent in charge of the inn, and on that night parties unknown broke into and entered the inn and took therefrom cigarettes, candy, and wine to the value of approximately $5.

Accused Pruett stated in his confession (Ex. 2), that he and one Stogner went to the railroad yards in Dumas, Texas, and met accused O'Day. The three of them agreed to rob the Eureka Inn. They waited until dark, put paper bags over their heads, went to a little shack located just north of the inn, and tied up a man. O'Day stood guard over the man with a pistol while Pruett and Stogner broke a window, entered the inn, and took therefrom cigarettes, candy, and two quarts of wine.

O'Day stated in his confession (Ex. 3), that he met Pruett and Stogner in Dumas, Texas, and went with them to Etter, Texas, waited until dark and then went to the Eureka Inn. O'Day and Pruett put paper bags over their heads, went to a house located close to the Eureka Inn and tied up a man. O'Day pointed a pistol at the man and ordered him to be quiet, and stayed in the house with the man while Pruett and Stogner went to the inn. O'Day does not know what they did there. When they returned they gave him nothing. The three left and were apprehended in Plainview, Texas.

The record shows clearly that Pruett unlawfully entered the Eureka Inn and took goods therefrom to the value of approximately $5 (Exs. C, 2).

4. "Robbery is the felonious and violent taking from the person of another by force or intimidation". (Wharton Crim. Ev., p. 1884).

The general rule as to robbery is that the property must be taken from the person of another, but the words "from the person" are not restricted to their popular and strict meaning. In contemplation of law it is taking from his person if the property is taken in the presence of the owner. Robbery includes larceny and all the elements that are necessary to constitute larceny are necessary to constitute robbery (Marshall & Clark Crimes, 4th Ed., pars. 371, 374.) To sustain an indictment for larceny, the goods alleged to have been stolen must be proved to be either the absolute or special property of the alleged owner (Wharton Crim. Law, 12th Ed., vol. 2, p. 1491).

The essential element of the crime of robbery is the violent taking of his property from the person of another or from his immediate presence (M.C.M. p. 170; Dig.Ops.JAG 1912-40, sec. 451 (58)). The Specification alleges the robbery of Albert Clements by force and violence and by putting him in fear, and the larceny of his property. Mr. Schroeter testified that Albert Clements was in charge of the Eureka Inn, but there is no proof that he was present when the inn

was broken into and entered. There is no proof that the man who was tied up by Pruett and O'Day was Clements, nor, in fact, any proof of the identity of that man.

In the absence of any proof that the man whom Pruett and O'Day tied up was Albert Clements, there is a total failure of proof of the allegation that Albert Clements was robbed. It follows that the record of trial is legally insufficient to support the findings of guilty of Specification 1, Charge I, and of Charge I.

5. The maximum authorized penalty for desertion prior to February 3, 1942, terminated by apprehension after more than six months in service (Pruett) is dishonorable discharge, total forfeitures, and confinement at hard labor for two and one-half years; and for absence without leave for six days (O'Day) is confinement at hard labor for eighteen days and forfeiture of twelve days' pay.

6. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Specification 1, Charge I, and of Charge I; and legally sufficient, as to Pruett, 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 two and one-half years, and, as to O'Day, to support only so much of the sentence as involves confinement at hard labor for eighteen days and forfeiture of twelve days' pay.

[signature], Judge Advocate.

Chas. C. Cresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General
Washington, D. C.

SPJGK
CM 222660

JUL 30 1942

UNITED STATES	)	PANAMA MOBILE FORCE
v.	)	Trial by G. C. M., convened at Camp Paraiso, Canal Zone, April 28, 1942. Confinement for two (2) months (suspended) and forfeiture of $16 per month for like period.
Private LeGRAND O. LIVINGSTON (34096343), Company K, 5th Infantry.	)	

OPINION of the BOARD OF REVIEW
HOOVER, SIMPSON and LYNCH, 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 in part. The record has now been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

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

CHARGE I: Violation of the 93rd Article of War.
(Finding of not guilty)

Specification: (Finding of not guilty)

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

Specification: In that Private LeGrand O. Livingston, Company "K" 5th Infantry, was in the vicinity of Juan Diaz, R. de P., on or about February 1, 1942, drunk and disorderly, while in uniform.

He pleaded not guilty to the Charges and Specifications. He was found not guilty of Charge I and its Specification and guilty of Charge II and its Specification. No evidence of previous convictions was introduced. He was sentenced to confinement at hard labor for six months and forfeiture of $16 per month for a like period. The reviewing authority approved the sentence but remitted so much thereof

as was in excess of confinement at hard labor for two months and forfeiture of $16 per month for a like period, and directed execution of the sentence as thus modified but suspended that portion of the sentence adjudging confinement at hard labor. The proceedings were published in General Court-Martial Orders No. 77, Headquarters Panama Mobile Force, June 4, 1942.

3. The only question requiring consideration is whether the sentence to forfeitures is excessive.

The monthly pay of accused is stated on the charge sheet to be $21. The Commanding General, Panama Canal Department, has advised The Adjutant General by radiogram that on April 28, 1942, the date the sentence was adjudged, the monthly pay of accused was $21.

A court may not, by a single sentence which does not include dishonorable discharge, adjudge against an accused soldier a forfeiture of pay at a rate greater than two-thirds of his pay per month (par. 104b, M.C.M.). It follows that so much of the sentence to forfeitures as exceeds forfeitures of $14 per month for two months is excessive and illegal.

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 sentence as involves confinement at hard labor for two months and forfeiture of $14 per month for a like period.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General
Washington, D. C.

SPJGK
CM 222709

JUL 3 1942

UNITED STATES v. First Lieutenant JOHN E. JONES (0-289952), 8th Infantry.	4TH MOTORIZED DIVISION Trial by G. C. M., convened at Camp Gordon, Georgia, June 15, 1942. Dismissal.

OPINION of the BOARD OF REVIEW
HOOVER, SIMPSON and LYNCH, Judge Advocates.

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

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

CHARGE: Violation of the 94th Article of War.

Specification: In that 1st Lieutenant John E. Jones, 8th Infantry, did, at Camp Gordon, Georgia on or about May 26, 1942, feloniously take, steal, and carry away one (1) Turkey, undrawn, dressed of the value of about Three dollars and eighty four cents ($3.84), property of the United States furnished and intended for the military service thereof.

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

3. Accused confirmed his pleas of guilty to the Charge and Specification after having been advised in detail of the effect of such pleas (R. 6-8). No evidence was presented by the prosecution. Accused made the following unsworn statement:

"I plead guilty to the charge and specification, but earnestly ask that this statement be considered in the determination of my punishment. I believed the turkey to be overage and no one would be harmed by my taking it. I am positive now that I should not have been so incautious - it wasn't mine to take. I am certain that I'll never again indulge in such a foolish act. I have learned my lesson. I am a married man. My wife is pregnant. She has no home except with me, and no source of income except that of mine. I beseech you to give me a chance and not make an example of me. I ask you to let me retain my commission and serve my Country. Again let me repeat that I am sorry. I give you my word that if you will give me a chance I will vindicate your confidence in me." (R. 12)

Colonel James A. Van Fleet, 8th Infantry, commanding officer of accused, testified that accused had been under his command since July 21, 1941, and that witness rated him superior in efficiency and value to the service (R. 9). Lieutenant Colonel Raymond G. Miller, Inspector General's Department, testified that accused had been a member of a special inspecting team under witness and that in this capacity accused had done excellent work and had appeared to be a conscientious, hard-working officer of excellent character (R. 10). Chaplains (Captain) Trop B. Yopp and (First Lieutenant) Cajetan R. Sullivan, 8th Infantry, testified that they had known accused about one year and had formed favorable impressions as to his good character (R. 10, 11). It was stipulated that if Lieutenant Colonel E. H. Strickland, 8th Infantry, were present he would testify that he had known accused for several months and that accused had impressed him as a good, conscientious officer (R. 10).

4. War Department records show that accused is 32 years of age, was graduated from high school, took the Basic Red, White and Blue courses of the C.M.T.C., was appointed a second lieutenant, Infantry Reserve, on October 1, 1931, and was ordered into active military service on April 17, 1941. He was promoted to first lieutenant on May 12, 1942, upon the recommendation of his division commander who stated, on May 2, 1942, that accused had demonstrated his superiority over officers senior to him.

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

trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of violation of Article of War 94.

[signature], Judge Advocate.

On Leave, Judge Advocate.

[signature], Judge Advocate.

1st Ind.

War Department, J.A.G.O., JUL 8 1942 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant John E. Jones (0-289952), 8th Infantry.

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

3. The report of investigation of the charges accompanying the record of trial indicates that at the time of the larceny accused was supply officer for his battalion. On the morning of May 26, 1942, he went to a ration tent where an issue of turkeys was being made and asked that any "overage" of turkeys be sent to Company I of the battalion inasmuch as that company was being "shorted on meat". Four turkeys were issued to each of the companies and, following the request by accused, a fifth turkey, left over after the distribution, was also issued to Company I. At about 5:30 p.m. accused went to the Company I kitchen and took a turkey, placed it in his car and proceeded toward his home. First Lieutenant Benjamin S. Harrison who was in the car asked accused, "What in the world are you doing there; swiping one of those turkeys"? Accused requested Harrison to refrain from saying anything about the matter. Harrison nevertheless reported the transaction.

Although the theft was a petty one it thus appears that it was deliberate and involved the taking of rations issued for the use of enlisted men. Accused used his official position as supply officer to accomplish his dishonest purpose. He had prior to his offense rendered very creditable service but by the transaction here involved he so demeaned himself that, in my view, his usefulness as an officer came to an end. I accordingly recommend that the sentence to dismissal be carried into execution.

4. Inclosed are a draft of a letter for your signature transmitting the record to the President for his action, and a form of

Executive action designed to carry into effect the recommendation hereinabove made should it meet with approval.

Myron C. Cramer

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

3 Incls.
Incl.1-Record of trial.
Incl.2-Draft of letter for sig. Sec. of War.
Incl.3-Form of action.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General
Washington, D. C.

SPJGK
CM 222737

JUL 3 1942

UNITED STATES v. Corporal CLINTON L. GILBERT (35010093), Company B, 368th Infantry.	93RD INFANTRY DIVISION Trial by G. C. M., convened at Fort Huachuca, Arizona, June 9, 1942. Dishonorable discharge and confinement for ten (10) years. Federal Correctional Institution, Englewood, Colorado.

REVIEW by the BOARD OF REVIEW
HOOVER, SIMPSON and LYNCH, Judge Advocates.

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Corporal Clinton L. Gilbert, Company B, 368th Infantry, did, at Kingman, Arizona, on or about April 19, 1942, with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Jack Crompton, Company B, 368th Infantry, a human being, by shooting him with a pistol.

He pleaded not guilty to the Charge and Specification, the defense stating, also, that accused desired "to plead not guilty to violation of the 92nd Article of War, but does desire to plead guilty to the charge of Man slaughter" (R. 3). He was found guilty of the Specification "except the words, 'with malice aforethought, deliberately and with premeditation;' of the excepted words, Not Guilty", and not guilty of the Charge but "Guilty of the 93rd Article of War." 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, designated the Federal Correctional Institution, Englewood, Colorado, as the place of confinement, and forwarded the record of trial

for action under Article of War 50½.

3. The evidence shows that on April 19, 1942, accused and Private Jack Crompton were members of Company B, 368th Infantry, stationed at Kingman, Arizona (R. 4, 12, 17), accused being quartered in a room on the second floor of the two-story "Harvey House" in Kingman (R. 5). Crompton was considerably taller and somewhat heavier than accused (R. 8). Accused shot and mortally wounded Crompton in accused's room at the Harvey House sometime before nine o'clock (R. 13) on the morning of April 19 under the following circumstances: Crompton followed accused from the hallway on the second floor of the Harvey House into accused's room "playing with" him, shoving him around, tickling him and boxing and sparring with him (R. 5, 7, 9, 20). Most of the men in the company, including accused, had been in the habit of playing with each other in the same way (R. 8). On this occasion the accused asked Crompton five or six times to stop (R. 9, 21), but Crompton persisted (R. 10). After about three minutes a shot was heard in the room of accused. Crompton then ran from the room saying that he had been shot (R. 10) and that accused had shot him (R. 13, 18). Accused came to the door of his room and said that he had shot Crompton (R. 6). A few minutes later, while appearing to be "unusually excited" (R. 13), he told the charge of quarters, "That son-of-a-bitch kept fucking with me and I shot him", that there had been no argument between him and Crompton, and that "I wasn't mad at anyone, I simply shot the boy" (R. 14). The charge of quarters took five live cartridges and one empty cartridge case from accused, and, after accused had said that he had "hid the gun", found a .38 caliber revolver in the clothes closet of the room of accused under some dirty clothes (R. 14). By deposition the medical officer who attended him testified that Crompton was brought to the hospital at 2 p.m., April 19, 1942, because of a gunshot wound caused by an "approximate" .38 caliber bullet wound through the right thigh to the left of his abdomen, penetrating the peritoneum and small intestines, that Crompton was in a critical condition for ten days until his death at 8 p.m., on April 28, 1942, that witness was present at the death of Crompton, and that Crompton died as a result of the gunshot wound (R. 19; Ex. A).

Accused testified that Crompton had persisted in "picking on" him after he had been warned by accused at least four times to stop, that Crompton followed him into his room and struck him on the head with his hand hard enough to hurt him. Accused had previously placed the revolver in his shirt bosom to prevent another soldier from seeing it,

and when Crompton struck him accused lost his temper, became excited, drew the revolver and shot Crompton (R. 20-22, 28). At the time accused was worried because he had received news of the probable death of one of his children (R. 22). He and Crompton had had an "argument" some time before, but accused carried no grudge against Crompton (R. 25, 26). At the time of the shooting accused "had in my mind to shoot him, but not to exactly kill him" (R. 28).

4. It is undisputed that at the place and time alleged, without legal justification or excuse, accused willfully and unlawfully shot Crompton with a revolver and that Crompton died as a result. The shot was fired in apparent heat of sudden passion under provocation. The provocation was not of such degree as might be deemed adequate to excite uncontrollable passion in the mind of a reasonable man (par. 149a, M.C.M.) and findings of guilty of murder, as charged, would have been legally justified. The evidence is legally sufficient to support the findings of guilty of the lesser included offense of voluntary manslaughter, in violation of Article of War 93.

5. The deposition of the medical officer was properly received in evidence with the express consent of the defense (R. 19) (par. 119a, M.C.M.).

6. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence. Confinement in a Federal correctional institution is authorized by Article of War 42 for the offense of voluntary manslaughter, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by section 274 of the Criminal Code of the United States (18 U.S.C. 453).

_____, Judge Advocate.

On Leave, Judge Advocate.

_____, Judge Advocate.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General
Washington, D. C.

SPJGK
CM 222840

JUL 13 1942

UNITED STATES)	EIGHTH CORPS AREA
)	
v.)	Trial by G. C. M., convened at
)	Camp Claiborne, Louisiana, June
First Lieutenant JAMES T.)	12, 1942. Dismissal.
HOLMAN (0-331035), Corps)	
of Military Police.)	

OPINION of the BOARD OF REVIEW
HOOVER, SIMPSON and LYNCH, Judge Advocates.

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

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

CHARGE I: Violation of the 85th Article of War.

Specification: In that First Lieutenant James T. Holman, Corps of Military Police, was, at Camp Claiborne, Louisiana, on or about May 5, 1942, drunk while on duty as Commanding Officer of the Military Police Detachment, SC-CASC, Camp Claiborne, Louisiana, and also while performing the duties of Provost Marshal.

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

Specification 1: In that First Lieutenant James T. Holman, Corps of Military Police, was, at Camp Claiborne, Louisiana, on or about May 5, 1942, drunk and disorderly in uniform on the post.

Specification 2: In that First Lieutenant James T. Holman, Corps of Military Police, did, near and in sight of a public highway and around the main gate and on the road leading into the main gate of Camp Claiborne, Louisiana, on or about May 5,

1942, while drinking and under the influence of intoxicating liquor, wrongfully and without proper authority and to the prejudice and discredit of military discipline, drill and cause to be drilled for a period of approximately two hours a group of soldiers in uniform and members of the military service whom he had overtaken and encountered on said public highway thereby humiliating and bringing ridicule upon the said soldiers in the presence of civilians and other soldiers.

Specification 3: (Finding of not guilty)

Specification 4: In that First Lieutenant James T. Holman, Corps of Military Police, did, at Camp Claiborne, Louisiana, on of about May 5, 1942, drink intoxicating liquor to the extent of rendering himself unfit for duty.

He pleaded not guilty to Charge I and its Specification and to Charge II and Specifications 1, 3 and 4 thereunder, and pleaded to Specification 2, Charge II,

"Guilty, except to the words: 'while drinking and under the influence of intoxicating liquor, * * and to the prejudice and discredit of military discipline, * * thereby humiliating and bringing ridicule upon the said soldiers in the presence of civilians and other soldiers."

He was found guilty of Charge I and its Specification and of Charge II and Specifications 1, 2 and 4 thereunder, and not guilty of Specification 3, Charge II. No evidence of previous convictions was introduced. He was sentenced "To be dismissed from the service of the United States". The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence shows that at about 7 p.m., May 5, 1942, 1st Lieutenant Alvin P. Brauer, Field Artillery, the provost marshal at Camp Claiborne, Louisiana, telephoned accused, who was the commanding officer of the military police detachment at the camp (R. 14, 15, 18), and asked accused "if he was going to be in Camp and if he would watch things"

(R. 72). Although Lieutenant Brauer was not the immediate commanding officer of accused he had authority as provost marshal to detail him to this duty (R. 71, 72). There had previously been a "mutual agreement" between the two, acquiesced in by camp headquarters, whereby each at times assumed the duties of the other (R. 17, 74). Shortly before or after the telephone call accused made or caused to be made on a duty register notations indicating his intention to be absent from camp from 7:30 p.m., May 5, to 7:30 a.m., May 6 (Def. Ex. D-1). However, he told Lieutenant Brauer, in response to the request, that he "would look after it" (R. 15). Thereafter, through the course of the evening, accused and a noncommissioned officer of his detachment, Staff Sergeant Joseph A. Bloodworth, Military Police Detachment, Camp Claiborne, went about Camp Claiborne and vicinity in a reconnaissance car "on patrol" (R. 7, 8).

At about 9 p.m., upon approaching the gate across the main entrance to the camp, accused encountered on the highway about 12 or 14 soldiers in uniform, including a noncommissioned officer, Sergeant Walter Kay, 327th Infantry, who were off duty (R. 9, 32, 43) and were "drilling" (R. 12) or "marching down the road, and they were sticking their feet out in front of the automobiles coming" (R. 9). Their actions were interfering with traffic on the highway (R. 13). Accused ordered Sergeant Bloodworth to gather the men together and march them to the gate and there drill them (R. 9). At the gate accused, who was in uniform (R. 43), had the men execute some movements in formation (R. 38, 41) and then ordered a Sergeant Bradley to drill them (R. 9). As they drilled accused called various men from ranks and made "corrections" - he would "bawl them out" (R. 33). Accused remained with the group for some little time and then left but returned at about 10 p.m., and ordered Sergeant Henry L. Dean, Military Police Detachment, Camp Claiborne, to "take these men and drill them until I get back" (R. 22) and drove away. The enlisted men were marched in and out of the camp, through the gateway, and were drilled in the vicinity of the gate, for about two hours (R. 23, 30, 32). Accused returned to the scene in a truck at about 11 p.m. (R. 25, 26) with a Private Leland P. Caldwell, Company A, 327th Infantry. Accused placed Caldwell at the head of the column for drill (R. 27). Caldwell had been operated on for appendicitis in September, 1940, and had been in hospital for about three weeks for reasons unknown to the patient, shortly before May 5 (R. 43, 69). On account of physical weakness or on account of drunkenness (R. 35) Caldwell, after being drilled for a time, commenced "weaving in ranks" (R. 42) - "couldn't stand up" (R. 27, 35). Accused "pushed

him in the back and stomach", apparently trying to "straighten him up" (R. 42). Accused finally placed a man on each side of Caldwell in ranks to support him (R. 27, 35) and told these men to "make him stand up or hit him" (R. 35). A short time after this occurrence, after the drill had terminated, Caldwell collapsed and was taken to a dispensary (R. 42). The group of enlisted men which was drilled was finally released at about 11:15 p.m., in the absence of accused and upon the direction of another officer (R. 25, 41). During the drills other soldiers and civilians passed through the gate (R. 10, 23, 41) and some soldiers "ganged around" (R. 34). Enlisted onlookers laughed at the men in ranks (R. 23, 34, 37, 41). One group of enlisted men addressed remarks to the noncommissioned officer conducting the drills, asking him "when they started the parade ground up there and when they started the night drill squad, and things like that" (R. 23).

In the course of the evening a colored enlisted man, Technician Charles Garries, Company B, 758th Tank Battalion, was stopped by a military policeman at the gate above described and was told to walk on the right hand side of the street with the traffic. The enlisted man agreed to do so and started away but was called back. Thereupon an officer, identified by the military policeman as accused, but not so identified by Garries, called Garries "names" and twice struck him with his fist (R. 53, 54, 58, 60, 61, 63, 64). Although Garries denied it, the military policeman testified that he believed Garries tried to strike accused (R. 64, 65).

Shortly after 11 p.m., while the drilling was still in progress the noncommissioned officer in charge of the men went to Second Lieutenant George J. Pozzini, Infantry, who had been watching accused and the drilling about the gate, and asked if he "could do something about it". Lieutenant Pozzini declined to intervene but the noncommissioned officer went to accused and told him that Lieutenant Pozzini wanted to see him at his car which was parked nearby (R. 48). Accused entered the car and Lieutenant Pozzini drove in the direction of accused's tent within Camp Claiborne, accused, in the meanwhile, insisting on going back to the gate. Lieutenant Pozzini drove about for a few minutes and accused fell asleep (R. 48). Lieutenant Pozzini thereupon took accused to the neighborhood of his tent and suggested to accused that he go to bed. Accused insisted on returning to the gate (R. 49). Lieutenant Pozzini agreed and upon arrival there the two encountered Lieutenant Brauer, the provost marshal. The three officers then drove to accused's home in a nearby town, Glenmora, Louisiana (R. 49). En route accused gave Lieutenant Brauer a drink from a pint bottle in which there

was about "an inch and a half" of whisky or other liquor (R. 20, 71).

While on patrol early in the evening accused had stopped at a "Highway Tavern" near the camp. Thereafter he had carried in his shirt pocket an object which appeared to be "a pint bottle". Sergeant Bloodworth, who remained with accused until about 11 p.m., testified that he noted an odor of alcohol on accused's breath (R. 8) but that he did not believe accused was drunk (R. 8, 12). Sergeant Dean, who drilled the enlisted men at the gate beginning about 10 p.m., and who observed accused while the latter was concerning himself with Private Caldwell, testified that accused "was not acting normal" and appeared to be drunk or under the influence of intoxicating liquor (R. 24, 25, 29, 30). Two of the men who were required to drill, including Sergeant Kay, testified that while accused was in the immediate vicinity he was "unsteady on his feet" (R. 34, 43). One of these men testified that accused appeared to have "been drinking" (R. 35) and the other testified that accused seemed to be "slightly intoxicated" (R. 43). The military policeman who observed the assault upon the colored enlisted man testified that accused "had his uniform on -- I don't think it was on very good. His tie was not buttoned up good and his collar was crooked" (R. 64). Lieutenant Pozzini testified that when he was with accused the latter had in his possession a pint "bottle of rum" and that accused appeared to be under the influence of liquor or drunk (R. 49, 52). This witness testified that in his opinion accused was not fit for military duty (R. 50). Captain (formerly 1st Lieutenant) Brauer testified that when he saw accused at the main gate of the camp and later, "he was a little unsteady on his feet, and he had a very heavy tongue when he talked. Of course, some of that is natural" (R. 16). This officer also testified that accused's speech was "rambling" (R. 20) and that he appeared to be intoxicated (R. 16) and unfit for military duty (R. 17).

Accused declined to testify or make an unsworn statement.

4. The evidence thus shows that during the evening of May 5, 1942, at Camp Claiborne, Louisiana, where he was on duty as commanding officer of the military police detachment of that camp, accused properly assumed the additional duties of camp provost marshal. While performing duties appropriate for a provost marshal he took it upon himself, between 9 p.m. and 11 p.m., to drill and cause to be drilled, in the immediate vicinity of the main gate to the camp, a noncommissioned officer and other enlisted men not under his command whom he had encountered on the highway and whose conduct in his presence had been somewhat disorderly. The drilling

took place in the presence of civilians and enlisted men other than those drilled. Accused and the men who were drilled were in uniform. The drilling was conducted at a time and place and in a manner which made it conspicuous and no doubt humiliating to the enlisted men involved. It brought some open ridicule by onlookers upon the enlisted men. Accused's action in the premises, as admitted by his plea of guilty, with exceptions, to Specification 2, Charge II, was wrongful and unauthorized.

Accused required one enlisted man to take part in the drill while the enlisted man was in such physical condition that he could not stand or walk without assistance. While in the vicinity of the main gate accused struck another enlisted man, a colored soldier, with his fist without excuse or adequate provocation.

Accused had intoxicating liquor in his possession during the period covered by his abnormal actions, his breath bore the odor of alcohol and several officers and enlisted men who observed him concluded that he was drunk or under the influence of intoxicants. The officers who observed him testified that in their opinion accused was, on account of his drunkenness, unfit for the performance of military duty.

Upon all the evidence there can be no reasonable doubt that at the place and time alleged accused was drunk while actually on duty as commanding officer of his detachment and while actually performing the duties of provost marshal, as alleged by the Specification, Charge I. Although he took action indicative of an intention to go "off duty", it is clear that he did not do so. Inasmuch as he was in fact engaged in the performance of official duties when found drunk his drunkenness was violative of Article of War 85. Accused was drunk and disorderly in uniform, as alleged in Specification 1, Charge II, and he drank intoxicating liquor to such an extent that he rendered himself unfit for duty, as alleged in Specification 4, Charge II. He was under the influence of intoxicating liquor at the time at which he wrongfully and without proper authority drilled and caused to be drilled the group of enlisted men, as alleged in Specification 2, Charge II. The Specification, Charge I, and Specifications 1 and 4, Charge II, allege distinct offenses which were in some respects but different aspects of one transaction - accused's insobriety on the night of May 5.

5. War Department records show that accused is 32 years of age. He attended college but did not graduate. He was a member of the National

Guard of Alabama for three years and of the Enlisted Reserve Corps for a period not shown, prior to his appointment as second lieutenant, Infantry Reserve, on April 18, 1935. He was promoted to first lieutenant on June 11, 1938, and ordered into the active military service on August 8, 1941. He attended the Provost Marshal General's School in January and February, 1942.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of violation of Articles of War 85 and 96.

Richard H. Harris, Judge Advocate.

Gordon Simpson, Judge Advocate.

Raymond J. Lynch, Judge Advocate.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General
Washington, D. C.

SPJGH
CM 222856

OCT 27 1942

UNITED STATES	)	5th INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Camp Liberty, Iceland, June 3, 1942. Dishonorable discharge and confinement for two (2) years. Disciplinary Barracks.
Private EARL S. STEVENSON (15046574), Battery A, 50th Field Artillery Battalion.	)	

HOLDING by the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates

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

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

CHARGE: Violation of the 86th Article of War.

Specification: In that Private Earl S. Stevenson, Battery A, 50th Field Artillery Battalion, being on guard and posted as a sentinel, at Camp Halogoland, Iceland, on or about May 8, 1942, did leave his post before he was regularly relieved.

The accused pleaded not guilty to the Charge and Specification and was found guilty of both. He was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for two years. The reviewing authority approved the sentence and ordered its execution, but suspended the dishonorable discharge and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. The sentence was published in General Court-Martial

Orders No. 45, Headquarters 5th Infantry Division, June 15, 1942.

3. The evidence shows that the accused was posted as a sentinel on post No. 3, Camp Halogoland, Iceland, at 1:00 a.m. on May 7, 1942. Post No. 3 is described as a roving post, including an area of the camp containing about thirty huts. The sentinel's orders were to walk through this area, avoiding as much as possible retracing the same route, and to be watchful for fires, overheated stoves, unusual noises, and flares (R. 13, 15). The special orders for post No. 3 were posted at the guardhouse, and were read by the accused. The corporal of the guard testified that in the event of a fire in a barrack the accused was under orders to go into the barrack, awaken the soldiers, and give the alarm (R. 9). The officer of the day testified that the sentinel's orders directing him to look for fires would authorize him "to look in the buildings, but not necessarily go in them", but that there were no definite orders about going into the huts (R. 6, 9).

Shortly after 1:30 a.m. the officer of the day, in making his inspection of post No. 3, failed to find the accused. Thereupon, he called the sergeant of the guard, and they searched for the accused. At about 2:30 a.m. the accused was found asleep on a bunk in one of the huts (R. 5).

4. The accused testified that he entered the building where he was found asleep because he heard a noise and thought that his duty required him to investigate it; that he had previously taken five aspirin tablets to kill a toothache; that upon entering the building he felt dizzy and sat down on a bunk. On this point the accused testified as follows:

> "* * * I thought the dizzy spell would go away and I would go back on my post. Everything went black and I don't know anything. The next thing I knew I was asleep" (R. 19).

The accused testified that he had not reported to the corporal of the guard that he had taken five aspirin tablets and that he made no effort to be relieved as a sentinel (R. 19, 21). The accused had no clear recollection of the special order for post No. 3.

5. In view of the uncontradicted testimony that the accused was found asleep in a hut within the perimeter of the general area which he was assigned to guard, the important question to be determined is whether the accused left his post within the purview of the 86th Article of War.

The 86th Article of War provides that:

> "Any sentinel who is found drunk or sleeping upon his post, or who leaves it before he is regularly relieved, shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct; * * *."

Winthrop states that the purpose of this article "* * * is to secure on the part of the sentinels that alert watchfulness and steadfastness which are the very essense of their service" (Winthrop's Military Law and Precedents, Reprint, p. 616). The post of a sentinel is, therefore, that position or area, designated by orders of various degrees of exactness, on or from which he may effectively perform his duties. Concerning the limits of such position or area of duty, the Manual states that:

> "A sentinel's post is not limited to an imaginary line, but includes, according to orders or circumstances, such contiguous area within which he may walk as may be necessary for the protection of property committed to his charge or for the discharge of such other duties as may be required by general or special orders. The sentinel who goes anywhere within such area for the discharge of his duties does not leave his post, but if found drunk or sleeping within such area he may be convicted of a violation of this article" (M.C.M., 1928, par. 146 a).

Furthermore, the Manual states that:

> "The offense of leaving post is not committed when a sentinel goes an immaterial distance from the point, path, area, or object which was prescribed as his post" (M.C.M., 1928, par. 146 c).

The test, therefore, to be applied in ascertaining whether a sentinel has left his post is to determine whether he has so far removed himself from his normal position or area of duty as to be unable adequately to perform his duties.

In the present case the duties of the accused required him to walk about the camp and to look out for rockets, fires, and other disturbances. Basically, such an assignment was an outdoor undertaking and required the accused to remain in a place or area where he could

faithfully and effectively discharge such duties. The authority which the accused possessed as a roving sentinel did not authorize him to enter the buildings of the camp except "* * * for the protection of property committed to his charge or for the discharge of such other duties * * *". Even the accused recognized this limitation on his right to enter the buildings of the camp when he testified that while waiting in the hut to recover from a dizzy spell he intended to "* * * go back to my post". Although the accused testified in effect that his entry into the hut was to investigate a noise which he had heard, the findings of the court show that his testimony was not believed. The fact that accused was found asleep in the hut serves to show the real purpose for which he left his post and affords an ample basis for the inference that he entered the hut for the unauthorized purpose of resting or sleeping therein. The accused, by thus entering the hut where his vision of the camp was completely obstructed, so far removed himself from the area designated by his orders as to prevent his performance of his duties as a sentinel. These facts clearly show that the accused left his post before he was properly relieved, within the meaning of the 86th Article of War.

6. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty and the sentence.

Curtis S. Hill Jr., Judge Advocate.

Edwards Bresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General
Washington, D. C.

SPJGK
CM 222861

JUL 1 8 1942

UNITED STATES	)	SIXTH CORPS AREA
v.	)	Trial by G. C. M., convened at Fort Sheridan, Illinois, June 15, 1942. Dishonorable discharge (suspended) and confinement for two and one-half (2½) years. Disciplinary Barracks.
Private DOMINIC FRAGASSI (16000249), Battery H, 61st Coast Artillery (AA).	)	

OPINION of the BOARD OF REVIEW
HOOVER, SIMPSON and LYNCH, 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 in part. The record has now been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Dominic Fragassi, Battery "H", 61st Coast Artillery (Anti-Aircraft), did, at Fort Hancock, New Jersey, on or about February 13, 1942, desert the service of the United States with intent to shirk important service, to wit: to avoid the important and impending change of station beyond the continental limits of the United States, for which preparations were being made by his organization during time of war, and did remain absent in desertion until he was apprehended at Chicago, Illinois, on or about February 20, 1942.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for five years. The reviewing authority approved the sentence, remitted

two and one-half years of the confinement adjudged, ordered execution of the sentence as thus modified, but suspended that portion of the sentence adjudging dishonorable discharge, and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 87, Headquarters Sixth Corps Area, June 27, 1942.

3. The evidence shows that the accused absented himself without leave from his station at Camp Hancock, New Jersey, on February 13, 1942 (R. 8; Ex. 1). The organization to which he belonged, Battery H, 61st Coast Artillery, had proceeded to Fort Hancock, from Fort Sheridan, Illinois, on December 8, 1941, under then secret orders to report to the Commanding General, First Army, New York City, New York (R. 7). On February 20, 1942, at about 3:15 p.m., accused was arrested in Chicago, Illinois, by military policemen about six blocks from a bus depot, dressed in uniform, while walking toward the depot with a bus ticket in his possession. Upon apprehension he stated he was absent without leave but was going to catch the bus back to his organization, leaving at about 4:20 p.m. (R. 10, 11, 12).

Accused testified that after he arrived at Fort Hancock he received letters from home saying "they needed money, that they were in debt and all that" (R. 17) and stating that his mother wanted him to come home so he could help her out. His mother wrote the company commander who "bawled" accused out and told him to tell his mother to stop writing because he was busy. When accused left his post it was not his intention to stay away. There was nothing on his battery bulletin board indicating the command was about to go any place. His battery had been restricted to Fort Hancock or Staten Island, New York, for two weeks, during which time he had only a 6-hour pass to go to New York, although 3-day passes to Chicago were being issued to other persons in his unit (R. 18-21). He was en route to New York when apprehended, and had tried to leave on February 19 but the departure of the scheduled bus had been canceled (R. 14, 15). The defense introduced testimony, by stipulation, corroborative of accused's statement as to cancellation of the bus (R. 22).

The only testimony that Battery H, 61st Coast Artillery, was ever ordered beyond the continental limits of the United States or that the organization ever departed from such limits or prepared to do so was elicited from First Lieutenant Phillip A. Hart, Infantry, Post Adjutant, Fort Sheridan, who stated there were no records at his post

which would show that the unit had left Fort Hancock (R. 7), but testified:

> "Q Lieutenant Hart, acting in your capacity as Adjutant, have you been informed or been able to verify the fact that the 61st Coast Artillery including Battery H was transferred to an overseas station on or about or subsequent to February 13, 1942, and is not now at a station within the continental limits of the United States?
> "A Yes, I have been advised that that statement is correct" (R. 7-8).

Accused testified on this point:

> "Q When you arrived at Fort Hancock were there any orders that were issued to the troops? Were the troops advised as the possibility of probable movements?
> "A No, sir, they was not. Just a lot of rumors" (R. 17).

4. Accused was found guilty of desertion with

> "intent to shirk important service, to wit: to avoid the important and impending change of station beyond the continental limits of the United States, for which preparations were being made by his organization during time of war".

There is no evidence that he or his organization, Battery H, 61st Coast Artillery, was ordered overseas, that the organization prepared to change station or that the organization moved beyond the continental limits of the United States. These are facts of which the court could not take judicial notice. There is no evidence that accused knew or had reason to believe that his unit was about to depart for foreign service. The statement by Lieutenant Hart that witness had been advised that the 61st Coast Artillery was transferred to a station beyond the continental limits of the United States is mere hearsay and is not evidence (M.C.M., par. 113). No weight can be attached to the

statement by accused that there were rumors about troop movements, for he was not asked what the rumors were and it would only be speculation to say the rumors were that his organization was about to be moved out of the country. The fact that the members of the organization were restricted with only short term passes suggests an alert status of the organization but is not proof that the organization was facing imminent departure for duty beyond the continental limits of the United States.

The evidence sufficiently shows that accused absented himself without leave from Fort Hancock, New Jersey, on February 13, 1942, and remained absent until apprehended in Chicago, Illinois, on February 20, while apparently seeking to return to his station. The circumstances do not justify an inference of an intention by accused not to return to his proper station or to quit the service entirely. Neither do they justify an inference of intent by accused, as specially charged, to shirk important service with his organization beyond the continental United States. The findings of guilty of desertion cannot be sustained. The record is legally sufficient to support only so much of the findings of guilty as involves the lesser included offense of absence without leave for 7 days, and only so much of the sentence as is authorized by paragraph 104c of the Manual for Courts-Martial for that offense.

5. 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 its Specification as involves findings that the accused, at the place and time alleged, absented himself without leave from his organization and remained absent without leave until apprehended at the place and time alleged, in violation of Article of War 61, and legally sufficient to support only so much of the sentence as involves confinement at hard labor for 21 days and forfeiture of $18.66 of his pay.

Herbert H. G. Haines, Judge Advocate.

Gordon Simpson, Judge Advocate.

Raymond J. Lynch, Judge Advocate.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General.
Washington, D. C.

SPJGH
CM 222902

AUG 28 1942

UNITED STATES	)	CHESAPEAKE BAY SECTOR NORTH ATLANTIC COASTAL FRONTIER
v.	)	Trial by G.C.M., convened at Camp Pendleton, Virginia, June 5, 1942. Reduction to grade of private and confinement for two (2) months and forfeiture of $20 per month for a like period.
Private First Class EVERETT F. McLAUGHLIN (11014043), Battery B, 28th Coast Artillery Battalion.	)	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates.

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

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

CHARGE I: (Finding of not guilty.)

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

Specification: In that Private First Class Everett F. McLaughlin, Btry B, 28th C.A. Bn., being on guard duty as an exterior guard, did at Camp Pendleton, Va., on May 10, 1942, absent himself without proper leave from his guard with intent to abandon the same.

The accused pleaded not guilty to all Charges and Specifications. He was found not guilty of Charge I and the Specification thereunder, and guilty of Charge II and the Specification thereunder with the exception of the words, "with intent to abandon the same". He was sentenced to be

reduced to the grade of private, confinement at hard labor for a period of two months, and forfeiture of pay in the sum of $20 per month for a like period. The reviewing authority approved the sentence, ordered its execution and designated Camp Pendleton, Virginia, as the place of confinement. The result of the trial was published in General Court-Martial Order No. 35, Headquarters Chesapeake Bay Sector, North Atlantic Coastal Frontier, June 25, 1942.

3. The only question requiring consideration is whether the record of trial is legally sufficient to support the sentence in its entirety.

4. The Specification of which accused was found guilty does not allege that he was absent from his guard for any definite period of time. While the proof shows that accused did absent himself from his guard, neither the evidence nor the finding attempts to establish that accused was absent for any definite period of time. The record will, therefore, support only a sentence of forfeiture of fifteen days' pay, the maximum authorized for the lowest bracket, for absence from guard for not more than one hour. Reduction to the grade of private is authorized in addition, when confinement for more than five days, authorized substitutions considered, may be adjudged (par. 104 c, M.C.M., 1928).

5. 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 sentence as involves reduction to the grade of private and forfeiture of fifteen days' pay.

[signature], Judge Advocate.

Chas. C. Cresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General
Washington, D. C.

SPJGK
CM 222952

JUL 22 1942

UNITED STATES	)	NORTHWESTERN SECTOR, WESTERN DEFENSE COMMAND
v.	)	Trial by G.C.M., convened at Bremerton, Washington, June 4, 1942. Dishonorable discharge (suspended) and confinement for ten (10) months. Fort Lewis, Washington.
Technician JOHN J. WEIDMANN (33101564) Battery C, 303rd Coast Artillery Barrage Balloon Battalion.	)	

OPINION of the BOARD OF REVIEW
HOOVER, SIMPSON and LYNCH, 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 and sentence, has been examined by the Board of Review, and the Board submits this, its opinion, to The Judge Advocate General.

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

CHARGE: Violation of the 86th Article of War.

Specification: In that Technician 5th Grade John J. Weidmann, Battery C, 303rd Coast Artillery Barrage Balloon Battalion, being on guard and posted as a sentinel, at Site 35, Battery C, Manette, Washington, on or about May 5, 1942, was found sleeping upon his post.

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

period of confinement adjudged to ten months, ordered execution of the sentence as thus modified but suspended the execution of that portion of the sentence adjudging dishonorable discharge and designated the Post Guardhouse, Fort Lewis, Washington, as the place of confinement. The proceedings were published in General Court-Martial Order No. 5, Headquarters Northwestern Sector, Western Defense Command, June 23, 1942.

3. The evidence shows that accused was posted as a sentinel of a special guard at a barrage balloon site, "Site 35", in the vicinity of Seattle, Washington, at 2 a.m., May 5, 1942, for a tour of duty of two hours (R. 5, 7, 8, 10, 11, 15). A system of telephone "line checks" every half hour was observed (R. 5). The telephone instrument was "near the balloon" (R. 6). The soldier who preceded accused on the post heard accused answer the line check at 2:30 a.m. (R. 12). It was reported to the noncommissioned officer charged with keeping the telephone lines in order that the telephone at site 35 "failed to answer" at 3 a.m. The noncommissioned officer waited for the line check at 3:30 a.m. (R. 5), and there being no answer, went to the site, tested the telephone and found it working - "It worked all right; it rang. I called back and it worked all right" (R. 6). He did not see the sentinel and reported the matter to Sergeant John Pittaro, Battery C, Coast Artillery Barrage Balloon Battalion, who was in charge of the site (R. 6). The latter searched for accused and found him lying on his bunk in his tent (R. 6), about 15 or 20 feet from the balloon emplaced on the site (R. 8). When Pittaro entered the tent accused "jumped up", and, on being asked "what was the idea", said nothing but went out and started walking his post (R. 7). Pittaro testified that when found, accused was clothed and equipped with "Full O.D. uniform, belt, helmet, gas mask, rifle" (R. 9), that "He was sitting there the way I am, just laying on his side with his head on his pillow" (R. 10). This witness testified that he knew accused's sleeping habits and that accused -

> "* * * is hard to wake up. Sometimes it takes me about fifteen or twenty minutes to wake him up, sir. I shake him; I actually lifted him out of his bunk and he was still sleeping on his feet one night" (R. 9).

The tent where accused was found was within accused's post (R. 16).

No witness testified that accused was sleeping when found in the tent. The following is from Pittaro's testimony:

"Q. What did Private Weidmann say to you, or did he say anything when you awakened him?
"A. He didn't say anything sir" (R. 8).

* * *

"Q. At what time was he found asleep?
"A. Well, sir, he didn't answer the three o'clock check or three-thirty check, so it was between three-thirty--three and three-fifteen. Well, it was about, I guess, between three and three-thirty" (R. 11).

There is evidence that accused had been engaged in fatiguing physical labor "all day" until about 5 p.m., on May 4, 1942 (R. 8, 9, 14, 16-18).

Accused did not testify or make an unsworn statement.

4. The evidence shows that accused was on guard and posted as a sentinel as alleged in the Specification. When found by Pittaro, accused was sitting and partially reclining on a cot with his head on a pillow. No witness testified that accused was asleep. Questions addressed to Pittaro included assumptions that accused had been asleep but his answers, quoted above, may not be construed to involve any such assumption or conclusion on the part of the witness. Neither the questions nor the answers supply this hiatus in the evidence. The testimony to the effect that accused was probably physically tired, that he failed to respond to telephone calls and that he was found partially reclining on a bunk, indicates neglect of duty but does not justify an inference that he had been asleep. Although the tent where accused was found and the telephone instrument were in the same general locality there are no circumstances in evidence from which it can be inferred that a man sitting or reclining within the tent could normally have been expected to hear the telephone bell had he been fully awake. The circumstances proved are too uncertain in probative effect to furnish a foundation of substantial evidence for a finding that accused was asleep (CM 195562, Stover, CM 220886, Wright).

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

Robert H. C. Kenny, Judge Advocate.

Gordon Simpson, Judge Advocate.

Raymond J. Cyr, Judge Advocate.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General
Washington, D. C.

SPJGK
CM 222993

JUL 18 1942

UNITED STATES v. First Lieutenant CLYDE L. SPEED (O-373373), 19th Infantry.	24TH INFANTRY DIVISION Trial by G. C. M., convened at Schofield Barracks, Territory of Hawaii, June 17, 1942. Dismissal.

OPINION of the BOARD OF REVIEW
HOOVER, SIMPSON and LYNCH, Judge Advocates.

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

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

CHARGE I: Violation of the 85th Article of War.

Specification: In that First Lieutenant Clyde L. Speed, 19th Infantry, was, in the vicinity of Ashley Station, Oahu, Territory of Hawaii, on or about June 1, 1942, found drunk while on duty as Assistant to the Regimental Supply Officer, 19th Infantry.

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

Specification 1: In that First Lieutenant Clyde L. Speed, 19th Infantry, was, in vicinity of Ashley Station, Oahu, Territory of Hawaii, on or about June 1, 1942, drunk and disorderly while in uniform.

Specification 2: (Motion for finding of not guilty sustained)

Specification 3: (Motion for finding of not guilty sustained)

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

Specification 1: In that First Lieutenant Clyde L. Speed, 19th Infantry, did, on the Kamehameha Highway, Oahu, Territory of Hawaii, between the Sea View Inn and Ashley Station, on or about June 1, 1942, wrongfully operate a United States Government ¼ ton vehicle in a reckless manner and at an excessive speed.

Specification 2: In that First Lieutenant Clyde L. Speed, 19th Infantry, did, on the Kamehameha Highway, Oahu, Territory of Hawaii, between the Sea View Inn and Ashley Station, on or about June 1, 1942, wrongfully operate a United States Government ¼ ton vehicle while drunk.

He pleaded not guilty to the Charges and Specifications. The court sustained a motion for findings of not guilty of Specifications 2 and 3, Charge II. He was found guilty of Charge I and its Specification, Charge III and its Specifications and the Specification, Charge II, and not guilty of Charge II but guilty of violation of Article of War 96. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence shows that on June 1, 1942, accused was on duty as assistant to the 19th Infantry Regimental Supply Officer (R. 7), with the forward echelon of the 19th Infantry at Pupukea Heights, Oahu, Territory of Hawaii. He was charged with the responsibility of supervising construction work of the regiment in the field (R. 5) and of supervising the work of getting supplies (R. 6). As a part of his duties he made frequent trips to the 24th Infantry Division headquarters at Schofield Barracks on the island to make arrangements for supplies for field work and for consultation with the division G-4 (R. 5). During the entire day of June 1 he was on a duty status (R. 6, 8, 10, 47). At about 8 a.m., accused received permission from the executive officer of his regiment to report to Lieutenant Colonel James D. O'Brien, General Staff, 24th Infantry Division, at division headquarters with reference to some utility work at Pupukea Heights (R. 7). Lieutenant Colonel O'Brien testified

that he did not recall that he sent for accused or that accused reported to him on June 1 (R. 10), but accused was seen at division headquarters at about noon and also at about 2:30 p.m. of that day (R. 40).

At approximately 4 p.m., while returning to his station, accompanied by a companion identified only as Captain Barnwell (R. 22), accused was seen driving a Government ¼-ton "jeep" motor vehicle along Kamehameha Highway near the Haleiwa Airport at a high rate of speed (R. 11, 17), swerving from one side of the road to the other (R. 17). Private Lynn A. Patterson, Headquarters and Military Police Company, 24th Infantry Division, a highway motorcycle patrolman, saw the speeding vehicle, gave chase on his motorcycle, and drove at a speed of about 85 miles per hour for a distance of about 1½ miles before he caught up with accused when the latter slowed down to turn a corner at Ashley Station Road. Patterson "clocked" the "jeep" at 70 miles per hour (R. 11, 15). Accused stopped in response to Patterson's instructions "approximately one hundred to one hundred and fifty yards up Ashley Station Road" (R. 12). The accused was dressed in cotton khaki uniform and had on the insignia of his rank (R. 13, 20). During the time accused was pursued the "jeep" swerved from one side of the road to the other, went off the road three or four times, and, as it turned the corner at Ashley Station Road, spun almost completely around and nearly tipped over (R. 12). Shortly after accused was stopped, Captain Howard G. Salisbury, Headquarters and Military Police Company, 24th Infantry Division, who had seen the "jeep" driving at a high rate of speed and had ordered Patterson to pursue and "clock" it (R. 12, 15), drove up on a motorcycle and inquired of accused and Captain Barnwell as to their organizations. It was his intention to take them back to their own organizations for further action (R. 17). Accused at first refused to state his organization, but, upon questioning, admitted that he belonged to the 19th Infantry (R. 18). Thereupon Captain Salisbury and Patterson drove accused and his companion in the "jeep" toward a place where Captain Salisbury believed he would find an echelon of the 19th Infantry, leaving the motorcycles parked alongside the highway. After they had gone a short distance they were informed by a sentinel that accused's organization was in the opposite direction, and they turned back. When they reached the place where the motorcycles were parked Patterson observed that he had left his rifle in the scabbard of his motorcycle and stopped the "jeep" and went for

the rifle. While he was away, accused, who apparently shared the front seat with the driver, took the key from the "jeep" and refused to give it back to Patterson (R. 18). Captain Barnwell became profane and violent and "difficult to physically control" (R. 19).

At about this point Second Lieutenant Lester A. Wooster, 93rd Coast Artillery (AA), Staff Sergeant Emil J. Rizzolla, Battery A, 98th Coast Artillery (AA), Sergeant Edward V. Feliz, Battery E, 93rd Coast Artillery (AA), and another enlisted man drove up in a second "jeep" (R. 18). With their assistance Captain Barnwell was restrained and placed in the second "jeep" (R. 14). During a scuffle between Captain Barnwell and those who were attempting to restrain him, accused sat on the hood of the first "jeep". When the scuffle was over he refused to get off the hood. The other officers and men then pulled him from the hood and at this time accused became profane in his language and violent in his actions (R. 18). He insisted on getting into the car with Captain Barnwell (R. 14) and was difficult to handle. As a means of controlling him accused's hands were tied behind his back with a belt (R. 14, 18) and he was forced into the back seat of the "jeep" he had been driving. Accused was then driven toward Schofield Barracks (R. 18), Rizzolla driving while accused sprawled in the back seat "more in a lying position than a sitting position" (R. 21) with his feet between the front seats near the auxiliary gear shift. Feliz sat on the back of the car with his feet on the back seat (R. 23). Patterson preceded them on his motorcycle and escorted them toward Schofield Barracks (R. 18).

The events on the Ashley Station Road occupied "between a half hour and forty-five minutes" (R. 14). Captain Salisbury, Lieutenant Wooster, Patterson, Rizzolla and Feliz each testified that in his opinion accused was "drunk" (R. 13, 18, 19, 20, 26). Captain Salisbury testified, also, that accused did not appear to have full control of his faculties and called "me, and to the best of my knowledge some of the other men there, a few names", - "such as, 'God damn son-of-a bitch,' and the general run of names used by a man who is inebriated" (R. 18). Lieutenant Wooster testified that accused's "eyes were blood-shot, he talked incoherently, and he was unsteady on his feet" (R. 19). Patterson testified that accused "was staggering" and used "profanity" and "vulgar words" none of which witness could remember (R. 13, 14). Feliz testified that when accused "got off the jeep he staggered a little, and when I helped him into the jeep I smelled liquor on his breath" (R. 26).

On the way to Schofield Barracks accused kicked and disengaged the auxiliary gear shift of the car on two occasions (R. 22). Rizzolla, the driver, thereafter kept his hand on the shift (R. 21). As they proceeded Rizzolla turned out into the road to avoid hitting a civilian car but at that moment accused again kicked the gear shift, striking Rizzolla and disengaging the shift (R. 21). As a result, because of lack of traction (R. 22, 24, 27), the "jeep" ran into a boy on a bicycle (R. 22), causing minor injuries to him and damage to the bicycle (R. 31). The party thereafter proceeded to the office of the provost marshal at Schofield Barracks (R. 14, 23).

Upon arriving at the provost marshal's office at about 5 p.m., accused was sent by the officer in charge to the North Sector General Hospital, Oahu, for a sobriety test (R. 32, 33). Captain Max S. Thomas, Medical Corps, hospital officer of the day at the time accused was admitted, testified that, upon his arrival, accused was

> "under the influence of alcohol. He was very talkative, but wasn't pugnacious or anything like that. His gait was staggering, and he wasn't able to use his full mental powers of ability because of the alcoholic condition he was in" (R. 34).

In witness' opinion accused was not capable of competent operation of a motor vehicle (R. 35). A sobriety test was given accused at about 5:30 p.m. A chemical analysis of his blood disclosed that accused then had 3.0 milligrams of alochol per cubic centimeter of blood (R. 36). A report of the sobriety examination made at the time of the examination by Captain Thomas was admitted in evidence (R. 34; Ex. B). It recited, among other things, that the "shirt tail" of accused was out, that he was talkative, that his breath was alcoholic, that his gait was unsteady, that he was drunk, that he was not capable of operating a motor vehicle in a manner that a prudent, cautious person possessing his normal faculties would operate one, that he was not capable of performing military duty, that the odor of liquor was sufficient to make him a bad example before other men and that the final diagnosis was acute alcoholism. Major Kenneth R. Nelson, Medical Corps, chief of the laboratory service of the North Sector General Hospital, testified, as an expert, that when "an individual is clinically examined" and

> "has more than 1.5 milligrams of alcohol per cubic centimeter in his blood, he will have the clinical symptoms and signs of drunkenness *** and as levels of 2.5, 3.0, 3.5 and 4.0 are reached, these symptoms become stronger and stronger and more evident",

and further, that an individual with a blood alcohol content of 3.0 milligrams per cubic centimeter of blood would be drunk and would not be able to operate an automobile normally (R. 38).

Accused did not testify or make an unsworn statement.

Lieutenant Colonel Raymond W. Odor, 19th Infantry, former battalion commander of accused, testified he had observed accused and considered him "outstanding, and I would say without reservation that he is the most efficient lieutenant of his rank in the 19th Infantry". Colonel Max W. Sullivan, Chief of Staff of the 24th Infantry Division, a former regimental commander of accused, testified that he considered accused "a superior officer, and in the upper third" and that accused had done particularly good work as construction engineer in the building of machine gun nests (R. 45).

4. The evidence establishes that during the afternoon of June 1, 1942, on the Kamehameha Highway, in the vicinity of Ashley Station, Oahu, Territory of Hawaii, accused was found drunk while in a duty status as assistant to the regimental supply officer, 19th Infantry. Although he was not exercising command of troops at that time, his presence on the highway was incidental to the performance of his duties as assistant supply officer of his regiment. While drunk he operated on the highway described a United States Government $\frac{1}{4}$-ton motor vehicle in a reckless manner and at an excessive speed. He drove at a speed of approximately 70 miles per hour, swerving from one side of the road to the other, endangering life and Government property. When apprehended in the vicinity of Ashley Station he was in uniform. The military police attempted to bring him back peaceably to his organization but he became profane and abusive in his language toward them, resisted them and was so disorderly that he had to be restrained by strapping his hands behind his back. On the way to Schofield Barracks accused interfered with the operation of the vehicle in which he was being driven in such manner as to cause it to run into a civilian on a bicycle. Officers and enlisted men who

observed accused were of the opinion that he was drunk and that he evidenced the characteristics of a drunken man. The clinical examination of his blood clearly confirmed these opinions.

There can be no reasonable doubt that at the place and time alleged accused was found drunk on duty as assistant to the regimental supply officer, as alleged in the Specification, Charge I, in violation of Article of War 85. Also, at the places and time alleged, accused was drunk and disorderly while in uniform, as alleged in Specification 1, Charge II, and wrongfully operated a United States Government ¼-ton vehicle in a reckless manner and at an excessive speed and while drunk, as alleged in the Specifications, Charge III. His latter acts were violative of Article of War 96.

5. War Department records show that accused is 26 years of age. He attended Louisiana Polytechnic Institute for a period of three years but did not graduate. He served as an enlisted man in the Regular Army from October 28, 1936, to March 3, 1939, being discharged as private, character excellent. He enlisted in the Regular Army Reserve on March 9, 1939. He was appointed a second lieutenant, Infantry Reserve, on December 23, 1938, was ordered into active military service on June 29, 1940, and was promoted to first lieutenant on November 1, 1941.

6. All members of the court and the personnel for the prosecution and defense joined in a recommendation, attached to the record of trial, that the sentence be commuted to forfeiture of $50 pay per month for six months. The recommendation contains the following:

> "Lieutenant Speed is a very superior young officer of otherwise fine character. His military record discloses that he is very efficient and even outstanding. In these times of dire emergency there is a great need for officers of his caliber in the service" (Ex. D).

The following recommendation is incorporated in the action of the reviewing authority:

> "Since this officer has shown outstanding qualities as a superior officer in tactical missions and,

because his conduct has heretofore been exemplary, I recommend that clemency be extended by commutation to a sentence of less serious import. I, therefore, concur in the recommendation of clemency submitted by the court."

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of violation of Articles of War 85 and 96.

Richard W. Hanner, Judge Advocate.

Gordon Simpson, Judge Advocate.

Raymond J. Lynch, Judge Advocate.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General.
Washington, D. C.

SPJGH
CM 223054

JUL 11 1942

UNITED STATES v. Private LEONARD A. LANGANKI (37092104), Headquarters and Military Police Company, 36th Infantry Division.	THIRTY SIXTH INFANTRY DIVISION Trial by G.C.M., convened at Camp Blanding, Florida, May 22, 1942. Dishonorable discharge and confinement for four (4) years. Federal Correctional Institution, Englewood, Colorado.

HOLDING by the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates.

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

2. Accused was found guilty of absence without leave for six days in violation of Article of War 61; applying to his own use and benefit a truck value $752.50, and misappropriating to his own use a pistol value $26.42, both property of the United States furnished and intended for the military service and both in violation of Article of War 94; and assault and battery upon a civilian and wrongfully threatening a civilian, both in violation of the 96th Article of War. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for four years. The reviewing authority approved the sentence, designated the Federal Correctional Institution, Englewood, Colorado, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. Confinement in a Federal correctional institution is not authorized. Paragraph 90 b, Manual for Courts-Martial, provides:

> "Subject to such instructions as may be issued from time to time by the War Department, the United States Disciplinary Barracks at Fort Leavenworth, Kans., or one of its branches, or a military post, station or camp, will

be designated as the place of confinement in cases where a penitentiary is not designated."

War Department letter dated February 26, 1941 (AG 253 (2-6-41)E), subject: "Instructions to reviewing authorities regarding the designation of institutions for military prisoners to be confined in a Federal penal or correctional institution", authorizes confinement in a correctional institution only when confinement in a penitentiary is authorized by law (CM 220093, Unckel). Penitentiary confinement is not authorized by Article of War 42 for any of the offenses of which accused was found guilty in this case.

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 four years in a place other than a penitentiary, Federal correctional institution or reformatory.

[signature], Judge Advocate.

Chas. C. Cressory Judge Advocate.

Abner E. Lipscomb Judge Advocate.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General
Washington, D. C.

SPJGH
CM 223134

SEP 11 1942

UNITED STATES	)	NINTH CORPS AREA
	)	
v.	)	Trial by G.C.M., convened at Fort Huachuca, Arizona, May 11 and 25, 1942. Death.
	)	
Private First Class OSCAR B. DUDLEY (38038998), Company A, 25th Infantry.	)	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates.

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Oscar B. Dudley, Company "A", 25th Infantry, did, at the Civic Building, Helena, Montana, on or about March 11, 1942, with malice aforethought, willfully deliberately, feloniously, unlawfully, and with premeditation kill one Private Earlie Bables, Company "A", 25th Infantry, a human being, by shooting him with a rifle.

The accused pleaded not guilty to, and was found guilty of the Charge and its Specification. He was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. On March 10, 1942, Company A, 25th Infantry, was quartered in the Civic Center, a three-story building in Helena, Montana. In the basement there was a boiler room with stairs leading to a platform a

half-floor above. On the platform were two doors, one leading into a garage used as a supply room, and the second from which stairs led up into the kitchen (R. 6; Ex. A).

At about 11:30 p.m. on that night, in the boiler room, the accused, Private Bables (the deceased), Sergeant Jennings, Private Little, and a few others were engaged in a game of craps (R. 22, 34). On the platform Sergeant McBeth and Corporal Briggs were playing cards (R. 12).

Private Bables was running the crap game and with dice which belonged to him. Neither the accused nor Bables were winning. After he had lost in the game, the accused asked for a shot. Bables gave accused a shot, which accused lost. Accused, upon his request of Bables, was again given a shot, for which Sergeant Jennings gave him a quarter, which accused ran up to a dollar and then lost. Upon the third request of accused, Bables gave accused a shot, which he lost. When accused again asked for a shot, Bables said that he was not able to give one because he himself was a loser in the game, accused picked up the dice off the table. Bables asked accused to put the dice down and let the game go on. Accused then faced Bables and asked if Bables was going to give him another shot. Bables replied "I am not able to now, let me get hold of some money and both of us will have some". Accused then put the dice on the table, ran up the steps to the platform and went upstairs. Accused did not act angry when he went upstairs (R. 13, 22, 23, 33-35, 52).

Upon the suggestion of Sergeant Jennings and Private Little that he go upstairs and see what was wrong with accused, Bables, in about five minutes, went upstairs. Bables soon came down again and said that he met and talked with accused up in the latrine, and that accused was fixing to go to bed (R. 35). Accused came down about ten minutes after he had gone upstairs (R. 49). Bables then left the game and went back of the boilers. When he returned, the accused asked him if his feelings were hurt about the dice. Bables said "No". Accused asked the question again and received the same response. When Bables asked accused what was wrong with him, the accused said "Goddam it, mine are", and then went up the steps and through the doorway. At the suggestion of Sergeant Jennings, Bables went up the stairs to talk with accused. The accused, at the door, said to Bables, who was standing on the top step, "Bables, I feel mistreated". Bables replied "I don't want you to feel that way, I want to apologize". Accused then said, "If I did things right, I would get my M-1 rifle and blow your Goddamn brains out". Bables replied, "I apologize with you, Dudley, I don't want you to feel that way". The accused did not have a rifle in his hands at that time. Bables said to accused "come on and let us gamble", and if

there was anything wrong "let us go home and go to bed". Accused and Bables then commenced talking and laughing together and the argument was over. The three men who testified to the happenings up to this point then ceased observing the accused and Bables (R. 13-14, 23, 35-37, 49).

A few minutes thereafter Corporal Briggs, on the platform, and Sergeant Jennings and Private Little, in the boiler room, heard a shot fired (R. 14, 23, 37). Corporal Briggs saw smoke coming from a rifle in the hands of the accused who was standing in the open doorway at the foot of the stairs from the kitchen (R. 14). Bables was then standing on the steps about four feet from the accused (R. 16-18). The bullet ricochetted on the concrete floor under Briggs' foot and hit his foot (R. 14, 56). He looked at his foot, looked up again and saw accused pull off the second load. On the second shot accused had the rifle along his hips pointing at Bables. Briggs did not take time to look to see if Bables fell, but heard three shots fired (R. 14, 15). Sergeant Jennings heard one shot fired, looked up and heard two more shots fired right together. He could see a portion of the gun but could not see the rest of it because the door was facing the other way (R. 37). Private Little heard three shots fired but did not then see the accused. After the three shots, Little saw Bables fall down the steps and saw the accused move across by the supply room in the basement, carrying a rifle at the present (R. 23-24).

At about 1:30 a.m., March 11, 1942, First Lieutenant Robert D. Mervynne, Medical Corps, 25th Infantry, in Helena, Montana, went downstairs and found two men in a room used as a dispensary. Corporal Briggs was complaining of a wound in his foot. Private Bables was lying on the floor seriously hurt with a badly shattered elbow and a wound in the abdomen. Bables seemed to be in shock, with a rapid weak pulse, and spit up blood. Lieutenant Marvynne gave Bables one-eighth grain of morphine to relieve the pain, placed him on a litter and called the Veterans Hospital for an ambulance (R. 19-20).

During the night of March 10, 1942, between the hours of 11 and 12 p.m., Staff Sergeant Randolph W. Jones, First Battalion Headquarters, 25th Infantry, on duty as corporal of the guard and sitting inside the front door of the Civic Center, heard a sound as if three GI cans hit the cement floor. He went to the kitchen to investigate but found no one, went upstairs to get his flashlight and then downstairs. As he went out the front door he heard a sentry telling someone to halt. He saw the ac-

cused running. When accused slipped on the ice Jones ran over, caught him by the belt and brought him back inside. When Jones asked accused if he did the shooting, the accused replied "Yes". Accused added "I didn't go to kill the man, I just wanted to scare him, that is all". Sergeant Jones picked up an M-1 rifle with no sling, among the old fire trucks in the basement, when it was pointed out to him by another soldier. He took the rifle upstairs, opened the bolt, and found five rounds of ammunition - one in the chamber and four in the clip. He gave the rifle and ammunition to Captain McGuire (R. 26-29).

Captain Raymond C. McGuire, 25th Infantry, was awakened about 12:30 a.m., March 11, 1942, and told that two men were injured. He went down to the dispensary where he saw Lieutenant Marvynne attending Private Bables. He called for a weapon carrier in which Bables and Corporal Briggs were taken to the hospital. Captain McGuire found one cartridge case in the room where the shooting occurred, just outside of the door to the stairway leading from the door on the platform of the boiler room up into the kitchen. A man found two more cartridge cases on the platform of the boiler room and handed them to Captain McGuire. He identified the gun with the sling missing, serial number 132501, and five rounds given him by the corporal of the guard on the night of the shooting. The rifle was received in evidence as Exhibit B (R. 7-8). The company records showed that the rifle was assigned to Sergeant McBeth. Each man in the company kept his own rifle. Ammunition was issued only to platoon leaders and any not used returned to the supply room (R. 31).

Lieutenant Mervynne next saw Bables when he, with the coroner, performed an autopsy on the body on the morning of March 12. They found two bullet wounds, one in the abdomen and the other which shattered his right elbow and "creased" his chest. Both those wounds could have caused severe shock and could have caused his death (R. 20-21).

There were introduced in evidence, with an affirmative statement of "No objection" by the defense, three papers: (1) a transcript of hospitalization at the Veterans Hospital, Fort Harrison, Montana, showing the admission of Earl Bables on March 11, 1942, and his death at 2:50 a.m., March 11, 1942; (2) a letter from the manager of that facility to the commanding officer, Company A, 1st Battalion, 25th Infantry, stating the admission of Private Earl Bables (38038073), at 1:30 a.m., March 11, 1942, and his death at 2:50 a.m., March 11, 1942; and (3) a Standard Certificate of Death of the State of Montana, signed by F. W. Scott, M.D. CMO, VAF, Ft. Harrison, Montana, stating the death of Earl Bables at 2:50 a.m., March 11, 1942, from gunshot wound, chest, right elbow and abdomen (R. 21; Ex. D).

On March 11, 1942, after the shooting, Sergeant John R. Ranson, supply sergeant, Company A, 25th Infantry, inventoried by direction of his

company commander the barracks bags of accused and found six rounds of .30 caliber ammunition in the very bottom of one bag. He then checked the ammunition for which he was accountable as supply sergeant and it checked to a shell. Neither the six rounds in the bag nor the eight rounds in the clip were on his accounts. He stated that his records showed that rifle, serial number 132501, was assigned to Sergeant McBeth. In Company A each man kept his own rifle, and ammunition was issued only to platoon leaders and returned to the supply room when they came in (R. 30-32).

4. For the defense, the accused testified that his relations with Bables were friendly and he had no reason to become angry enough to kill Bables. Accused had been in town that night, drank a little beer and a little whiskey, returned to the company at about 10:30 p.m., and went into a dice game. After he had lost his money, he asked Bables to give him a shot. Bables did so and the accused lost. When he asked Bables for another shot, Bables said no. Accused tried to get a shot from anybody but failed. He again tried to get a shot from Bables, but did not. He then got to talking and arguing with Bables about a shot but did not remember exactly what he said. After the argument, accused and Bables went up the stairs to the platform. Accused did not go any further than the platform, did not go up into the kitchen, or upon the first floor at all. Bables left the platform. Accused stuck in his pocket a letter which he was reading, went back down stairs and into another dice game. As they did not have much over there, accused came back to Bables' game and tried to get another shot on the dice. When accused asked Bables for a shot, Bables said that he did not have any money and that the accused was trying to get some money from him. Accused then started talking "like the first time". Accused went upstairs and on to the same platform as before. After Bables came up on the platform, accused went through the doorway and found a rifle, which he had not seen before, sitting in the corner of the door. He picked it up, turned around and was going to ask Bables if it was his rifle. Accused was going to push the bolt handle back on it and look in the chamber of the rifle. The rifle then went off accidentally. He had his hand in there somewhere and guesses he must have had it on the trigger. "I just turned around and loosed this hand, like that, (indicating), and then the gun went off, and I got afraid, and the gun fired, and the hull came out and struck me in the face, like that" (R. 39-43).

Upon cross-examination and upon examination by the court accused denied that he went upstairs above the platform when he first left the crap game; denied that he said anything to Bables about "feelings" or that he said "Goddam it, mine are", but remembered only that he asked Bables if

he had gotten hold of any money; denied that he said anything about blowing Bables' brains out; denied that he stood in the doorway with the gun pointing at Bables; denied that he was angry with or mad at Bables; and denied that he put any ammunition in his laundry bag.

With respect to find the gun, accused stated:

> "The gun was sitting in the doorway, when I started through, and he said something to me, that is how I came to find the rifle, and he drew my attention, and I picked the gun up and turned around."

He could not explain the three empty cases. He did not know how many times the rifle went off, but said that he must still have had it when it went off the second and third times. He never had a rifle issued to him, had very little training with the M-1 rifle, but had used a rifle on guard (R. 44-48).

When recalled as a witness for the defense, Corporal Briggs stated that he did testify that he had heard accused threaten the life of Bables. He denied that he had stated on an investigation that when accused was standing on the platform and Bables on the steps leading up from the boilers that "they were talking and laughing together, so I didn't pay any attention to them" (R. 32-33).

Upon introduction by the defense, but without identification, an unsigned statement "Summary of Evidence of Corporal Willie Briggs" which contained the statement denied above by Corporal Briggs, was received in evidence (Def. Ex. D; R. 33).

5. The court took judicial knowledge of the fact that the M-1 rifle has a safety bolt in it, which requires that the trigger be pulled for each separate shot (R. 60)

6. "Murder is the unlawful killing of a human being with malice aforethought. * * *.

* * *

"Malice aforethought. - Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission

of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed.

"Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not (except when death is inflicted in the heat of a sudden passion, caused by adequate provocation); knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused; intent to commit any felony. * * *." (M.C.M., 1928, par. 148 a.)

"Malice is presumed from the use of a deadly weapon." (M.C.M., 1928, par. 112 a.)

7. The evidence is undisputed that three shots were fired from a rifle. Corporal Briggs saw smoke coming from the rifle in the hands of accused standing in the open doorway after the first shot which ricochetted and hit his foot. Briggs saw accused pull off the second load with the rifle along the hips of accused, pointing at Bables. No witness testified that he saw the third shot fired, but Sergeant Jennings heard three shots, the last two right together, and Corporal Briggs and Little both heard three shots. Accused admitted that he must have still had the rifle when it went off the second and third times. After the three shots, Little saw Bables fall down the steps and saw the accused move across by the supply room in the basement, carrying a rifle at the present.

Bables died in the hospital at 2:50 a.m. within approximately two hours after the shooting, from gunshot wound of chest, right elbow, and abdomen. The autopsy showed wounds from two bullets, of which one passed through the chest and shattered the right elbow and the other passed through the abdomen. Both of these wounds could have caused his death.

The record affords no satisfactory basis for a reason why the accused shot Bables. The accused as well as Bables had lost money in a

crap game which Bables ran. Bables allowed accused several free shots in the game after accused had lost his money, but finally told accused that he was not able to give him another shot. After arguing with Bables, accused went upstairs, but, as he stated, not beyond the platform. At the suggestion of the others in the game, Bables went upstairs to see what was wrong with accused. After Bables came back to the game, accused came down and entered another dice game. Accused twice asked Bables if his feelings were hurt, to which Bables replied in the negative. When Bables asked what was wrong with him the accused replied that his feelings were hurt. Accused, standing at the door, said to Bables, who was on the stairs, that he felt mistreated. Bables stated that he did not want accused to feel that way and that he wanted to apologize. Accused then said "If I did things right, I would get my M-1 rifle and blow your Goddamn brains out". Bables again stated that he did not want accused to feel that way and wanted to apologize. Accused and Bables then commenced talking and laughing together and the argument was over. Soon the three shots were fired and Bables fell down the stairs.

In the opinion of the Board of Review, the evidence is clear that accused suddenly and unexpectedly attacked Bables without any adequate provocation and without any necessity of self defense. There is nothing to disprove the statement of accused that he found the rifle in the doorway, except the statement of Corporal Briggs that he did not see a rifle in the doorway when he came downstairs about two hours before the shooting. The accused testified that the rifle went off accidentally when he picked it up and turned to ask Bables if it was his rifle. He had, however, stated to the corporal of the guard when he was apprehended shortly after the shooting, that he did the shooting but "I didn't go to kill the man, I just wanted to scare him, that is all". A considerable period of time elapsed between the time when accused left the crap game and the shooting.

The record establishes, in the opinion of the Board of Review, beyond any reasonable doubt that the homicide was committed by accused with malice aforethought, willfully, deliberately, unlawfully, and with premeditation as alleged. Such an act constitutes murder in violation of Article of War 92.

8. The age of accused stated on the charge sheet as 26 was corrected to read 23. He was inducted at Henderson, Texas, on February 20, 1941.

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

trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence. The death penalty is authorized upon conviction of violation of Article of War 92.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

(358)
SPJGH
CM 223134 1st Ind.

War Department, J.A.G.O., NOV - 2 1942 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Private First Class Oscar B. Dudley (38038998), Company A, 25th Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence. The accused murdered a member of his own company by deliberately firing three shots from an M-1 rifle, of which two entered the body of the victim and caused his death about two hours later. The accused and the victim had lost money in a game of craps which the victim had run. The accused expressed his displeasure because the victim would not afford him more shots, and left the game. The accused later returned, said that he felt that he had been mistreated and if he did the right thing would get his M-1 rifle and blow out the brains of the victim. After the victim stated that he did not want accused to feel that way and wanted to apologize, the two commenced talking and laughing together and the argument was over. The accused turned, picked up from behind a doorway an M-1 rifle which had been assigned to another member of the company, and fired the three shots, of which the last two took effect in the victim about four feet away. Although accused testified at the trial that the gun went off accidentally, when apprehended shortly after the shooting he had stated that he did not go to kill the victim but just wanted to scare him. The record discloses no basis for the shooting other than a possible fancied grievance because the victim declined to continue to grant to accused free shots in the crap game. There is no suggestion of any unfair practice in the game. In my opinion, there are no mitigating or extenuating circumstances. I recommend that the sentence be confirmed and carried into execution.

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

Myron C. Cramer

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

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

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General
Washington, D. C.

SPJGH
CM 223160

JUL 28 1942

UNITED STATES v. Private JERRY F. LIBONATI (32171562), Company A, Supply Battalion, 1st Armored Division.	SECOND CORPS AREA Trial by G.C.M., convened at Fort Jay, New York, May 27, 1942. Dishonorable discharge (suspended) and confinement for two and one-half (2½) years. Disciplinary Barracks.

OPINION of the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates.

1. The record of trial in the case of the soldier named above having been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings and sentence in part, 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 on the following Charge and Specification

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Jerry F. Libonati, Company A, Supply Battalion, 1st Armored Division, did at Fort Knox, Kentucky on or about March 10, 1942 desert the service of the United States and did remain absent in desertion until he surrendered himself at Fort Jay, New York, on or about April 9, 1942.

The accused pleaded not guilty to the Specification and Charge, but guilty to absence without leave in violation of Article of War 61. He was found guilty as charged, sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for two and one-half years. The reviewing authority approved the sentence, ordered its execution but suspended the dishonorable discharge, and designated the United States

Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. The result of the trial was published in General Court-Martial Order No. 209, Headquarters Second Corps Area, July 7, 1942.

3. The prosecution introduced in evidence an extract copy of the morning report of Company A, Supply Battalion, 1st Armored Division, Fort Knox, Kentucky, showing an entry from duty to absence without leave as to accused on March 10, 1942 (R. 8; Ex. 1). It was stipulated that accused surrendered at Fort Jay, New York, on April 9, 1942, in uniform (R. 8). No other evidence was presented by the prosecution.

4. Accused, through his counsel, made an unsworn statement that he was inducted into the service on August 25, 1941, and stationed at Fort Knox, Kentucky. From September 30, 1941, to April 9, 1942, the date he surrendered at Fort Jay, New York, he received absolutely no pay, had no credit at the Post Exchange, was dependent on the generosity of men in his outfit for such necessities as soap, razor blades, cream, and other ordinary needs of a soldier. During that period he made at least six attempts to get his pay through proper channels, going to the company clerk and the first sergeant for assistance. His parents were not wealthy but had sent him $2 on each of three occasions. He attended no movies, spent nothing at any bar, and never took so much as a glass of beer. After the first of the year he again wrote home for money but his parents were unable to send him any. This condition kept him from being a neat soldier and on March 10, 1942, he went "over the hill" and hitch-hiked his way to his home in New York City to learn why his father could not give him any more money. After spending some time at his home he turned himself in at Fort Jay, New York, in uniform. He never intended to desert the service of the United States (R. 8-10).

Captain Nelson A. Voorhees, Personnel Adjutant, Fort Jay, New York, testified that the service record of accused showed that accused was last paid on September 30, 1941, and was entitled after that date to receive at least one-third of his pay (R. 10-13).

5. The only matter requiring consideration is the question of law whether the evidence is legally sufficient to support the findings of guilty of desertion.

Desertion is absence without leave from the service with intent not to return. It is well settled that mere absence without leave is not satisfactory evidence of desertion unless it is much prolonged. The Board of Review has expressed the opinion that in order to sustain a finding of guilty of desertion, there must be shown, in

addition to the fact of absence without leave for a short period, some evidence tending to show a motive for desertion, or some other evidence from which a court might reasonably infer an intent on the part of accused not to return to the military service (CM 189658, Hawkins; 195988, Parr; 196187, Roath; 196776, Maioloha; 198750, Knouff; 200601, Rowland).

In CM 205916, Williams, accused, who left Fort McArthur, California, on September 6, 1936, and surrendered himself at Fort Hayes, Ohio, 2500 miles away, on September 23, 1936, was found guilty of desertion by the court, the Board of Review said:

> "The only evidence introduced by the prosecution shows that accused absented himself without leave from his organization and station at Fort McArthur, California, on September 6, 1936, and remained so absent without leave until he surrendered himself in uniform at Fort Hayes, Ohio.
>
> * * * *
>
> "In the absence of any other proof, it seems clear that, without regard to accused's explanation the foregoing evidence, showing merely an absence of seventeen days terminated by surrender in uniform at the military post nearest the accused's home, where he must have known he was in danger of apprehension, is in itself, insufficient to establish any intention to abandon entirely the military service.
>
> * * * *
>
> "* * * The burden of proof to the contrary was upon the prosecution, throughout and inasmuch as it has introduced no evidence inconsistent with the entire innocence of the accused of desertion, it is the opinion of the Board of Review that the evidence of record is legally insufficient to support the finding of guilty of that offense".

In the instant case the accused left his organization without funds and hitch-hiked 900 miles to his home in New York City, and surrendered himself at Fort Jay after an absence of 30 days. His absence was not so prolonged, nor was the distance travelled to his home so great as to afford a basis for a reasonable inference of an intent not to return to the military service. There is no evidence in the record which supports such an inference. The evidence on the contrary, indicates strongly an intent to return to his station. His statement that he surrendered in uniform is supported by a stipulation to that effect.

6. 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 its Specification as involve findings that accused, at the place alleged, absented himself without leave from his organization from March 10, 1942, to April 9, 1942, in violation of Article of War 61, and legally sufficient to support only so much of the sentence as involves confinement at hard labor for ninety days and forfeiture of sixty days' pay.

Judge Advocate.

Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General
Washington, D. C.

SPJGK
CM 223300

AUG 3 1942

UNITED STATES	)	SIXTH CORPS AREA
v.	)	Trial by G. C. M., convened at Fort Sheridan, Illinois, June 10, 1942. Dishonorable discharge (suspended) and confinement for ten (10) years. Disciplinary Barracks.
Private VAHAK T. MANASHIAN (16025026), Battery D, 61st Coast Artillery (AA).	)	

HOLDING by the BOARD OF REVIEW
HOOVER, SIMPSON and LYNCH, Judge Advocates.

1. The record of trial in the case of the soldier named above, having been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings and sentence in part, has been examined by the Board of Review.

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Vahak T. Manashian, Battery D, 61st Coast Artillery (AA), did, at Fort Hancock, New Jersey, on or about February 18, 1942, desert the service of the United States with intent to shirk important service, to wit: embarkation for duty beyond the continental limits of the United States, and did remain absent in desertion until he surrendered himself at Headquarters Sixth Corps Area, Chicago, Illinois, on or about February 24, 1942.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of one previous conviction by special court-martial for absence without leave, in violation of Article of War 61, 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, ordered its execution but suspended that portion of the sentence

adjudging dishonorable discharge and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 110, Headquarters Sixth Corps Area, July 6, 1942.

3. The evidence shows that accused absented himself without leave from his organization, Battery D, 61st Coast Artillery (AA), at Fort Hancock, New Jersey, on February 18, 1942 (R. 9, 10, 13, 16, 20; Pros. Ex. 1; Def. Ex. 1) and surrendered, in uniform, to military authorities at Chicago, Illinois, on February 24, 1942 (R. 8, 9). His father accompanied him when he surrendered. Accused was crying and appeared to be "upset". He said, "Here I am, and shoot me if you want" (R. 9).

First Lieutenant Phillip A. Hart, Infantry, testified:

> "Q Lieutenant Hart, as Post Adjutant of Fort Sheridan, can you tell the Court where the records of the 61st Coast Artillery are, specifically those of Battery D?
> "A I can tell the Court only that the records of the 61st Coast Artillery, and specifically D Battery are not at this station, and that they accompanied the organization which no longer is at this station.
> "Q Lieutenant Hart, do you have any information and can you tell the Court whether or not Battery D of the 61st Coast Artillery is in the continental limits of the United States at the present time?
> "A It is not.
> "Q Can you tell the Court where the 61st Coast Artillery is at the present time (June 10, 1942)?
> "A It is at an overseas station" (R. 6).

Accused testified that he went to a clinic at Fort Hancock to have a broken dental plate fixed and was told that the appliance would have to be sent to some Army laboratory which would require at least 25 days to do the work (R. 15, 26). His battery commander told him

> "they did not know when they were going to leave or what they were going to do, and that there was a laboratory in Red Bank, New Jersey" (R. 15).

The battery commander also said he "did not know if they were going to change station or what" (R. 24). Accused found that the laboratory in Red Bank could make the repairs in about two hours (R. 25). He had no money to pay for the repairs (R. 15). His battery commander told him if he could get the necessary funds he could get a pass (R. 19, 29, 31). Accused borrowed money from a chaplain to pay for fixing the dental plate (R. 15, 16) and obtained a 19-hour pass from him for the purpose of going to Red Bank (R. 15, 19, 26; Def. Ex. 1). Accused knew he should get the pass from his organization commander rather than from the chaplain. Upon leaving the post accused went to Red Bank, had his dental plate fixed, and instead of returning to Fort Hancock caught a ride to Chicago (R. 16), intending, after a short absence, to "turn in at Headquarters at Chicago *** with the intentions that they would put me in the Casual Detachment so my folks could come and visit me" (R. 21). When he reached home, "most naturally I was scared, and I thought, wartime desertion, I would be shot" (R. 18). As to possible departure of his organization overseas, accused testified that troops were leaving "right along" for ports of embarkation (R. 21, 22, 32) and that the last troops that "were going to go across with the A.E.F., *** were notified in one day they were going" (R. 24). He also testified that his battery commander stated that "we would not leave; that if we would go that we would not leave until May or June" (R. 24), and that "the boys said if we were going to embark there would be something put on the bulletin board to the effect" (R. 17).

Accused's father testified that he "forced" accused to go with him to surrender (R. 12).

4. The court was justified in concluding from all the circumstances in evidence that accused did at the place and time alleged desert with the intent to shirk the important service of embarkation for duty beyond the continental limits of the United States. As the fact finding body exclusively entitled to weigh the evidence, the court preferred to believe that the accused, apprehending an imminent departure of his battery for overseas service, and preferring to be stationed at Chicago where he could be visited by his family, left his post with intent to shirk the duty of embarking with his organization for foreign service. This was desertion (A.W. 28, 58, M.C.M., pp. 142, 143).

Accused testified that he did not know that his command was to depart until May or June for an overseas station, and believed that he

would be apprised of the departure by a notice on the bulletin board, but he also testified that he knew troops were being moved continually to ports of embarkation from Fort Hancock, that the last troops to go overseas therefrom left on one day's notice, and that he wished to go to Chicago for service in a place where his relatives might visit him. Upon surrender he tacitly, if not directly, conceded that he was a deserter. From his testimony and all the circumstances of the case the court was fully justified in inferring that accused knew or must have had reason to believe he would be ordered to embark for duty beyond the continental limits of this country, and that he quit his organization for the purpose of avoiding such embarkation.

5. The Board of Review holds the record of trial legally sufficient to support the findings and the sentence.

[signature], Judge Advocate.

Gordon Simpson, Judge Advocate.

Raymond J. Lynch, Judge Advocate.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General
Washington, D. C.

SPJGK
CM 223315

JUL 31 1942

UNITED STATES)	PANAMA COAST ARTILLERY COMMAND
)	
v.)	Trial by G. C. M., convened at Fort Amador, Canal Zone, June 11, 1942. Dismissal.
)	
Captain JOHN T. FRAWLEY)	
(0-357516), Medical Corps.)	

OPINION of the BOARD OF REVIEW
HOOVER, SIMPSON and LYNCH, Judge Advocates.

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

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

CHARGE: Violation of the 85th Article of War.

Specification: In that Captain JOHN T. FRAWLEY, Medical Corps, was, at Fort Kobbe', Canal Zone, on or about April 15, 1942, found drunk while on duty as Medical Officer of the day.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial, including in his action the following:

"Pursuant to Article of War 48, the execution of the sentence is withheld."

The record of trial has been treated as if forwarded for action under Article of War 48.

3. The charges, findings and sentence upon rehearing were identical with those upon the original hearing. No member of the court who

participated in the rehearing participated in the original hearing.

4. The evidence shows that accused was detailed as medical officer of the day of the 83rd Coast Artillery regimental dispensary at Fort Kobbe, Canal Zone, for a tour extending from 4 p.m., April 15, to 7 a.m., April 16, 1942 (R. 8, 22-24; Ex. A). As medical officer of the day he was expected to be on the post at all times, available if called. He was in command of the medical detachment in the absence of the officer regularly commanding that detachment and, among other things, was charged with making diagnoses in the cases of patients brought to the dispensary during his tour and with the care and evacuation of such patients (R. 25, 31, 32). During the day of April 15, until about 4 p.m., he was engaged in moving his household furniture to a newly assigned set of quarters on the post (R. 33, 34, 40). The regimental surgeon and detachment commander, Captain Frank M. Townsend, Medical Corps, left the post to attend a dinner party in Panama City during the early part of the evening of April 15 (R. 20).

At about 8:50 p.m., April 15 (R. 12), a patient, a member of Battery D, 83rd Coast Artillery, was brought to the dispensary. The charge of quarters unsuccessfully attempted to reach accused by telephone, whereupon Corporal Joseph R. Corda, Detachment Medical Department, 83rd Coast Artillery, emergency ambulance driver, went to the new quarters and informed Mrs. Frawley, the wife of accused, that a patient at the dispensary required accused's attention. Mrs. Frawley stated that she knew where accused could be reached and that she would have him come to the dispensary. Corda returned to the dispensary and waited for ten minutes but accused did not come. Corda then again went to the quarters where he talked to Mrs. Frawley. She stated that she was unable to locate accused. Corda told her he would send the patient to the station hospital in about 10 minutes after his return to the dispensary (R. 8, 9). Accused did not go to the dispensary. The patient was sent to the Fort Kobbe Station Hospital at about 9:35 p.m. (R. 9).

At about 9:40 p.m., Captain Townsend was advised by telephone of the occurrences (R. 9). He came to the dispensary, arriving at about 10:40 p.m. He and Corda immediately drove in a command car to the quarters of accused (R. 9, 20). When they arrived Corda rang the doorbell for two or three minutes (R. 14, 20, 26), but there was no response (R. 14, 20). Captain Townsend then rang the doorbell

several times and called (R. 21, 27). Getting no response, he opened the door, went to the "foot of the stairs" and called for accused in a loud voice (R. 21). Mrs. Frawley appeared at the head of the stairs and Captain Townsend told her he wanted to see accused downstairs at once. After "five or more minutes", during which time Captain Townsend "had to call again to see if he was coming", accused appeared. Captain Townsend testified:

> "His shirt was unbuttoned, he was very unsteady on his feet, and was staggering. He came down to the foot of the stairs and he staggered to the left across the room, clutching at the dining room table. He seemed to be in a markedly confused state. I said, 'You've been drinking.' He said he had." (R. 21)

The room at the foot of the stairs was illuminated "very well" (R. 27) by one white light on the stairway and the lights from the command car shining through the windows (R. 15, 27). In addition to the white light "there may have been a red light in the living room" (R. 19). After accused had dressed Corda assisted him down an outside flight of stairs to the command car and accused was driven to the dispensary and thence, by ambulance, to the Gorgas Hospital, Ancon, C. Z. (R. 10, 11).

Captain Townsend testified that accused "appeared to be obviously drunk" (R. 21). In addition to noting accused's unsteadiness on his feet, his staggering, his untidy appearance, and his apparent mental confusion, witness observed that accused grasped the stairway banister, walked very slowly and breathed heavily while descending the stairs, that his face was flushed (R. 27, 28) and that his speech, when addressed, was hesitating (R. 22, 28), "absentminded" and confused (R. 28). Witness knew accused intimately (R. 21) and was familiar with his normal appearance (R. 27). It seemed to witness that it was "very necessary" for Corda to assist accused when he was walking to the command car (R. 29). In witness' opinion accused's drunkenness plainly impaired the rational and full exercise of his mental and physical faculties. He was not in a suitable condition to perform the duties of medical officer of the day (R. 23, 32). Witness did not detect the odor of alcohol on the breath of accused but witness had himself had two or three glasses of beer with his dinner (R. 30). When accused was placed in the ambulance he "still appeared to be sluggish" (R. 30), his speech was hesitant, he was "perspiring profusely" and

had "a kind of vacant look" about his eyes (R. 31). At the investigation of the charges witness stated that accused had "appeared to be rather intoxicated and somewhat confused and unsteady on his feet" (R. 29).

Corda testified that in his opinion accused "was under the influence of liquor". There was a "very strong" odor of liquor on his breath (R. 10), and he

> "seemed very confused when he came down the stairs, and his speech was incoherent, and he staggered from object to object — he didn't seem to know what he was doing so much".

Witness helped accused walk to the command car because he "was very unsteady, and I was afraid he might fall down". Witness had seen accused in his work every day and felt qualified to express an opinion as to the condition of accused (R. 10). In witness' opinion the intoxication of accused was sufficient sensibly to impair the rational and full exercise of his mental and physical faculties (R. 11).

Dr. Lawrence M. Fairchild, resident physician, Gorgas Hospital, testified that he saw accused in the course of a routine examination some time after 9 a.m., April 16, 1942 (R. 34, 35). In response to a routine question as to why he had been hospitalized, accused said he "was drunk *** that he had been intoxicated, but not markedly so" (R. 36, 37). He also said that he had taken "four or five beers and a corresponding number of rum-and-Coca-Colas between the hour of 5:00 p.m. and his admission to the hospital" (R. 37, 38).

Accused testified that he was not accustomed to physical exertion and, through moving, became "really very, very tired". Because of his fatigue he stopped at the officers' club some time after 4 p.m., and had "one rum-and-Coca-Cola" (R. 40). During supper at his quarters he had a "beer or so" and "while getting things in shape so we could sleep that night, I had one or two" (R. 43). He also drank "one or two rum-and-cokes" before going to bed at about 7:15 or 7:30 p.m. (R. 40). He was not drunk (R. 43). In explanation of the early events of the evening he testified that when the first call for his services came,

> "My wife woke me, after a little bit of difficulty, and I got up, but went right back to bed, according

to her story. I hardly remember being awakened from a sound sleep, and I believe that is sometimes customary with any man who is a sound sleeper — that when the alarm clock rings, he will sometimes get up, turn it off, and go back to bed without realizing it. The second time I was called, I got up and got dressed to go over to the dispensary. I was intending to drive my car, which I sometimes do when the roads are dry, but before I left, a call came in that the man was sent over to the hospital. Now, this patient was sent in from a position out in the field, Position 63, at which position there is a Medical or Dental officer there each night, so I knew that this man had been seen by an officer and certainly would not suffer from me not seeing him at the dispensary. The only thing I would have done, anyway, would have been to confirm the disposition of the patient already made by sending him to the Fort Kobbe hospital. I then went back to bed" (R. 40-41).

As to the events incident to Captain Townsend's call at his quarters accused testified:

"On hearing Captain Townsend shouting at the top of the stairs, I got up and put some clothes on and came downstairs with my wife. Now, it has always been the way with me — I am a sound sleeper, and on getting up, for some time I am very confused — I don't wake up very readily ***. The door bell is a chime type, in which the chimes are situated at the rear staircase, and the possibility of hearing that upstairs is nil. Also, on going downstairs, the furniture was littered about the floor, and the boxes, and not having my glasses on, I was unable to see very distinctly. I am very myopic — very nearsighted —, and in any darkness whatsoever, without my glasses I am practically blind and it is necessary for me to more or less feel my way along. I can state my vision: it is more than 200 — I am very nearsighted. However, when Captain Townsend said he was sending me to the hospital, I went upstairs again and put on a clean uniform and changed my ornaments and came

> back down again. At that time, Captain Townsend ordered Corporal Corda to assist me (R. 41) ***. I made no protest, however, as I saw there was no harm, and there was nothing to be gained by making any type of protest whatsoever. I got into the command car and went over to the dispensary, and there got into the ambulance. On reaching Gorgas Hospital, I talked for some time with the clerk on duty and also with the interne who was Medical O. D. that evening. Our conversation consisted of medical subjects -- I believe he had just finished giving a transfusion, and we discussed the methods used at Gorgas and the methods that I have used in my various residencies and interneships. I want to make the statement that at no time was I drunk. I was physically exhausted, and my faculties were a little bit slow in coming back on account of fatigue and being awakened from a sound sleep" (R. 42).

It was stipulated that if Mrs. John T. Frawley, wife of accused, were present and sworn she would testify in substance that she was

> "awakened by someone shouting 'Captain Frawley!' at the top of the stairs in our home. My husband awakened at the same time, and went to see who was in the house. It was Captain Townsend. My husband went back to the bed room to put on some clothes. Captain Townsend said that he was going to send my husband to the hospital. Then there was a short conversation between both men. The illumination of the stairway and living room was very poor -- the only light burning was a dark red lamp. Captain Frawley was conducting himself in his usual fashion, as he does when awakened from a sound sleep and not wearing his glasses. On leaving the house, Captain Townsend ordered Corporal Corda to assist my husband" (R. 44-45).

5. The undisputed evidence thus shows that at the place and time alleged in the Specification, while on duty as a medical officer of the day, accused failed to respond to a call for his services and was subsequently found in his quarters in such a condition that his immediate commanding officer concluded that he was drunk and unfit for his duties. The noncommissioned officer who saw accused at this time and who assisted

accused in walking from his quarters also reached the conclusion that accused was under the influence of intoxicants. Accused stated on the following day that he had consumed considerable rum and beer and that he became drunk or intoxicated to some extent. In his testimony he denied drunkenness and asserted that his apparent mental confusion and lack of physical coordination was a result of his fatigue and natural inability fully and quickly to arouse from deep sleep. This assertion was supported to some extent by the stipulated testimony of his wife. All the evidence considered, the Board of Review entertains no doubt that accused was in fact drunk, as found by the court.

When found drunk accused was not actually employed upon any specific military duty, but, as medical officer of the day, it was his duty to hold himself in readiness to respond to possible calls for his services as a medical officer. Such being the case he was on duty within the meaning of Article of War 85. Paragraph 145 of the Manual for Courts-Martial expressly states that the article applies

> "although the duty may be of a merely preliminary or anticipatory nature, such as *** an awaiting by a medical officer of a possible call for his services."

6. War Department records show that accused is 33 years of age. He was graduated from Georgetown University in 1931 and from Western Reserve University School of Medicine in 1937. He was a member of the 107th Cavalry, Ohio National Guard, for a period not disclosed. He was appointed a first lieutenant, Medical Corps Reserve, on June 16, 1937, was ordered into active military service on February 14, 1941, and was promoted to Captain on December 24, 1941. He was ordered to duty with the Panama Canal Department on March 26, 1941.

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 and sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of violation of Article of War 85.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General
Washington, D. C.

SPJGH
CM 223331

SEP 21 1942

N.D

UNITED STATES	SIXTH CORPS AREA
v.	Trial by G.C.M., convened at Fort Brady, Michigan, June 10, 1942. Dishonorable discharge (suspended) and confinement for one (1) year. Disciplinary Barracks.
Private SPELMAN ROSS (34130126), Battery I, 100th Coast Artillery (AA).	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates

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

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: (Disapproved by the reviewing authority).

Specification 2: In that Private Spelman Ross, Battery I, 100th Coast Artillery (Anti-Aircraft), did, at Sault Ste. Marie, Michigan, on or about May 6, 1942, by force and violence and by putting him in fear feloniously take, steal, and carry away from the person of Sergeant Thomas N. Stanley, Battery I, 100th Coast Artillery (Anti-Aircraft) about thirty ($30.00) dollars in lawful money of the United States, the property of the said Sergeant Thomas N. Stanley.

The accused pleaded not guilty to and was found guilty of the Charge and the Specifications thereunder. He was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for one

year. The reviewing authority disapproved the finding of guilty of Specification 1, approved the sentence,,ordered its execution, but suspended the dishonorable discharge and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. The result of the trial was published in General Court-Martial Orders No. 122, Headquarters Sixth Corps Area, July 11, 1942.

3. The evidence shows that at about 3 a.m., on May 6, 1942, the accused, after having been relieved from a tour of guard duty, was engaged in a dice game in his hut at Sault Ste. Marie, Michigan, when Sergeant Stanley entered and was invited to join in the game. Sergeant Stanley soon won $40 from the accused and returned to his own hut. Shortly thereafter the accused followed Sergeant Stanley into his hut and charged him with winning his money with crooked dice. The accused requested Sergeant Stanley to return the money but Sergeant Stanley refused. The accused then stated, "You will give it to me", and rushed out of the hut. The accused reentered the hut directly with his rifle. Sergeant Stanley grabbed the rifle, but the accused jerked it out of his hand and again ran out of the hut. The accused then ran around the hut, thrust his rifle through the window, pointed it at Sergeant Stanley, and threatened to fire unless Sergeant Stanley returned his money. After some discussion, Sergeant Stanley refunded first $20 and then $10 more. The entire incident took about 15 minutes. The accused is described as being very angry, and Sergeant Stanley testified that he himself was "panicky" (R. 3-4, 6-9).

4. The accused testified that Sergeant Stanley won $40 from him unfairly by slipping one of the dice out of the game and putting in a crooked one. The accused explained that Sergeant Stanley did all of the dice rolling until Stanley had won the $40, that Stanley then knocked the dice out of the hand of the accused when the accused picked them up, leaving one dice on the floor, and went to his own hut with two dice in his possession.

The accused testified further that after he had told Sergeant Stanley that Stanley had won the money unfairly and after Stanley refused to return it to him, he decided to get his Springfield rifle and to bluff Stanley into returning it. The accused stood at the window of the hut and kept begging "for his money" until Stanley gave him back $30 of it. The accused also testified that Stanley opened the window of the hut while the accused stood on the outside (R. 18-20).

5. Specification 2 alleges that the accused did, by force and violence, feloniously take, steal, and carry away from the person of

Sergeant Stanley about $30, the property of Sergeant Stanley.

In order, therefore, to sustain the court's finding of guilty, it is necessary that the evidence support the several elements of the offense as alleged. Thus, it is necessary for the evidence to show the following: First, that the accused did, with force and violence, take about $30 from Sergeant Stanley; Second, that the money so taken was the property of Sergeant Stanley; and, Third, that the money so taken was taken animus furandi, or with the intent to steal.

The evidence shows that the accused, within a few minutes after losing $40 to Sergeant Stanley in a game of dice, went to Sergeant Stanley's hut, charged him with winning the money unfairly, and demanded its return. After Sergeant Stanley had refused the demand, the accused rushed from the hut and returned with his rifle. There then followed a scuffle over the possession of the rifle, resulting in the accused breaking away from Sergeant Stanley and running outside of the hut. The accused then pointed his rifle through a window of the hut and demanded the return of his money. After some argument, Sergeant Stanley returned first $20 and then $10 more. The evidence shows that this quarrel lasted about 15 minutes, that the accused was very angry, and that he demanded the return of the money under a claim that it was his. This evidence very clearly established the first of the elements of the offense charged.

On the other hand, do these facts show that title to the winnings of the dice game were in Sergeant Stanley and that the demand and taking of $30 of the $40 was an act of theft by the accused? We think not. Ordinarily when money is taken from another at the point of a gun, the facts surrounding the taking afford ample proof of an intent to steal. In the present case, however, the taking occurred in connection with a quarrel over the fairness or crookedness of a dice game. Furthermore, the accused was very angry and demanded the return of the money because he appears to have thought himself entitled thereto. Although we cannot determine whether the accused was justified in his anger against Stanley, neither can we determine that his anger was a fraudulent sham and that he did not believe himself entitled to the return of the money claimed. Even if the entire testimony of the accused be rejected, the testimony for the prosecution fails to show the specific intent to steal which is alleged and which is essential to the offense charged. In view of this conclusion, it is unnecessary to determine where the true title to the money lay.

It does not follow, however, that the accused did not commit an offense, that he should not be punished for the acts which he committed, and for the particular mens rea which he possessed. His hostile act in

pointing a dangerous weapon at Sergeant Stanley was clearly unlawful and indicates the commission of "an assault with intent to do bodily harm with a dangerous weapon", for which the accused might have been charged under the 93rd Article of War. Such an offense, however, "is one of a number of separate offenses denounced by the 93rd Article of War, and is not of itself a lesser included offense in the charge of robbery" (CM 126998, McCormick). This interpretation is necessarily correct because the Specification did not allege an "assault with intent to do bodily harm with a dangerous weapon". It is, of course, axiomatic that the evidence in a case cannot establish an offense which is not included within the Specification.

On the other hand, when Specification 2 is reduced by striking out the words "feloniously * * * steal * * * the property of Sergeant Thomas N. Stanley", which allegation the evidence has failed to establish, the remaining part of the Specification - the part which is supported by proof - alleges that the accused did, at the time and place stated,

> "* * * by force and violence and by putting him in fear * * * take * * * and carry away from the person of Sergeant Thomas N. Stanley, Battery I, 100th Coast Artillery (Anti-Aircraft) about thirty ($30.00) dollars in lawful money of the United States, * * *".

This allegation and the proof supporting it, clearly establish an assault, in violation of Article of War 96. This is apparent from the fact that the Manual for Courts-Martial defines an assault as "an attempt or offer with unlawful force or violence to do a corporal hurt to another", and from the further fact that it gives as an example of an assault the "presenting of firearm ready for use within range of another" (M.C.M., 1928, par. 149 l). Accordingly, the findings are legally sufficient to support the lesser included offense of assault and only so much of the sentence as involves confinement at hard labor for three months and forfeiture of two-thirds pay for a like period (M.C.M., 1928, par. 104 c).

6. 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 Specification 2 as involves findings that the accused did, at the time and place alleged, commit an assault upon the person of Sergeant Thomas N. Stanley, in violation of Article of War 96, and legally sufficient to support only so much of

the sentence as involves confinement at hard labor for three months and forfeiture of two-thirds pay per month for a like period.

(Dissent), Judge Advocate.

Chas Dresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

WAR DEPARTMENT
SERVICES OF SUPPLY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON

(380)

SPJGH
CM 223331

August 12, 1942.

N.P.

MEMORANDUM of Dissent in the case of Private Spelman Ross (34130126), Battery I, 100th Coast Artillery (AA).

1. I do not agree with so much of the opinion in the case of Private Spelman Ross (34130126), as finds the record legally sufficient to support only a finding of guilty of an assault, and legally sufficient to support only a sentence to confinement for three months and forfeiture of two-thirds pay for a like period.

2. I believe that the offense stated in the quoted portion of the Specification (p. 4 of opinion), includes more than a simple assault, more than a wrongful offer of violence. In the stripped allegation, supported by the proof, the accused by force and violence and putting him in fear, has taken and carried away from the person of Sergeant Stanley the sum of $30. Even if both the property and right to possession were in the accused, he has taken the law into his own hands and committed an act fraught with danger to the military personnel and to the peace and good order of the camp. He has wrongfully committed, over and above the assault, an offense - as stated in the stripped allegation - to the prejudice of good order and military discipline, cognizable under Article of War 96. In going about the recovery of the money by such means, he has committed an offense which has no counterpart in the nomenclature of offenses, but is a lesser offense included in that of robbery, with which he was charged. As a lesser included offense of robbery, it has no maximum punishment stated in the table of maximum punishment (par. 104 c, M.C.M., 1928).

3. The maximum authorized punishment for robbery, the most closely related offense, dishonorable discharge, total forfeiture, and confinement for ten years, is amply sufficient to support, and in my opinion does support the sentence to dishonorable discharge, total forfeiture, and confinement for one year.

Lester S. Hill, Jr.
Lester S. Hill, Jr.,
Colonel, J.A.G.D.

1st Ind.

War Department, J.A.G.O., OCT 29 1942 - To the Secretary of War.

1. The record of trial and the accompanying papers in the case of Private Spelman Ross (34130126), Battery I, 100th Coast Artillery (AA), together with the opinion of the Board of Review and the dissenting opinion of one member are transmitted herewith pursuant to Article of War 50½ as amended by the act of August 20, 1937 (50 Stat. 724; 10 U.S.C. 1522), for the action of the Secretary of War.

2. The reviewing authority approved only the findings of guilty of one specification (Specification 2), of robbery of $30 from the person of Sergeant Stanley in violation of Article of War 93, and the sentence adjudged of dishonorable discharge, total forfeitures, and confinement at hard labor for one year, ordered the sentence executed, but suspended the dishonorable discharge and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 122, Headquarters Sixth Corps Area, July 11, 1942.

3. 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 Specification 2 as involve findings that accused did at the time and place alleged, commit an assault upon the person of Sergeant Stanley in violation of Article of War 96, and legally sufficient to support only so much of the sentence as involves confinement at hard labor for three months and forfeiture of two-thirds pay per month for a like period.

I concur in the opinion of the Board of Review that the record of trial is not legally sufficient to support the findings of guilty of robbery in violation of Article of War 93. I do not concur in so much of the opinion of the Board of Review as finds the record legally sufficient to support only a finding of guilty of simple assault and to support only a sentence to confinement for three months and forfeiture of two-thirds pay per month for a like period.

The evidence does establish that the accused by force and violence, and putting him in fear, took and carried away from the person of Sergeant Stanley the sum of $30. Those facts support something more than simple assault. Even if both the property and the right to possession of the $30 were in the accused, he has taken the law into his own hands in going about the recovery of the money by such means, and committed an act fraught with danger to the military personnel and to the peace and good order of the camp. He has wrongfully committed over and above the assault, an offense to the prejudice of good order and military discipline, cognizable under Article of War 96. That offense is a lesser

offense included within that of robbery of which accused was charged and found guilty.

As a lesser included offense of robbery, this offense has no maximum punishment stated in the table of maximum punishments (par. 104c, M.C.M., 1928). The maximum authorized punishment for robbery, the most closely related offense, dishonorable discharge, total forfeitures, and confinement at hard labor for ten years, is amply sufficient to support, and does in my opinion support, the adjudged sentence of dishonorable discharge, total forfeitures, and confinement for one year.

4. I recommend, therefore, that only so much of the findings of guilty of Specification 2 of the Charge be approved as involve findings of the lesser included offense of the taking by accused by force and violence and by putting him in fear and carrying away from the person of Sergeant Thomas N. Stanley, Battery I, 100th Coast Artillery (AA), about $30 in lawful money of the United States in violation of Article of War 96. I recommend that the sentence be approved.

5. Inclosed herewith are two forms of action prepared for your signature. Draft A will accomplish the approval of the findings and sentence in accordance with my views. Draft B will accomplish the approval of the findings and sentence in accordance with the views of the Board of Review.

Myron C. Cramer

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

3 Incls
Incl 1 - Record of trial
Incl 2 - Form of action A
Incl 3 - Form of action B

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General
Washington, D. C.

SPJGK
CM 223335

AUG 3 1942

UNITED STATES)	UNITED STATES ARMY FORCES IN ASCENSION ISLAND
v.)	Trial by G. C. M., convened at Georgetown, Ascension Island, May 28, 1942. Dishonorable discharge and confinement for fifteen (15) years. No place of confinement designated.
Private BERRY E. PRICE (6994698), Medical Detachment, 175th Station Hospital, Ascension Island.)	

REVIEW by the BOARD OF REVIEW
HOOVER, SIMPSON and LYNCH, Judge Advocates.

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

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

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

Specification 1: In that Private Berry E. Price, Medical Detachment, 175th Station Hospital, did, at Georgetown, Ascension Island, in the Zymodic Building, on or about 8 May 1942, strike Captain Wilfred W. Wilcox, Medical Corps, his superior officer, who was then in the execution of his office, on the body with his fist.

Specification 2: In that Private Berry E. Price, Medical Detachment, 175th Station Hospital, having received a lawful command from Captain Wilfred W. Wilcox, Medical Corps, his superior officer, to "Go to your tent", or a command to that effect, did at Georgetown, Ascension Island, in the Zymodic Building, on or about 8 May 1942, willfully disobey the same.

CHARGE II: Violation of the 65th Article of War.

Specification: In that Private Berry E. Price, Medical Detachment, 175th Station Hospital, having received a lawful order from Staff Sergeant

> Douglas T. Sexton, a noncommissioned officer who was then in the execution of his office, to "Keep quiet and go to your tent", or an order to that effect, did, at Georgetown, Ascension Island, in the Zymodic Building, on or about 8 May 1942, willfully disobey the same.

He entered a special plea in bar of trial on the ground that "he is periodically insane and was insane at the time the act was committed". This plea was overruled. He then pleaded not guilty to and was found guilty of the Charges and Specifications. Evidence of two previous convictions by summary courts-martial, one for absence without leave, in violation of Article of War 61, and one for using threatening and insulting language to a noncommissioned officer, in violation of Article of War 65, was introduced. He was sentenced, three-fourths of the members of the court present concurring, to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for fifteen years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 50½. In lieu of designating a place of confinement he stated:

> "The place of confinement is designated as 'such place as may be directed by the Judge Advocate General of the Army'".

3. The evidence shows that at about 12 noon, May 8, 1942, in the vicinity of the Zymodic Building, Ascension Island (R. 18, 23), accused, who had been drinking earlier in the day with a Private Wills, came upon the scene of a physical encounter between Wills and Staff Sergeant Douglas T. Sexton, acting first sergeant of the Medical Detachment, 175th Station Hospital. Accused told Sexton not to strike Wills "while he was down". Sexton ordered accused to be quiet and to go to his tent but accused did not comply and continued "hollering and kind of crying and waving his arms around" (R. 15). One eyewitness, an officer, testified that accused protested when

> "he saw what we were trying to do to restrain Private Wills, about putting him into this clothes container and having the steam turned on. He kept calling that we could not do that" (R. 25).

Captain Wilfred W. Wilcox, Medical Corps, commanding officer of the medical detachment, of which accused was a member, came to the scene and ordered accused to go to his tent (R. 15, 18). Accused did not obey. The order was repeated by the officer. Accused then "doubled his fist" and advanced toward the officer (R. 18). Captain Wilcox put his hands on accused's shoulders in an attempt to turn him about or push him away. Accused stepped back, stumbled on an obstruction and fell down. Upon arising he struck Captain Wilcox a glancing blow on the left shoulder with his doubled fist (R. 18, 19). Captain Wilcox testified that accused "swung at" and struck him on the shoulder (R. 18), and another officer, Lieutenant Colonel William K. Rogers, Medical Corps, testified that he saw the blow (R. 19). Captain Wilcox seized accused about the neck and the two grappled and fell to the ground (R. 16, 18). They were disengaged by others (R. 18). Lieutenant Colonel Rogers testified that soon after the altercation, while accused was sitting near Sexton, witness approached and asked him if he had been drinking whereupon accused courteously stood up and said, "I don't know what you mean" (R. 20).

About the middle of the morning of May 8 accused was observed drinking denatured alcohol. He and another soldier (Wills) had two 16-oz. bottles "between two men" (R. 21). Sexton, Captain Wilcox and Lieutenant Colonel Rogers each testified that in his observation of accused he did not detect any evidence of drunkenness (R. 16, 20, 27). Sexton and Lieutenant Colonel Rogers testified that they believed accused was sober at the time of the altercations described (R. 16, 20). Captain Philip W. Oden, Medical Corps, who was present at the scene of the altercations, testified that accused did not, in witness' opinion, behave as would a sober man under similar circumstances (R. 26). Two enlisted men who saw accused after he had commenced to drink and at the scene of the altercations testified that he appeared to be drunk (R. 23, 25). One testified that:

> "He was not drunk to the staggering point, although he was pretty well intoxicated" (R. 21).

The other testified that accused "walked pretty unsteady", that he "talked very loud, silly talk, as if he had mush in his mouth", and that he fell down when trying "for fun" to pick up Private Wills (R. 25).

An enlisted man testified for the defense that accused did not strike Captain Wilcox but "pushed" him and seized him about the waist (R. 23).

Accused testified that he and his companion while at work under a building on the morning of May 8 found and drank one bottle of alcohol. They secured an additional bottle but accused did not recall what occurred after the alcohol from the first bottle had been consumed (R. 26, 27).

4. There is direct evidence that at the place and time alleged accused struck Captain Wilfred W. Wilcox, Medical Corps, his superior officer, then in the execution of his office, on the body with his fist (Spec. 1, Charge I); that he willfully disobeyed the lawful command of that officer to go to his tent (Spec. 2, Charge I); and that he willfully disobeyed the lawful order of Staff Sergeant Douglas T. Sexton, then in the execution of his office, to keep quiet and go to his tent (Charge II and Spec.). There is some evidence that at the time of these offenses accused was drunk. He testified that he was so drunk that he did not recall his actions. Upon all the evidence, however, the court was amply justified in concluding that accused was not drunk to such an extent that he was incapable of understanding the quality of his acts involved in the assault upon the officer or of entertaining the specific intent involved in the offenses of willful disobedience.

5. Upon arraignment, as noted above, accused entered a special plea in bar of trial upon the ground that he was "periodically insane and was insane at the time the act was committed" (R. 4). In support of this plea Lieutenant Colonel Rogers who stated that he had practiced medicine and surgery for over twenty years testified that he saw accused on May 8 (during the altercations) in what witness believed was a "doubtful state of sanity", or temporary insanity in the form of a fit of uncontrolled temper (R. 6). Witness had never examined accused to determine his sanity but upon his observation of accused believed that

> "he is sane; at times, however, he is liable to have periods when he is unable to control his actions. I, therefore, should believe that the accused might have had such a period and it is very difficult to say if he lost control of his faculties" (R. 5).

Witness believed that a person who is subject to fits of uncontrolled temper "has sense enough to be reasonably responsible for his actions" (R. 7). Captain Philip W. Oden, Medical Corps, who stated that he had been in the general practice of medicine for about two years and had served for a month as an interne in a hospital for the insane, testified that he had seen accused about the station hospital from time to time over a period of about three months and had observed or heard of three "violent flares of temper" by accused. In witness' opinion accused was insane (R. 8) and was of a type which might properly be committed to an insane asylum (R. 10). Witness stated:

> "he was the type of man with depressive insanity, or probably the kind of individual with a low intelligence quotient, just unable to restrain himself, and anything trivial will aggravate him; or he may be classified under the third type of dementia praecox or possible paranoid type, a person thinking that somebody is trying to persecute him" (R. 8).

In the course of the examination of this witness the defense counsel referred to a record of a brain concussion suffered by accused. No evidence of the contents of the record was introduced. Witness testified, however, that concussion of the brain might result in changes of personality or insanity (R. 9). Since the trial there has been received in the Office of The Judge Advocate General a copy of a clinical record of the Station Hospital, Fort Eustis, Virginia, showing that accused was hospitalized at that place on November 1, 1941, for injuries, including a cerebral concussion, moderately severe, suffered accidentally on the date of hospitalization.

The prosecution introduced in evidence, upon the issue of insanity, the report of a board of five medical officers, including four medical officers of the Army and an officer of the British Royal Navy, dated May 11, 1942 (Ex. A), stating that accused had been examined on May 10, 1942, and that the board found him a "psychopathic personality, uncooperative on examination. Sane" (R. 11). One member of the board, Captain Nicholas E. Keseric, Medical Corps, who stated that he had been engaged in general medical practice for about six years, testified that no member of the board was a specialist in nervous or mental diseases but that all members agreed that accused was sane. Witness believed that the displays of temper by accused and his psychopathic personality

were not indicative of insanity. The board inquired into the personal history of accused (R. 12). Captain Wilcox, the officer assaulted by accused, testified that he had engaged in general medical practice for about ten years and deemed himself qualified to express an opinion as to the sanity of accused whom witness had known for about three months. Witness considered him sane (R. 13, 14).

In the course of the inquiry with respect to the special plea the defense offered accused as a witness in his own behalf. The president of the court announced that the law member ruled that "accused cannot take the stand in this inquiry at this time" (R. 11). The court erred in thus excluding the testimony of accused (par. 120d, M.C.M.) but there is nothing in the record to suggest that his proffered testimony would have materially influenced the determination of the special issue before the court. As noted, he subsequently testified upon the general issue. In view of the nature of the special issue involved the Board of Review is convinced that the error could not have injuriously affected the substantial rights of accused within the meaning of Article of War 37.

Upon the evidence before it the court was legally justified in overruling the special plea in bar of trial (CM 204790, Hayes). Inasmuch as the record of trial contains expressions of medical opinion to the effect that accused may not have been mentally responsible for his acts, and since it does not appear that accused has been examined by a psychiatrist, administrative action may appropriately be taken upon the soldier's return to the United States to determine his mental responsibility.

6. The United States Disciplinary Barracks, Fort Leavenworth, Kansas, should be designated by the reviewing authority as the place of confinement.

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 and sentence.

[signature], Judge Advocate.

Gordon Simpson, Judge Advocate.

Raymond J. Lynch, Judge Advocate.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General
Washington, D.C.

SPJGH
CM 223448

SEP 12 1942

UNITED STATES	IX ARMY CORPS
v.	Trial by G.C.M., convened at Fort Lewis, Washington, May 28 and 29, 1942. Dismissal and confinement for five (5) years.
First Lieutenant FRANCIS R. RIESENMAN (O-420670), Medical Corps.	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, 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 1st Lt. Francis R. Riesenman, Medical Corps Reserve, did, at Fort Lewis, Washington on or about April 16, 1942 with the intention of evading his duty as an officer, feign disability.

Specification 2: In that 1st Lt. Francis R. Riesenman, Medical Corps Reserve, Assistant Battalion Surgeon of the 776th Tank Destroyer Battalion, having been directed by Captain John H. Carlock, Medical Corps, Battalion Surgeon of the 776th Tank Destroyer Battalion, to perform routine daily duties at about 12:00 Noon, April 16, 1942 did between 1 P.M. April 16, 1942 and 3:40 P.M. April 16, 1942 fail to obey the same, at Fort Lewis, Washington.

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

Specification: In that 1st Lt. Francis R. Riesenman, Medical Corps Reserve, Assistant Battalion Surgeon of the 776th Tank Destroyer Battalion, having received a lawful command from Major J. P. Barney,

Jr., 776th Tank Destroyer Battalion, his superior officer, who was then in the execution of his duties as the Commanding Officer of said 776th Tank Destroyer Bn. to perform certain routine daily duties, hereinbelow tabulated, did at Fort Lewis, Wash. on or about April 16, 1942, wilfully disobey the same, to wit;

Headquarters Medical Detachment
776th Tank Destroyer Battalion,
Fort Lewis, Washington

April 16, 1942

Routine Daily Duties for 1st Lt. Francis R. Riesenman, MC

1. 6:15 AM .....Reveille attended by all Officer.
2. 6:15 to 6:45 AM .....Calisthenics for entire battalion.
3. 7:00 AM .....Breakfast.
4. 7:30 AM .....Sick-Call--Dispensary.
5. 9:00 AM .....Medical Supply, Administration and Medical Personnel Duties.
6. 9:30 AM .....Inspection of Battalion Area, All Messes and Barracks.
7. 10:45 A, to 11:45 AM ..Firing Instruction on Ranges in .22 Caliber and .30 Caliber Rifles. Machine guns and Sub-machine guns, and .45 Caliber Pistols.
8. 12:00 Noon .....Lunch.
9. 1:00 PM .....Medical Record, Maintenance and Schedule Routine, Files and Correspondence.
10. 2:00 PM to 4:00 PM ...Classes for Medical Training of Detachment Personnel.
11. 4:15 to 4:45 PM .....Obstacle Course and Physical conditioning Exercises.
12. 5:00 PM .....Recall. Attention to Personal Items, especially as regards to appearance, in preparation for inspections.
13. 6:00 PM .....Dinner.

The remainder of the day is free except on those days when you are the Medical Officer of the day. Major

Wyatt of the 144th FA works with us, thus you will be medical officer of the day every third night, according to the schedule posted in our dispensary. It is recommended that in your free time at night, you thoroughly familiarize yourself with the contents of the following Field Manuals:

FM 8-40 .... Field Sanitation
FM 8-45 .... Records of Morbidity and Mortality
FM 8-220 ... Medical Department Soldiers Handbook
FM 22-5 .... Infantry Drill Regulations

/sgd/ John H. Carlock, Capt. MC
John H. Carlock, Capt. MC
Surgeon, 776th Tank Destroyer Bn.

He pleaded not guilty to all Charges and Specifications. He was found guilty of Charges I and II, and the Specifications thereunder. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for five years. The reviewing authority approved only so much of the findings of guilty of Specification 2, Charge I, as involves failure to obey, in the manner, under the circumstances, and at the place alleged between the hours of 1 p.m. and 3 p.m. of April 16, 1942, and only so much of the findings of guilty of the Specification of Charge II as involves willful disobedience of a lawful command, in the manner and under the circumstances alleged between 2 p.m. and 4 p.m., approved the sentence, and forwarded the record of trial for action under the 48th Article of War.

3. At the beginning of the trial the trial judge advocate and the defense counsel joined in moving the court to inquire into the sanity of the accused. This motion was granted, and extensive testimony was received concerning the mental responsibility of the accused as of the time of the trial and as of the time of the alleged offenses.

This evidence shows that prior to April 16, 1942, the date of the alleged offenses, the accused had been twice a patient in the Barnes General Hospital. During his first period of hospitalization from February 10 to March 19, 1942, the accused was primarily the patient of Dr. Goering of the Orthopedic Department. He was particularly examined by Dr. Goering for an alleged back injury, and by Dr. Sugar, an eye specialist, for an eye complaint. During this period, however, the accused was also examined by Captain Bradshaw, Chief of the Neuropsychiatric Section, who testified that he examined the accused one afternoon for several hours and that he conferred both with Dr. Goering and Dr. Sugar concerning the complaints of the accused, but that he did not discuss the

psychoneurotic condition of the accused with them. He testified that the accused suffered subjective symptoms, exaggerated his complaints, and in his opinion had a mild case of psychoneurosis (R. 160). He also testified that he did not observe any emotional instability in the accused, or any compulsive defensive reaction on the part of the accused while the accused was at the hospital, but that the accused seemed to be happy and content while there. He further stated that it would be very easy for a doctor with a knowledge of psychiatry to simulate psychoneurosis (R. 162). Captain Bradshaw admitted that it was possible for a psychoneurotic who was apparently normal, under very great change in circumstances, to change within a very short time to such a state that he would be unable to perform physical duty (R. 169-170). On this point he stated that he believed that if a psychoneurotic person were called a liar, a coward, a malingerer, and threatened with court-martial action, he might experience a defensive reaction (R. 178).

On March 10, 1942, a Disposition Board at the Barnes General Hospital rendered the following report concerning the accused:

> "After a thorough examination of the officer and the clinical record pertaining to his case, the Board finds that the diagnosis is as follows:
>
> "(1) Psychoneurosis:
>
> LOD, No, EPTAD.
>
> The Board is of the opinion
>
> "That this officer has reached maximum hospital improvement and is physically fit for active military service" (Cts. Ex. 22).

From April 2 to April 15, 1942, the accused was again a patient in the Barnes General Hospital. During this second period of hospitalization, the accused was primarily the patient of Captain Cromwell, an assistant of Captain Bradshaw, the chief of the Neuropsychiatric Department, and Captain Bradshaw did not, during this period, attempt to make a detailed study of the accused (R. 163). Captain Cromwell testified that the illness of the accused "* * * is an honest illness" on his part, although he has a tendency to exaggerate his condition. He stated that "My conclusion is that Lt. Riesenman is a psychoneurotic and has been for years".

On the basis of this period of hospitalization, a second Disposition Board composed of two of the same officers who on March 10, 1942,

had reported the accused as fit for full military duty, made a similar report, as follows:

> Second diagnosis, April 7, 1942.
> Period of hospitalization April 2 to April 15, 1942.
> "(1) Psychoneurosis, mild, not disabling.
> "(2) Pes planus, 1st degree, bilateral, non-symptomatic. LOD, #1 and #2, No, EPTEAD.
>
> The Board is of the opinion
>
> "That this officer has reached maximum hospital improvement and is physically fit for full military duty.
>
> The Board recommends:
>
> "That 1st. Lt. Francis R. Riesenman be discharged from the hospital and returned to his proper station for duty" (Cts. Ex. 22).

Following these two periods of hospitalization in the Barnes General Hospital, and subsequent to the alleged offenses of which the accused is charged, a Board of Medical Officers was appointed to determine whether the accused was sane and whether on the date of the alleged offenses he was able to distinguish right from wrong and to adhere to the right (Cts. Ex. No. 1). This board, consisting of two psychiatrists and a general practitioner of medicine, observed the accused from May 7, 1942, until May 13, 1942, and rendered a report as follows:

> "a. Diagnosis: Psychoneurosis, mixed type, severe.
> "b. That this officer is not insane and was not insane on April 16, 1942.
> "c. That this officer did know right from wrong.
> "d. That knowing right from wrong he nevertheless was unable to adhere to the right because of his marked emotional instability and his compulsive defensive reactions.
> "e. That this officer is capable of conducting his defense intelligently."

In addition to the report of this board of officers, each of the members of the board testified in person. Each officer expressed the opinion that the accused was suffering from a severe, mixed type of psychoneurosis. Psychoneurosis was described as a condition or state of emotional instability which causes a person to suffer from imaginary or exaggerated complaints. It was explained that such a person might be compelled, by a so-called compulsive defensive reaction, to defend him-

self from circumstances or conditions which, because of his exaggerated or imaginary ailments, he might feel unable to meet. Such a person, in his efforts to defend himself from such conditions, might be so emotionally unbalanced as to be unable to adhere to the right although recognizing the difference between right and wrong. In the opinion of the board of officers the accused was in such a condition on April 16, 1942, the day of the alleged offenses (R. 28-49; 94-107; 110-136). The president of the board testified that "From a psychiatric and medical viewpoint, * * *" the accused should be pardoned from the consequences of his acts on April 16, 1942 (R. 41-42). He also explained that wrong conduct or the failure of a psychoneurotic to adhere to the right

> "* * * does not show a lack of character. It shows an inherent instability * * *. Usually they [the psychiatric] inherit these tendencies and not the actual difficulty. They inherit the tendencies toward these so called breakdowns * * *" (R. 30).

Concerning the inherited tendencies of the accused toward a psychiatric condition, the collected data considered by the board of officers shows that the father of the accused has been insane, that his father is a highstrung, nervous person who, on two occasions, has been confined in a hospital for mental treatment. One brother at the age of 3 suffered from pertussis with ensuing encephalitis and convulsions and had to be kept in a straight jacket for 3 years. One paternal aunt has been a patient in a mental institution for 3 years. Another paternal aunt never married and has been in different hospitals for approximately 15 years. She is very nervous and unstable. One paternal cousin was sent to the Warren State Hospital for mental treatment 2 months prior to this trial. Another paternal cousin is said never to have been right since the last war. Still another first cousin is in a mental institution at the present time (R. 52-54).

The Army history of the accused, which was considered by the Board of Medical Officers, shows that when the accused first applied for a commission he was rejected for reason of physical disability and that later, through the efforts of friends and notable persons, he secured a commission which he accepted despite his trouble with his eyes and headaches. The accused served approximately 6 months in Walter Reed Hospital in the Neuropsychiatric Section and was given to believe that he was to be assigned to a hospital for that type of work. Instead of such an assignment, however, he was sent to field duty at Fort Lewis and assigned to the 776th Tank Destroyer Battalion. The accused felt that he was incapable of doing field work and made an effort to be relieved of his assignment. When

efforts failed, he became more nervous and was then sent to the Barnes General Hospital for treatment. After a short stay in the hospital he was returned to duty with his organization. Shortly thereafter he was again sent to the Barnes General Hospital and after a short time again returned to his organization for duty. It was on the occasion of this second return from the Barnes General Hospital that the events occurred upon which the Charges are based (R. 55-57).

Upon the basis of the testimony outlined above, the court, upon secret written ballot, made the following finding:

> "* * * that at this time the accused is in a proper mental condition to undergo trial, and the court further finds that the accused, on April 16, 1942, the time of the commission of the alleged offense, was so free from mental defect, mental disease or mental derangement, as to be able to distinguish right from wrong and adhere to the right" (R. 193).

At the conclusion of all the testimony the court again passed upon the issue of sanity and rendered a similar finding (R. 278).

4. The evidence presented in support of the Charges and Specifications shows that the accused returned from the Barnes General Hospital on April 15, 1942. On the following morning he reported to Captain Carlock, the administrative medical officer of his battalion, and informed him that he had been marked for duty by the hospital authorities but that regardless of the hospital report he was still sick. The accused asserted that he was suffering with his eyes, with headaches, and was so nervously upset that he felt as if he had a knot in his stomach. Although Captain Carlock did not examine the accused, he testified that he felt that the accused -

> " * * * was terribly nervously upset, wrought up, nervous.
> "Q In other words, he wasn't in a normal healthy condition?
> "A He wasn't in a state of nervous health anyway. He was irritable and excitable from a nervous standpoint. I don't know how to elaborate on that because I wasn't introspective from a medical angle" (R. 209).

Captain Carlock also stated that the accused, upon return from the hospital, appeared to have lost weight (R. 212).

Later, during the same day, Captain Carlock, at the direction of

Major Barney, his battalion commander, prepared a detailed daily routine of duties for the accused to perform. Captain Carlock gave this list of duties to the accused at about 12:30 p.m., and directed him to carry out his duties as outlined. These detailed requirements are set forth in the Specification of Charge II. The accused accepted the list but failed to perform the duties outlined for 1 p.m., i.e., "Medical Record, Maintenance and Schedule Routine, Files and Correspondence". Furthermore, the accused refused to conduct a class for the "Medical Training of Detachment Personnel" between 2 and 4 p.m., as directed. At the time the orders were presented to him, the accused stated "I can't do it. I just can't do it" (R. 215).

At about 11:30 a.m., on April 16, 1942, the accused reported to Major Barney, commanding officer of his battalion. Major Barney informed the accused that he had received a report from the Barnes General Hospital Disposition Board stating that the accused was physically and mentally competent to perform duty and that he had been returned to full duty status (R. 220). In reply the accused explained that he was ill and physically unable to do full duty but Major Barney informed him that Captain Carlock would give him his orders and that he must comply with them or he, Major Barney, "* * * would try him". Major Barney gave him a copy of the detailed orders which Captain Carlock had prepared (R. 217-220).

In the afternoon of the same day Major Barney, after a conference with the Corps inspector and Colonel Laughlin, the Corps judge advocate, called Captain Carlock, Major Gaulke, executive officer, Lieutenant Weir, adjutant, and the accused into his office. Major Barney then gave the accused the same instructions which he had previously received from both Major Barney and Captain Carlock, and told him -

> "* * * that if he failed to comply with the instructions contained in those orders, in view of the findings of the Medical Board at Barnes General Hospital that there was but one recourse open to me and that would be to prefer charges against him for malingering and direct disobedience of an order".

Major Barney explained to the accused the legal consequences of disobedience of the orders. The accused again protested his physical inability to perform regular duty and asserted that "I cannot and will not perform those duties and will have to accept arrest" (R. 222). The accused was then placed in arrest in his quarters and was kept in arrest until he was sent to the Station Hospital at Fort Lewis (R. 222-223).

5. The accused in an unsworn statement presented a biographical

sketch of his life. He explained that from the age of 7 to the age of 1 he was constantly emotionally disturbed by the feeble-minded condition of his brother which required the keeping of his brother in a straight jacket and that he had never quite recovered from the shock of losing another brother by drowning.

At an early age the accused developed a tendency toward car sickness which he had never overcome. In 1935 the accused experienced his first trouble with his eyes. Although he was repeatedly treated for his eye trouble he had never overcome it. In addition to the trouble with his eyes he suffered from headaches, nervous trouble, and from a back injury.

After graduation from medical school the accused had been offered a position in the Gallinger Hospital, which he rejected in order to enter the Army. When he first applied for a commission he was rejected for physical unfitness. The accused, however, appealed to the Surgeon General and assured him that he felt he could perform duty in a hospital. The Surgeon General promised that he would recommend him for a hospital post. Thereafter, the accused was commissioned and given an assignment at Walter Reed General Hospital.

The accused stated that at all times he was eager to serve his country, and that he had volunteered to go on an assignment to Africa. Instead of going to Africa, however, he had been sent to Fort Lewis for field duty. When his duties there had become too hard for him, he had answered sick call and had been marked "Duty". Later he was sent to the Barnes General Hospital on two occasions.

When the accused returned from the hospital and reported to his organization on April 16, 1942, he stated that he had lost 23 pounds in weight and was suffering with his eyes, his back, and his nerves. When he reported to Major Barney, his commanding officer, Major Barney stated that -

> "I am going to place you under arrest and charge you with feigned disability to evade duty * * *. I feel that you are doing it because you are afraid of going into action" (R. 269).

In describing his interview with Major Barney, the accused stated that although he might have said he would not follow the outline of duties at the morning interview when he was very excited, at the afternoon interview he had told Major Barney "I cannot do it. I am sorry". The ac-

cused stated that on April 16, 1942, he had a feeling which he could not describe and that he never willfully or intentionally attempted to evade or disobey any order or duty (R. 271-272).

6. Specification 1, Charge I, alleges that the accused, on April 16, 1942, feigned disability with intention of evading duty. The evidence shows that on April 15, 1942, the accused was discharged from the Barnes General Hospital and returned to his station for duty. It also shows that on the following morning he reported to his superior medical officer and advised him that he was unable to perform regular military duty. Despite this claim of illness, the accused was not examined and no determination at that time was made of his physical or mental condition, although this superior medical officer testified that he felt that the accused was at that time "* * * terribly nervously upset, wrought up, nervous". In view of this testimony and the absence of any direct evidence showing that the accused was actually feigning disability on April 16, 1942, the findings of guilty under this Specification should be disapproved.

7. Specification 2, Charge I, alleges that the accused failed to obey an order of Captain John H. Carlock to perform routine duties between 1 p.m. and 3:40 p.m. on April 16, 1942, in violation of the 96th Article of War. The Specification of Charge II, alleges that the accused willfully disobeyed Major Barney, his superior officer, by refusing to perform routine duties on April 16, 1942, in violation of the 64th Article of War. The allegation of the Specification, Charge II, alleges a willful disobedience at the same time covered in the allegation of Specification 2, Charge I. The reviewing authority, however, approved only so much of the findings under Specification 2, Charge I, as found that the accused failed to obey Captain Carlock between 1 p.m. and 3 p.m. of April 16, 1942, and only so much of the findings under the Specification, Charge II, as found that the accused willfully disobeyed Major Barney from 2 p.m. to 4 p.m.

The evidence shows that at about 12:30 p.m. on April 16, 1942, Captain Carlock, at the direction of Major Barney, gave the accused a list of daily routine duties and directed him to carry out the duties as outlined. Furthermore, the evidence shows that the accused claimed illness and failed to perform the duties outlined.

At about 3 p.m. of the same day, Major Barney gave the accused the same list of routine duties which had previously been given him by Captain Carlock and ordered him to perform them. The accused claimed illness, refused to obey the order of Major Barney, and specifically refused to perform the duties designated to be performed from 3 p.m. to 4 p.m. This evidence shows very clearly that the accused refused to obey

the order as alleged. If, therefore, the accused was shown to be so free from mental defects as to be able to "adhere to the right" on April 16, 1942, he is subject to the punishment assessed against him. In view, however, of the lack of proof that the accused was able to "adhere to the right", at the time in question, the findings of guilty under this Specification should be disapproved.

8. The controlling problem in this case, is the determination of the mental responsibility of the accused for the several offenses of which he is charged. On this question the Manual for Courts-Martial, 1928, directs that -

> "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. * * *" (M.C.M., 1928, par. 78).

This provision, which is similar to the provision of the 1921 Manual, places the burden of ultimate persuasion on the issue of mental responsibility upon the prosecution and recognizes the fundamental principle that all men are deemed innocent until proven guilty beyond a reasonable doubt (see M.C.M., 1921, par. 219). On this point the United States Supreme Court has made the following authoritative pronouncement:

> "* * * Strictly speaking, the burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence or to disapprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of the trial and applies to every element necessary to constitute the crime. * * *.
>
> "* * *
>
> "If insanity is relied on and evidence given tending to establish that unfortunate condition of mind, and a reasonable well-founded doubt is thereby raised of the sanity of the accused, every principle of justice and humanity demands that the accused shall have the benefit of the doubt" (Davis v. United States, 160 U.S. 469, cited in James, CM 116694).

In determining the type and extent of mental derangement or disease which will relieve one of criminal accountability, we are guided by the provisions of the Manual for Courts-Martial, 1928, which state that:

"* * * 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" (M.C.M., 1928, par. 78).

The Manual for Courts-Martial, 1921, on this point provides that in determining the issue of mental responsibility for a crime, the courts-martial having such responsibility should ballot upon the following questions:

"* * *

"(2) Was the accused at the time of the commission of the alleged offense so far free from mental defects, mental disease, or mental derangement as to be able, concerning the particular acts charged, both (1) to distinguish right from wrong and (2) to adhere to the right?

"This question will be balloted upon as to each specification, and if answered negatively or a tie vote the court will acquit the accused as to such specification" (M.C.M., 1921, par. 219 (g)).

Similarly, Winthrop states that:

"To constitute a defence on the ground of insanity, it may be made to appear, * * *, on the other hand, that, though aware of the nature and consequence of his act, as well as of its wrongfulness or its illegality, he was prompted by such an uncontrollable impulse as not to be a free agent" (Winthrop's Military Law and Precedents, Reprint 1920, p. 294).

In CM 116694, James, The Judge Advocate General cited the following language with approval:

"Men, under the influence of disease, may know the right, and yet be powerless to resist the wrong. The well-known exhibition of cunning by persons admitted to be insane, in the perpetration of an illegal act, would seem to indicate comprehension of its evil nature and legal consequence, and yet the power of self-control being lost from disease, there can be no legal responsibility."

Likewise, in CM 124243, Harris, The Judge Advocate General held that evidence showing acute melancholia or emotional insanity presented a valid defense against the offense charged. Although this just and humanitarian doctrine is not recognized in all jurisdictions, it is definitely a part of our military law.

In view of the above authorities and the uncontradicted testimony that the accused was capable of conducting his defense intelligently and of distinguishing right from wrong at the time of the alleged offenses, it remains only to determine whether, at that time, he was also able to adhere to the right. If the prosecution failed to discharge its burden of proof on this vital issue, the findings of guilty must be disapproved. A detailed consideration, therefore, of the evidence on this point is necessary.

The report of the board of medical officers appointed to inquite into the mental condition of the accused, reported:

> "d. That knowing right from wrong he nevertheless was unable to adhere to the right because of his marked emotional instability and his compulsive defensive reactions."

Furtheremore, each member of the board testified that he had examined the accused and that it was his opinion that the accused was unable to adhere to the right on April 16, 1942, the date of the alleged offenses. Their examination was based on the personal history of the accused, as well as upon their observation and examination of him. Two members of the board were experienced psychiatrists and there is no evidence in the record reflecting upon their credibility as witnesses, or upon the sincerity of their professional opinions. Their statements that there is an inherited tendency toward a psychiatric condition is clearly supported in the present case by the history of much mental illness in the family of the accused. Furthermore, the testimony of Captain Cromwell, the officer who had charge of the accused during his second visit to the Barnes General Hospital, without passing on the ability of the accused to adhere to the right, stated that "My conclusion is that Lt. Riesenman is a psychoneurotic and has been for years". In addition, the evidence tending to show the physical and mental condition of the accused upon his return from the Barnes General Hospital, including the statement of his superior medical officer, that "I felt that he was terribly upset, wrought up, nervous", tends to corroborate the definite conclusion of the board of psychiatrists.

On the other hand, the reports of the two Disposition Boards at

the Barnes General Hospital, made 37 days and 9 days, respectively, before the alleged offenses, although concluding that the accused was suffering from psychoneurosis, found further that the accused was "physically fit for full military duty". Inasmuch as these findings recognize the mental ailment of the accused, such findings support the basic opinion of the special board that the accused was suffering from psychoneurosis. Although the Disposition Board found the accused to be physically fit for duty at the time of their meetings, it could not and did not pass upon the mental condition of the accused or his ability to adhere to the right as of April 16, 1942, and its findings cannot, therefore, be considered as furnishing a trustworthy basis for the court's finding on this vital question.

Likewise, the testimony of Captain Bradshaw, Chief of the Neuropsychiatric Section of the Barnes General Hospital, failed to furnish evidence to support the conclusion of the court that the accused, on April 16, 1942, could "adhere to the right". Even though we give full credence to the assertion that he had observed no emotional instability in the accused while the accused was at the Barnes General Hospital, such conclusion appears to be based upon observations made without the benefit of knowledge acquired from subsequent events and scarcely affords, therefore, a trustworthy key to the interpretation of those events. The witness admitted that one suffering from psychoneurosis might undergo a distinct mental change in a short time if subjected to a sufficient disturbance. It would seem that the accused was subjected to such a disturbance on April 16, 1942, when he was charged with malingering and threatened with being court-martialed. It should be observed that neither Captain Bradshaw, nor any of the other expert witnesses testified directly that the accused was so free from mental defects as to be able "to adhere to the right" on April 16, 1942.

Furthermore, the record presents no satisfactory explanation why the clearly expressed and deliberate opinion of these experts, whose unimpeached and unprejudiced testimony presents prima facie proof that the accused was unable to adhere to the right on April 16, 1942, should have been rejected by the court. Concerning the duty of the court-martial to consider such testimony, it has been said that:

> "* * * While it is the function of the court as triers of fact to consider the report of the board and accord to it that weight and credence to which, in the judgment of the court, it may be entitled, yet since the report of the board, supported by other evidence, was unimpeached by the prosecution, it is prima facie proof of mental derangement and the court could not entirely disregard such evidence. * * *" (CM 128252, Heppberger).

Furthermore, Mr. Justice Harlan, in the case of Davis v. United States, cited above, concluded with the following observations:

> "It seems to us that undue stress is placed in some of the cases upon the fact that, in prosecutions for murder, the defense of insanity is frequently resorted to and is sustained by the evidence of ingenious experts whose theories are difficult to be met and overcome. Thus, it is said, crimes of the most atrocious character often go unpunished, and the public safety is thereby endangered. But the possibility of such results must always attend any system devised to ascertain and punish crime, and ought not to induce the courts to depart from principles fundamental in criminal law, and the recognition and enforcement of which are demanded by every consideration of humanity and justice. No man shall be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them, by whomsoever adduced, is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged."

In view of the standards definitely established by the foregoing authorities and the rule of law which places the burden of ultimate persuasion on the prosecution to show that the accused could adhere to the right on April 16, 1942, we are impelled to the conclusion that the prosecution, not only failed to discharge this burden of proof, but also failed to rebut the positive findings of the Medical Board appointed to determine the mental condition of the accused. Accordingly, all the findings of guilty and the sentence should be disapproved.

9. The Board of Review has given careful consideration to the following letters:

A letter from Jos. Riesenman, Jr., to Lieut. Colonel Alfred M. Wilson.
Letters from Augusta Mary Riesenman to Colonel Charles C. Cresson, dated July 3, 1942, and July 23, 1942.
Letters from Augusta Mary Riesenman to Lieut. Colonel Robert V. Laughlin.
A letter from the Honorable Harold Knutson to the Commanding General, Fort Lewis, Washington, and to The Judge Advocate General.
A letter from the Honorable Augustine B. Kelly to The Judge Advocate General.
A letter from the Honorable James J. Davis to The Judge Advocate General.

10. The accused was born at Franklin, Pennsylvania, on November 10, 1909. The records of the Office of The Adjutant General show his service as follows: Applied for appointment on February 12, 1941; Rejected as physically disqualified March 17, 1941; Waiver of overweight approved April 28, 1941; Appointed first lieutenant Medical Reserve June 14, 1941, and accepted by oath of office June 17, 1941; Ordered to extended active duty, effective July 12, 1941, with permanent station at Washington, D.C.

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

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

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vol 13 Army JAG Bd. Rev.

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