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Judge Advocate General's Department

BOARD OF REVIEW

Holdings, Opinions and Reviews

Volume XVI

including

CM 227873 to CM 228964

(1942-1943)

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

SPJGH
CM 227873

DEC 3 1942

N.R

UNITED STATES	)	EIGHTH SERVICE COMMAND
v.	)	Trial by G.C.M., convened at Fort Sill, Oklahoma, October 23, 1942. Dishonorable discharge and confinement for five (5) years. Federal Reformatory, El Reno, Oklahoma.
Private CHESTER D. ROYSTER (18011846), Service Battery, 2nd Battalion, 349th Field Artillery.	)	

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private Chester D. Royster, Service Battery, Second Battalion, Three Hundred Forty-Ninth Field Artillery, did, at Fort Sill, Oklahoma, on or about June 5, 1942, commit the crime of sodomy by feloniously and against the order of nature having carnal connection per rectum with a person of the same sex, to wit: General Prisoner Fred T. Willborn.

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

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3. The Specification alleges that the accused -

"* * *, did, at Fort Sill, Oklahoma, on or about June 5, 1942, commit the crime of sodomy by feloniously and against the order of nature having carnal connection per rectum with a person of the same sex, to wit: General Prisoner Fred T. Willborn".

The record presents, however, no competent evidence that the accused did penetrate the body of General Prisoner Fred T. Willborn with his sexual organ. Since actual penetration or sexual connection is an essential element of sodomy, the evidence is legally insufficient to sustain the offense alleged (CM 209651, Palmer and Morrell; CM 206242, Stone).

On the other hand, the evidence clearly shows that the accused attempted to commit sodomy in the manner alleged, and is legally sufficient, therefore, to support so much of the finding of guilty as involves a finding of guilty of the lesser included offense of an attempt to commit sodomy, in violation of the 96th Article of War (CM 191605, Ambrose; CM 186139, Kelley; CM 186140, Bolinger).

4. There is no maximum punishment prescribed in the table of maximum punishments (M.C.M., 1928, par. 104c), for the offense of an attempt to commit sodomy (CM 212056, Smith). The most closely related offense is sodomy, for which the maximum authorized punishment is dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for five years.

Since the offense of an attempt to commit sodomy is not punishable under Article of War 42 by confinement in a penitentiary by some statute of the United States of general application within the continental United States, excepting section 289, Penal Code of the United States, 1910, or by law of the District of Columbia, penitentiary confinement is not authorized in the present case.

5. For the reasons stated, the Board of Review holds that the record of trial is legally sufficient to support only so much of the findings of guilty as involves findings that the accused did, at the time and place, and in the manner alleged, attempt to commit sodomy, 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 five years at a place other than a penitentiary, Federal correctional institution, or reformatory.

Roston S. Hill Jr., Judge Advocate.

Chas. L. Grisson, Judge Advocate.

Abner E. Lefscomb, Judge Advocate.

SPJGH
CM 227873

1st Ind.

War Department, J.A.G.O., DEC 4 1942 - To the Commanding General, Headquarters Eighth Service Command, Services of Supply, Fort Sam Houston, Texas.

1. In the case of Private Chester D. Royster (18011846), Service Battery, 2nd Battalion, 349th Field Artillery, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty as involves findings that the accused did, at the time and place, and in the manner alleged, attempt to commit sodomy, 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 five years at 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. The court adjudged and you approved the sentence including confinement for five years, on the basis of findings of guilty of the accomplished act of sodomy, in violation of Article of War 93. I have concurred in the holding that the record legally supports findings only of an attempt to commit sodomy, in violation of Article of War 96. I recommend, therefore, that you remit so much of the confinement as in excess of that appropriate to the attempt to commit sodomy. In many states the statute provides for an attempt a penalty one-half as great as the penalty for the completed offense. I suggest that the sentence be reduced to confinement at hard labor for two and one-half years.

3. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:
(CM 227873).

Myron C. Cramer

DEC 4 '42 PM

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

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JAO, 8th Service Command

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

SPJGK
CM 227908

DEC 15 1942

UNITED STATES	SIXTH SERVICE COMMAND SERVICES OF SUPPLY
v.	Trial by G. C. M., convened at Fort Custer, Michigan, October 14 and 15, 1942. Dishonorable discharge and confinement for life. Penitentiary.
Private CHARLES WILSON (18009219), Headquarters Battery, 1st Battalion, 100th Coast Artillery (Antiaircraft).	

REVIEW by the BOARD OF REVIEW
HOOVER, COPP and SARGENT, 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 93rd Article of War.

Specification: In that Private (then Staff Sergeant) Charles Wilson, Headquarters Battery, First Battalion, 100th Coast Artillery (Antiaircraft), did, in conjunction with Private Henry Scarborough, Headquarters Battery, First Battalion, 100th Coast Artillery (Antiaircraft), at Sault Sainte Marie, Michigan, on or about August 30, 1942, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person and in the presence of Mr. Willard Jollineau a billfold, keys, and a driver's license, value about three dollars ($3.00), and a 1936 Ford V8 Coupe, License No. NU1133, value about one hundred dollars ($100.00), total value of about $103.00, the property of Mr. Willard Jollineau.

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

Specification: In that Private (then Staff Sergeant) Charles Wilson, Headquarters Battery, First Battalion, 100th Coast Artillery (Antiaircraft), did,

> in conjunction with Private Henry Scarborough, Headquarters Battery, First Battalion, 100th Coast Artillery (Antiaircraft), at Sault Sainte Marie, Michigan, on or about August 30, 1942, forcibly and feloniously, against her will, have carnal knowledge of Miss Dorothy Ellis.

He pleaded not guilty to and was found guilty of the Charges and Specifications. No evidence of previous convictions was introduced. Three-fourths of the members of the court present concurring, he was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Leavenworth, Kansas, as the place of confinement, and forwarded the record for action under Article of War 50½.

3. The evidence shows that at about 12:30 a.m., August 30, 1942, Miss Dorothy Ellis and Mr. Willard Wayne Jollineau were in an automobile parked on the City Limits Road of Sault Sainte Marie, Michigan (R. 14). Jollineau was in the driver's seat and Miss Ellis was lying with her head on his lap (R. 15). Miss Ellis was fourteen years of age (R. 36) and was of a weight of about 98 pounds (R. 50). The car, a 1936 Ford coupe, belonged to Jollineau (R. 14). He testified that it had a retail market value of about $225 (R. 14, 15). Two negro soldiers, in uniform (R. 15, 26) suddenly appeared on the driver's side of the car (R. 15, 31) and one of them, whom Jollineau identified as accused (R. 17, 28) commenced to strike the door window (R. 15) with a ".45 automatic" (R. 31) pistol (R. 15). Jollineau unsuccessfully tried to start the car but about this time a hole was broken through the window (R. 15; Ex. 4). The soldier identified as accused ordered Jollineau and Miss Ellis out of the car, saying, "Get out of the car, you'll get hurt; get out of the car or we will shoot". They got out of the car. One of the soldiers thrust the pistol against Jollineau's back and Jollineau raised his hands and went three or four steps toward the back of the car. Jollineau testified, "I guess that is when they hit me". He lost consciousness. (R. 16)

Miss Ellis testified that Jollineau,

> "put his hands up and walked a few steps, and I was standing beside the car. One of the negro soldiers was standing beside me. I heard a moan and I turned and Willard was lying on the road. A negro was standing by me. He had his hands down the side as though

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> he was looking for something, I don't know what. We went out to the field a little ways, and I screamed, and then there was just one negro with me at the time, and then when I screamed two were there. And when I screamed they grabbed me and held my mouth and I could not talk, I could hardly breathe. They were holding me down very tight, and they told me I better not scream any more, make any more noise. And then they tore the clothes off" (R. 44).

She also testified that one of the soldiers "led" her across the road and "the first thing I knew I found myself on the ground" (R. 41) in a field (R. 42). Her slacks, which the men removed, were wrapped "around" her "mouth" (R. 50). She testified that one of them "wanted me to kiss him" (R. 47). One of the two men had the "gun" but did not threaten her in words (R. 49). She also testified:

> "They grabbed me, and both of them seemed to have hands on my mouth and my throat. I could hardly breathe. That is the only force they used" (R. 49).

Witness tried to move and to strike or kick the men but could not do so because they had their hands on her arms (R. 49, 50). She was "afraid *** just half stunned" (R. 50). Asked how she was compelled to remain on the ground she testified:

> "At first they had that gun, and then until they left there was one of them with me all the time" (R. 49).

Both men had sexual intercourse with her, in turn. While the "second man was on" her she heard a shot fired. The two men later had a conversation and "looked around as if they lost something" (R. 45). Witness was menstruating at the time of the assaults (R. 42). She was bruised about the face (R. 50).

Soon after the assaults Miss Ellis went to Jollineau (R. 46). His head was cut (R. 34). She was without her slacks (R. 16). Jollineau regained consciousness. The two soldiers got in the car and drove away (R. 46). The girl "found" her slacks and she and Jollineau made their way to a nearby house. They later reported the occurrences to the police (R. 16, 46).

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Miss Ellis did not in court identify accused as one of her assailants. Jollineau identified accused "upon the build of the man" and from his voice. He testified that accused's features "looks a little familiar. I would not say from his face positively, though". (R. 27, 32) He estimated that accused was about five feet, eight inches tall and weighed about 150 or 160 pounds (R. 29). He saw accused twice at a hospital the "next night or the next night after that" and said at the time that accused "looked like the man, one of the men that were there" (R. 19).

Miss Ellis was examined by a civilian physician at about 2 a.m., August 30. The physician testified that she was "very, very neurotic" and that he did not observe any bruises. Witness found her vagina swollen to some extent. He believed the swelling might have been caused by an injury or by her menstruation. Witness could not determine whether she had had recent intercourse. (R. 52-55)

At about 7:20 a.m., August 30, there were found on the City Limits Road some broken glass, a "woman's panties and a monthly strap attached onto the panties" and a ".45 automatic bullet". Some blood stains were observed and the "ground was all trodden" (R. 57, 58). Accused was not in his barracks at 12:30 a.m., August 30 (R. 65, 67). At 5:45 a.m. it was found that a pistol previously issued to him was not in the company barracks (R. 70). A telephone message was sent to accused (R. 70, 71) and at about 7:30 a.m., he appeared in his barracks. Upon being questioned he stated that his pistol was "at his home" (R. 69). Accused was sent by car, with another soldier, to bring the pistol to barracks (R. 73). Upon arrival at his quarters in Sault Saint Marie accused left the other man in the car and went into his quarters, where he was later observed cleaning his pistol (R. 91). The pistol was turned over to the company charge of quarters (R. 73). The company commander examined the pistol and found the butt "badly scratched" and,

> "in addition to the scratch marks which were fresh, or appeared to be fresh, there were also particles embedded into the patchwork of the handle that reflected light, such as would be done by pieces of glass " (R. 101).

At about 10:30 a.m. accused was observed lying down. He was questioned and said he "had slipped" and injured his knee (R. 102). It was soon

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discovered that he was suffering from a gunshot wound in his right thigh (R. 103, 122). An X-ray revealed what appeared to be a bullet in his knee (R. 123). Accused at first said he had been stabbed (R. 103) but later stated that the wound was caused by a bullet (R. 122).

Accused was placed in arrest (R. 100). At about 6:30 p.m., August 30, an investigation was commenced by Second Lieutenant Walter E. Schroeder, Quartermaster Corps, with accused, his alleged co-offender and other witnesses present. Accused was advised that he might remain silent and that whatever he said would be used against him (R. 128). The investigation proceeded and at about 1 a.m., August 31 (R. 139), accused, without promises, threats or force (R. 134), made an oral statement, in private, to the investigating officer (R. 130). He said, in substance, that on the night of August 29, 1942, he went with one Scarborough to the City Limits Road in Sault Sainte Marie (R. 141) and noticed two cars parked there. The men laid among some weeds until one of the cars left and then went up to the remaining car. Accused stated,

> "Scarborough had the pistol, slammed in the window of this parked car and ordered the people inside to come out. Both of them got out on the same side of the car. Scarborough took the young man, held the pistol on him, told Wilson to take the lady, and Wilson walked on across the road to a clump of weeds. He got there and threw the girl into the bushes. Scarborough came and the girl started to cry out. Both of them put their hands over her mouth to still her outcry and Scarborough started taking the clothing off of this girl.
>
> "After a bit he asked Wilson: 'Do you want yours now?' Wilson got up — or Scarborough got up, rather, and Wilson gave him the pistol, and Wilson then had intercourse with the girl. He got off, got his pistol back from Scarborough and went over towards the road, and Scarborough resumed the act or started another act. He got over to the road and he started to put this pistol of his into his pocket. Someway or other he touched the trigger.
>
> "There happened to be a cartridge in the chamber, and the pistol went off and shot him in the leg" (R. 143).

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Accused stated further that he remarked to Scarborough that he could not proceed further because of his wound and that Scarborough suggested they take the car. They took the car and drove to a point somewhat beyond the vicinity of their home in Sault Sainte Marie. Accused then went to his home (R. 143).

After accused had made the foregoing statement Lieutenant Schroeder told accused, in order to induce him to repeat his statement in the presence of the other accused, that if accused would repeat the statement the officer would ask the county prosecutor to release accused's wife, a fourteen or fifteen-year-old girl who had been taken into custody (R. 135, 136). A second statement was then made. Evidence of the contents of this statement was not offered (R. 145). Lieutenant Schroeder testified that accused stated to Scarborough in witness' presence that he had made the second statement because the authorities had "the evidence" and that accused would have made it "regardless of the promise" concerning his wife (R. 147).

Accused did not testify or make an unsworn statement.

4. The evidence plainly shows the commission by accused of the rape and robbery charged. The testimony of Miss Ellis that accused had carnal knowledge of her through force and fear is uncontradicted and is in substantial accord with his statement to Lieutenant Schroeder. The circumstances preclude any possibility that the girl consented to the act. The evidence also shows that the automobile was taken by force and through fear. The circumstances of the taking sufficiently support the finding of larcenous intent.

5. The charge sheet shows that accused is 20 years of age. He first enlisted on August 18, 1940.

6. The court was legally constituted, and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. Confinement in a penitentiary is authorized for the offenses of robbery and rape, recognized as offenses of a civil nature and so punishable by penitentiary confinement for more than one year, robbery by

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section 463, Title 18 of the United States Code, and rape by section 458, Title 18 of the United States Code.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

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

SPJGK
CM 227909

DEC 11 1942

SIXTH SERVICE COMMAND
SERVICES OF SUPPLY

UNITED STATES v. Private HENRY SCARBOROUGH (34092791), Headquarters Battery, 1st Battalion, 100th Coast Artillery (Antiaircraft).	Trial by G. C. M., convened at Fort Custer, Michigan, October 15, 1942. Dishonorable discharge and confinement for life. Penitentiary.

REVIEW by the BOARD OF REVIEW
HOOVER, COPP and SARGENT, Judge Advocates.

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

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

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

Specification: In that Private Henry Scarborough, Headquarters Battery, First Battalion, 100th Coast Artillery (Antiaircraft), did in conjunction with Private (then Staff Sergeant) Charles Wilson, Headquarters Battery, First Battalion, 100th Coast Artillery (Antiaircraft), at Sault Sainte Marie, Michigan, on or about August 30, 1942, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person and in the presence of Mr. Willard Jollineau a billfold, keys, and a driver's license, value about three dollars ($3.00) and a 1936 Ford V-8 Coupe License No. NU1133 value about $100, total value of about $103.00 the property of Mr. Willard Jollineau.

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

Specification: In that Private Henry Scarborough, Headquarters Battery, First Battalion, 100th Coast Artillery (Antiaircraft), did, in con-

> junction with Private (then Staff Sergeant) Charles Wilson, Headquarters Battery, First Battalion, 100th Coast Artillery (Antiaircraft), at Sault Sainte Marie, Michigan, on or about August 30, 1942, forcibly and feloniously, against her will, have carnal knowledge of Miss Dorothy Ellis.

He pleaded not guilty to and was found guilty of the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced, three-fourths of the members of the court present concurring, to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Leavenworth, Kansas, as the place of confinement and forwarded the record for action under Article of War 50½.

3. The evidence shows that about 12:30 a.m., August 30, 1942 (R. 12, 23), Miss Dorothy Ellis and Mr. Willard Wayne Jollineau were seated in a 1936 Ford V-8 coupe, parked on the City Limits Road, Sault Sainte Marie, Michigan (R. 11, 12, 23). Jollineau was in the driver's seat and Miss Ellis was lying with her head in his lap (R. 23). Miss Ellis was 14 years of age and weighed about 98 pounds (R. 11). Jollineau was 19 years of age (R. 23). The car had a market value of about $225 (R. 25). Miss Ellis and Jollineau had been in the parked car for about an hour. At the time indicated "two negro soldiers" appeared (R. 12, 24) and struck the window on the left side of the car with the butt of a ".45 automatic" three or four times (R. 24, 25, 31) and broke a hole in the glass (R. 12, 30, 33, 35). Jollineau tried unsuccessfully to start the car (R. 24, 31). He and Miss Ellis vacated the car upon an order by the soldiers to "Get out or you will get hurt; get out or we will shoot" (R. 23, 33). One of the soldiers referred to as Wilson put the pistol against Jollineau's back (R. 20, 24, 34) and forced him to walk a few paces toward the back of the car with his hands raised (R. 24). At about this time Miss Ellis "heard a moan", turned and saw Jollineau lying on the ground. He became unconscious. (R. 12, 24, 34)

Miss Ellis testified that thereupon one of the men (R. 12) whom she pointed out in court as accused (R. 13),

> "*** ran his hands down the side of my jacket and my slacks, and took me over to the field. In the

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> field I screamed. The other one came and they put their hands on my mouth. I found myself on the ground before I knew it" (R. 12).

She testified that the men tore her "clothes" (R. 12), that one of them "asked me to kiss him, he held his fist up to my face and threatened to hit me with it" and that, without other threats (R. 22), the two "attacked" her (R. 12). She did not try to run away because she was "too frightened. All my strength was gone. I couldn't move" (R. 22). Each of the soldiers, Wilson first (R. 21), had intercourse with her, each inserting his penis in her vagina (R. 12, 14). Later they held a brief conversation which witness did not understand. During or at about the time of the conversation a shot was fired. The two "seemed to look around for something", told the girl to "stay there" and drove away in the automobile. (R. 13)

At about the time accused and his companion left the scene Jollineau regained consciousness (R. 24, 25). Miss Ellis "found" her "slacks" (R. 15). Together she and Jollineau went to a nearby house (R. 15, 36) and later notified the police by telephone (R. 15, 37). Miss Ellis was menstruating at the time of the assaults (R. 15). Her sanitary napkin and belt, later found at the scene, were introduced in evidence (R. 16). Jollineau next saw the car three or four days later at the police station in Sault Sainte Marie (R. 25).

The night of August 29-30, at the scene of the offenses, was cloudy with a moon which was at times obscured by the clouds (R. 33). During her testimony Miss Ellis at first definitely identified accused as one of the assailants (R. 13). She later testified that she had seen accused twice following the assaults and prior to the trial (R. 16, 17), that in the course of a "hearing" of the case she had stated that she was "quite sure", but was "not positive" that he was one of the assailants and that she could not be positive because "it was too dark to see for sure". She testified at the trial that she was not, at the time of the trial, more positive as to the identity of the assailant than at the time of the hearing (R. 19). Jollineau testified that from what he "saw of the man that night" accused fitted the "description" of one of the assailants as to "build" (R. 28), and looked like one of the assailants (R. 32). Witness saw accused in the course of an investigation, but could not then "positively say" that accused was one of the assailants (R. 29). Witness could not identify the assailants by their features (R. 36).

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On the morning of August 30 there were found at the scene of the offenses some broken glass, a "pair of girl's panties with a strap" and a .45 caliber automatic bullet. Blood stains on some rocks and grass were observed. (R. 38) On the same day a pair of trousers bearing the last four digits of the serial number of accused and the initials "H.S." were found in accused's barracks at Fort Brady, Michigan, in a footlocker bearing his name (R. 41, 42). These trousers had one or two "late" (R. 46) "dark stains" on the inside (R. 42, 43, 44) of the fly (R. 46). There were clinging to the trousers some "fine brown weed-seed" (R. 47, 53) of a variety found at the scene of the assaults and elsewhere in the locality of Fort Brady (R. 54). Some small particles of glass were found in the cuffs of the trousers (R. 47). Similar glass particles were found on the seat of the Jollineau car (R. 47; Ex. 8). After accused was taken to a police station on August 30 particles of glass were seen on his shoes (R. 81).

Accused was a member of and was quartered with Headquarters Battery, 1st Battalion, 100th Coast Artillery, but occupied a three-room cottage in Sault Sainte Marie with his wife and "Sergeant Charles Wilson" and the latter's wife (R. 41, 64, 65, 88, 100, 101). He was placed in arrest at about 2 p.m., August 30 (R. 76).

Sometime after 3 p.m. on August 30 accused was taken by a military policeman to the station hospital at Fort Brady and into the presence of Sergeant Wilson. After accused had been told that Wilson had stated that accused "was with him" and after Wilson had made a statement accused said that he "was the one that done it, that: 'You got me.' Put up his hands in the air" (R. 82). Later on the same day accused was questioned at the Sault Sainte Marie police station. Among the persons present were the local Chief of Police, Mr. J. Willard Welsh, the prosecuting attorney of Chippewa County, Michigan, Mr. F. Ray Gillespie, an assistant prosecuting attorney, Mr. James A. Byrnes, Sergeant Leonard A. Bamish, Company F, 131st Infantry, a military policeman, and Mrs. Scarborough, the wife of accused (R. 50). Accused was handcuffed with his hands behind his back (R. 86) or in front (R. 73, 74). Mrs. Scarborough made a statement (R. 61). Mr. Gillespie testified that thereupon, in response to a question, accused,

> "recited that his wife, Mrs. Scarborough, had told the truth and that he, Henry Scarborough, was present with Charles Wilson on the night of August 29th and early morning of Sunday, August 30th, but that he, Henry Scarborough, had not attacked the girl

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in the case.

* * * * *

Further in response to another question as to how Wilson had been shot Henry Scarborough said that Wilson was about to attack the girl in question a second time and that he objected, and in the ensuing struggle between him, Henry Scarborough and Wilson, the gun was discharged whereby Wilson was shot" (R. 63).

Mr. Welsh, Mr. Byrnes and Sergeant Bamish testified in substantial corroboration of the testimony by Mr. Gillespie (R. 52, 72, 83). In response to questions on cross-examination Mr. Welsh, Mr. Gillespie and Sergeant Bamish each testified that in so far as he knew, accused was not struck by anyone prior to making the statement last described (R. 60, 69, 86, 87).

Accused testified that on August 29, 1942, he remained in Fort Brady until 6 p.m. and then went to his cottage (R. 91) dressed in olive drab uniform but wearing borrowed civilian shoes (R. 95). He remained in the cottage until about 6:45 p.m. (R. 91), when he went elsewhere in Sault Sainte Marie (R. 101) and stayed in the town until about 8 p.m. (R. 92). Then he kept a "date" with a girl, Mrs. Casey, the wife of a man in charge of the local U. S. O. club (R. 102). At 9:15 p.m. the girl caught a cab and left (R. 104) and accused walked to Fort Brady, reaching his barracks at about 9:30 p.m. (R. 92, 104). About ten or fifteen minutes later he returned to Sault Sainte Marie where he joined his wife at their cottage at about 10 p.m. (R. 92, 108). Neither Wilson nor the latter's wife was at the cottage (R. 92, 109). Accused undressed, went to bed and requested his wife to awaken him at 11:30 or 11:45 p.m., so that he could return to camp in time to make bed check at 12:30 a.m. (R. 93, 109). Mrs. Scarborough awakened him around 1:45 a.m., after Wilson came home, informing him it was after midnight (R. 93). He arose and dressed and was told that Wilson was present and was injured (R. 93, 110). Wilson said that while attempting to evade arrest he had been shot in the leg by a military policeman (R. 93, 111). Wilson requested accused to get his "gun" from a friend's automobile which accused would find parked in front of the Fort Brady hospital (R. 94, 111). Accused located the automobile, a Ford V-8 coupe, about one-fourth of a mile from the cabin (R. 112, 132), parked in front of a hospital at Fort Brady (R. 112). He opened the left door of the car (R. 134) and searched carefully

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for the gun but did not find it (R. 94, 113, 115). He did not get inside the car or sit on the seat, but "put one foot in the car" (R. 115). He did not notice whether the car had any broken glass (R. 94, 112). After leaving the car he went to his barracks (R. 116). He hung his uniform trousers on a hanger in his bay (R. 95) and returned the borrowed civilian shoes to their owner (R. 96). When arrested, accused was taken to a hospital where Wilson was. In the presence of accused, Wilson was asked if accused was with him. Wilson remained silent at this time (R. 122), but accused later heard Wilson assert that the two were together and that accused attacked the girl (R. 121, 122). When taken to the police station accused was handcuffed with his hands behind his back (R. 96, 130). At the police station he was questioned for about twenty or twenty-five minutes. He denied that he had been with or had shot Wilson. He was struck several times by a civil police officer (R. 130). The blows left no marks on his body, but his lips became swollen (R. 131). He was threatened with hanging if he did not tell the truth (R. 98). When accused persisted in his refusal to confess (R. 98), the police brought his wife before him. She was crying and told him that the police had threatened to slap her if she did not tell them that accused was with Wilson (R. 98). Accused continued in his testimony:

> "And so then he started questioning me again, and then Sergeant Bamish struck me once or twice then. And so I said to him, I said: 'O.K., you win.' He said: 'What do you mean, you win?' I said: 'I was with Wilson.' He said: 'Well, what your wife says is the truth then?' I said: 'Any way you take it; if you believe it it is the truth, if you don't believe it it is not the truth'" (R. 99).

When he stated that he was with Wilson he knew that the time involved was the time of the alleged rape and robbery (R. 124, 125). In fact, however, he was not with Wilson on the night in question (R. 99). He never saw Miss Ellis before he was taken to police headquarters on the afternoon of August 30, 1942, and never had intercourse with her (R. 99). He did not state to the police that Wilson had been shot accidentally in the course of a struggle when accused tried to prevent him from attacking the girl a second time (R. 123). In response to a question by the defense, accused testified that he had been previously convicted of a military offense arising out of his unauthorized use of a Government vehicle (R. 100). On cross-examination he testified that he had also been convicted of civil offenses (R. 125).

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4. The evidence sufficiently establishes the commission of the offenses of robbery and rape as found by the court. Accused denied that he was one of the perpetrators and his identification by the victims was not positive, but the circumstances, including the stained condition of his clothing, the presence of shattered glass about his clothing and shoes, and the presence of the weed-seeds on his trousers, together with his admission that he was with the man Wilson at a time at which Wilson had stated in accused's presence that accused had participated in the offenses, strongly supported the identification and justified the court's conclusion that accused participated in the robbery and was one of the men who raped the girl.

The victim of the rape did not expressly testify that she resisted accused to the extent of her ability, that her resistance was overcome by force or prevented by fear, or that she did not consent to the intercourse. The circumstances to which she testified, however, fully justify the inference that she did not in fact consent, that accused had carnal knowledge of her by force, and that any lack of or cessation of resistance was attributable to her fear of great bodily injury or death. Such being the facts rape was committed (par. 148b, M.C.M.; sec. 701, Wharton's Crim. Law, 12th Ed.).

5. The court was legally constituted, and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. Confinement in a penitentiary is authorized for the offenses of robbery and rape, recognized as offenses of a civil nature and so punishable by penitentiary confinement for more than one year, robbery by section 463, Title 18 of the United States Code, and rape by section 458, title 18 of the United States Code.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

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

(21)

SPJGH
CM 227910

JAN 7 1943

UNITED STATES	NORTHWESTERN SECTOR WESTERN DEFENSE COMMAND
v.	Trial by G.C.M., convened at Fort Lewis, Washington, November 3, 1942. Dismissal.
Second Lieutenant JOSEPH S. KANE (O-1285062), 174th Infantry.	

OPINION of the BOARD OF REVIEW
HILL, LYON and SARGENT, Judge Advocates

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

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

CHARGE: Violation of the 95th Article of War.

Specification: In that 2nd Lieutenant Joseph S. Kane, 174th Infantry, did, at Gold Beach, Oregon, on or about September 10, 1942, with intent to deceive, order Cpl. Salvatore F. San Felippo, ASN 202331797, Company G, 174th Infantry, to state that he, the said corporal, did see a plane, on the morning of September 9, 1942, which statement was known by the said 2nd Lieutenant Joseph S. Kane to be false.

He pleaded not guilty to and was found guilty of the Specification and Charge. He was sentenced to be dismissed the service. The reviewing authority approved the sentence, and forwarded the record of trial for action under the 48th Article of War.

3. The evidence shows that the accused was in charge of observation posts and beach patrols along the Oregon coast, watching for the possible appearance of enemy aircraft. Eighteen men were under his

command patrolling a coast line of approximately 80 miles. Observation posts had been established at Wales Head, Cape Ferrello, Harris Park, and at the Chetco River. The accused was at a command post at Gold Beach. Another command post was 12 miles south at Raymond's Place, and a third at Brookings, 28 miles farther south. The accused was the only officer detailed in the entire area. There were an insufficient number of men detailed to the patrols and the posts, and the means of communication between headquarters and posts were inadequate. There was no telephone in the Brookings command post, messages were delivered to and from it through a telephone in the Driscoll Hotel about 2 blocks distant, and required about a half hour for delivery. On September 9, 1942, the accused learned from a civilian that an unidentified plane had flown over Brookings early that morning, and although it was actually observed by one man on duty, Private Moyer, no official report had been made. The next day an investigation revealed that a bomb had been dropped by the plane in the nearby mountains. The Forest Service and the Federal Bureau of Investigation conducted independent investigations (R. 37, 39, 41-43, 46-47).

September 11, 1942, at about 12 noon, the accused sent a note to Sergeant Fritz, in charge of the Brookings command post, ordering him to inform Corporal San Filippo that he and another trusted man should state, if questioned, that they had been posted on the Chetco River patrol the night and morning of September 8 and 9, 1942, and had heard the plane at about 6 a.m., September 9th, and had reported it. The note also stated, "it was just a little eyewash for the army to take credit, * * * the civilian people shouldn't take all the credit" (R. 5, 7-8, 17, 48).

Pursuant to the instructions given by the accused, both Sergeant Fritz and Corporal San Filippo, when questioned, falsely stated to the representative of the Inspector General, Fourth Army, that the plane had been reported. Both men later admitted to the representative that the plane had not been reported (R. 7-10, 18-19).

4. The accused admitted writing the note, that he knew at the time the contents were false, and that it was an order. He sent it because the Forest Service had begun an investigation without notifying him, because he did not know what part the Federal Bureau of Investigation was to take in it, and because it seemed that the Army was completely "out of the picture" and other organizations were working against them. He did not want the Army criticized, or anyone to know of their "slip-up", or that the detail was short of men, or that there was an inadequate system of communication. He thought it might develop into another "Pearl Harbor", that somebody might write a letter saying the Army was not prepared, had no communications, and

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was cut off. There was no attempt made at any time to mislead any military authorities. When he was questioned by the investigating officer from the Fourth Army, he admitted he had told a false story and would assume any responsibility for whatever repercussions resulted. He did not plan to benefit personally by the story, it was just to show the public that as an Army unit they were alert. He did not want the men or the Army criticized because of their shortcomings (R. 47, 51-53).

The accused had been a member of the New York bar for 7 years and had previously taught school. He entered the service March 10, 1941, through the draft as a private, was released on October 13, 1941, because he was over 28 years old, and recalled January 27, 1942. He was graduated from an Officer Candidate School in June 1942, 3 months prior to the bombing incident (R. 40-41).

Major George F. Collins, Captain Walter K. Ettlinger, Captain John Sagar, Captain Thomas M. O'Connor, and First Lieutenant Claude E. Waldrop, all 174th Infantry, testified in substance to the good character of accused, that he was conscientious, morally clean, loyal, and had been assigned as a special instructor because of his efficient services (R. 30-36).

5. The evidence shows, and the accused admits, that he instructed two enlisted men to testify falsely with respect to the presence of an unidentified plane in the area which his organization was observing. The two men did so testify before an investigating officer. The accused thereafter told the two men to go in and tell the truth, and himself stated to the investigating officer that he had told the men the false story and would assume all responsibility for whatever repercussions resulted.

The making of a false official statement to a superior officer is cited by Winthrop and by the Manual for Courts-Martial as an instance of conduct unbecoming an officer and a gentleman, in violation of the 61st (95th) Article of War (Winthrop's Military Law and Precedents, Reprint, p. 713; M.C.M., 1928, par. 151). The offense of the accused in this case was even more serious than that, because he ordered two enlisted men of his organization, if questioned, to make a statement which all concerned knew to be false. Such a deliberate action by accused dishonored and disgraced him as an officer and a gentleman, and is cognizable under the 95th Article of War.

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6. The accused is 35 years of age. The records of the Office of The Adjutant General show his service as follows: Inducted as enlisted man, March 10, 1941; transferred to Enlisted Reserve Corps, October 13, 1941; recalled, January 27, 1942; appointed second lieutenant, Army of the United States, June 9, 1942.

The accused testified that he went to an Officer Training School on March 8, 1942, and was graduated on June 9, 1942.

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

Justus S. Hall Jr., Judge Advocate.

(Dissent), Judge Advocate.

Elwood W. Sargent, Judge Advocate.

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

SPJGH
CM 227910

JAN 7 1943

UNITED STATES	NORTHWESTERN SECTOR WESTERN DEFENSE COMMAND
v.	Trial by G.C.M., convened at Fort Lewis, Washington, November 3, 1942. Dismissal.
Second Lieutenant JOSEPH S. KANE (O-1285062), 174th Infantry.	

DISSENTING OPINION by LYON, Judge Advocate

With deference to the views of the majority members of the Board of Review, as expressed in its opinion in the case of the officer named above, I respectfully file this as my dissenting opinion.

Under all the facts and circumstances as disclosed by the record of trial, I do not think the evidence sufficient to support the finding of guilty of a violation of the 95th Article of War. I concede that the accused's action was unethical, improper, and wrongful, but it is apparent to me that the instructions to his subordinates were prompted by bad judgment, and not by any wicked, vicious, dishonorable, or reprehensible motive.

The conduct contemplated by the 95th Article of War 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" (Winthrop).

Taking into consideration the entire background, the conditions confronting the outpost, the attitude of the civil population, as dis-

closed by the record, and viewing the accused's act, in the light of these facts, I strongly feel that the act complained of, at most, constituted a violation of the 96th Article of War, and not a violation of the 95th Article of War.

A careful consideration of this record does not leave me with the conviction that the accused is "morally unworthy to remain a member of the honorable profession of arms".

Percy E. Gore, Judge Advocate.

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SPJGH
CM 227910 1st Ind.

War Department, J.A.G.O., JAN 16 1943 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Joseph S. Kane (O-1285062), 174th Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence, and to warrant confirmation of the sentence. 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 of trial to the President for his action, and a form of Executive action confirming the sentence and directing that the sentence be carried into execution.

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.

(Sentence confirmed but execution suspended, G.C.M.O. 70, 30 Mar 1943)

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

SPJGK
CM 227916

NOV 30 1942

UNITED STATES	)	FIFTH SERVICE COMMAND SERVICES OF SUPPLY
v.	)	Trial by G.C.M., convened at Camp Breckinridge, Kentucky, October 16, 1942. Dismissal.
Major JOHN F. LOGAN (0-208315), Infantry, 1570th Service Unit.	)	

OPINION of the BOARD OF REVIEW
HOOVER, COPP and SARGENT, Judge Advocates.

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

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

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

Specification: In that Major John F. Logan, 1570th Service Unit, did, at Camp Breckinridge, Kentucky, on or about September 16, 1942, fail to repair at the fixed time to the properly appointed place for the convening of a Special Court-Martial of which he was a member.

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

Specification: In that Major John F. Logan, 1570th Service Unit, was at Camp Breckinridge, Kentucky, on or about September 16, 1942, found drunk, on duty as mess and Billeting Officer and Officer in charge of Army Emergency Relief.

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 dismissed the service. The reviewing authority approved only so much of the findings of guilty of Charge II and its

Specification as involves findings of guilty of being drunk at Camp Breckinridge, Kentucky, on or about September 16, 1942, in violation of Article of War 96, approved the sentence, and forwarded the record of trial for action under Article of War 48.

3. The evidence shows that on September 15 and 16, 1942, accused was on duty at Camp Breckinridge, Kentucky, in charge of an officers' mess and the local Army Emergency Relief. He was a member of a special court-martial convened at the camp (R. 9). On September 15 the assistant trial judge advocate of the special court-martial orally notified accused that the court would convene on September 16 (R. 10). About 12 noon, September 16, accused told another member of the court that he would be present at the session of the court-martial at 1:30 p.m. of that day (R. 17, 20). He was not present (R. 11).

Four officers testified that they saw accused at or near his quarters at Camp Breckinridge between about 11:30 a.m. and 12:30 p.m. on September 16. One of these officers, Major Edwin S. Isberg, 1570th Service Unit, testified that accused appeared to be drunk (R. 18), that his eyes were "bleary", that his speech was "thick", that he was unsteady on his feet and that his face was "rather flushed" (R. 19). Another, Major Roscoe C. Ferguson, Cavalry, Camp Inspector, testified that accused was "acting as a comedian to some extent" (R. 23), and that from his appearance, speech and actions witness gained the impression that he was drunk (R. 22, 23). A third, First Lieutenant Harrison S. Rice, 1570th Service Unit, testified that he heard accused talking "incoherently in his room", saw him at his open door momentarily, and formed the conclusion that accused "had been drinking" (R. 25). The fourth, First Lieutenant Clair Scott, 1570th Service Unit, testified that accused had the odor of alcohol on his breath and spoke in a "mumbling" manner (R. 29). Witness believed he was drunk (R. 31).

An officer, a member of the special court-martial in question testified for the defense that witness received only informal and oral notice of the meeting of the court-martial (R. 32, 33).

Accused did not testify or make an unsworn statement.

4. There can be no doubt that at the place and time alleged in the Specification, Charge I, accused, after having been given notice of the convening of a special court-martial of which he was a member, failed to repair at the fixed time and place for this duty. It is

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equally clear that at the place and time alleged in the Specification, Charge II, accused was under the influence of intoxicants to such a degree as sensibly to impair the rational and full exercise of his faculties. The finding that he was drunk was justified. His conduct was of a nature to bring discredit upon the military service. Violations of Articles of War 61 and 96 are established.

5. War Department records show that the accused is 51 years of age. He served as an enlisted man of the Kentucky National Guard from August 1, 1909, to July 30, 1915. He was appointed a second lieutenant, Kentucky National Guard on May 17, 1916. He was promoted to first lieutenant and served in this grade and in the grade of captain from July 17, 1916, to March 10, 1919. On December 11, 1924, he was appointed a captain, Infantry Reserve. He was promoted to major, Infantry Reserve, on October 20, 1932, and was ordered to extended active duty on April 13, 1942.

6. 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 of guilty as approved by the reviewing authority, and legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of violation of Articles of War 61 and 96.

Richard H. Kearney, Judge Advocate.

Andrew Sapp Jr., Judge Advocate.

Edward H. Sargent, Judge Advocate.

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1st Ind.

War Department, J.A.G.O., C 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 Major John F. Logan (0-208315), Infantry, 1570th Service Unit.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty as approved by the reviewing authority and the sentence and to warrant confirmation thereof. Accused failed to repair at the fixed time and place for duty as a member of a special court-martial. At about the same time he was seen in camp in such a condition that other officers concluded that he was drunk. The drunkenness was not gross. In view of all the circumstances I believe the sentence to dismissal should be suspended. I accordingly recommend that the sentence be confirmed but that the execution thereof be suspended during the pleasure of the President.

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 and to suspend the execution thereof during the pleasure of the President, should such action meet with approval.

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

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

(Sentence confirmed but execution suspended, G.C.M.O. 18, 5 Mar 1943)

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

SPJGK
CM 228000

DEC 15 1942

UNITED STATES v. Private JAMES McCOY (33065768), Company C, 93rd Engineer Regiment.	)	NINTH SERVICE COMMAND SERVICES OF SUPPLY Trial by G.C.M., convened at Whitehorse, Yukon Territory, Canada, August 8, 1942. Dishonorable discharge and confinement for forty (40) years. Federal Correctional Institution, Englewood, Colorado.

REVIEW by the BOARD OF REVIEW
HOOVER, COPP and SARGENT, Judge Advocates.

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

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

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

Specification: In that Private James McCoy, Company "C", 93rd Engineer Regiment, did, at Skagway, Alaska, on or about April 30, 1942, forcibly and feloniously, against her will, have carnal knowledge of Mrs. Evelyn Frolander.

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

Specification 1: In that Private James McCoy, Company "C", 93rd Engineer Regiment, did, at Skagway, Alaska, on or about April 30, 1942, by force and violence and by putting her in fear, feloniously take, steal and carry away from the presence of Mrs. Evelyn Frolander, two rings, one pocket book and $13.00 in cash, the property of Mrs. Evelyn Frolander, value about $186.00.

Specification 2: In that Private James McCoy, Company "C", 93rd Engineer Regiment, did, at Skagway, Alaska, on or about April 30, 1942, unlawfully enter the dwelling of Mrs. Evelyn Frolander, with intent to commit a criminal offense, to wit, rape therein.

He pleaded not guilty to Charge I and its Specification and guilty to Charge II and its Specifications. He was found not guilty of the Specification, Charge I, but guilty of a substituted Specification "as Specification 3, Charge II:

> 'In that Pvt. James McCoy, Co. "C", 93rd Engineer Regiment, did, at Skagway, Alaska, on or about April 30th, 1942, with intent to commit a felony, viz: Rape, commit an assault on Mrs. Evelyn Frolander by willfully and feloniously choking the said Mrs. Frolander and throwing her to the floor.'",

guilty of Specifications 1 and 2, Charge II, and of Charge II. 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 forty years. The reviewing authority approved the sentence, designated the Federal Correctional Institution, Englewood, Colorado, as the place of confinement and forwarded the record for action under Article of War 50½.

3. The evidence shows that at about 10:45 a.m., April 30, 1942, accused appeared and knocked at the back door of a house in Skagway, Alaska, in which Mrs. Evelyn Frolander and her husband, an employee of the Alaska Road Commission, resided (R. 4, 8). The husband was not present at the time (R. 9). Mrs. Frolander, a woman about 60 years of age (R. 15), was alone in the house. She testified that she went to the back door and observed accused "standing in the door of our porch". He "very politely" asked for a glass of water and said he had been on a brush cutting detail nearby. The water was furnished and accused asked for a second glass of water. The two engaged in conversation, accused remarking, in response to a question, that he did not care for Skagway because there "wasn't much to do". In regard to her action in engaging in the conversation Mrs. Frolander testified that she had been "a nurse in the first war, and was not afraid of a soldier, and had faith in the American uniform". Accused made an inquiry concerning her husband and she told accused her husband was working "close to" the house. Accused finally asked "about women" and Mrs. Frolander said "we didn't have any wome in town". Accused handed the water glass to Mrs. Frolander and at this point "just rushed into the house" and closed the door (R.4) locking it (R. 5).

Mrs. Frolander testified that accused told her to lie down on the bathroom floor. She protested and "appealed" to him but he told her to "shut up" and pushed her into the bathroom. She testified:

> "*** I don't remember being on the floor for everything happened and went through so quickly. He was still peering through our bath room window. It is right at the front part of the house. Everybody comes into the yard from the back way. A lot of soldiers had been going through and had taken to the trails. Anyway, he was choking me, and I told him my husband was coming, and would be there any minute. He looked out the window and could see boys coming in from the back yard. He choked me and kept choking me and I was about out, but he didn't know it. I tried to grab his neck and bite him, and broke a string he had around his neck. He let loose of my throat. He had a knife, which was in his hand, and he held the knife above my head. He said 'spread your legs apart or I will kill you.' I was paralysed. I didn't know what he would do. After a short time I am quite sure he was undoing his trousers. There was an actual penetration, but only for a moment because by that time I told him my husband would be there. ***" (R. 4).

Mrs. Frolander told accused that she would give him her "pocketbook" if he would desist. He asked where the pocketbook was and she promised to tell him. She further testified:

> "*** Maybe he saw someone coming through the yard. Anyway, he got up and started through the living room to the hall. He said to come here and get the pocket book. My bloomers were trailing around my ankles and I took them off and rushed to the door. He came and got me and choked me. I was in the living room. He choked and choked, and I was almost gone. Apparently he thought I was. He let loose of my throat. *** Anyway, he struck me on the head, and then he hit me a second time. Then I told him I would give him my purse if he let me go, so he got up, and the purse was back of the pillow on the couch, and I gave it to him. He then also saw something on the piano. My husband had a knife there, and had put a cork on the tip of the knife. It was probably the handle that he saw first. I don't know how he happened to see the knife, but I knew what he was going after. I gave him the pocket book, when he came back, and pushed him toward the door. He unlocked the door and went out ***" (R. 4, 5).

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The pocketbook contained $12 or $13 in currency (R. 5), some change, a ring with diamond setting (R. 6) for which witness had paid $125 (R. 8) and which she valued at that amount, and an Eastern Star "Past Worthy Matron" ring which witness valued at about $32 (R. 6). As to the identity of her assailant, Mrs. Frolander testified that accused "just looks like him" and that she was "quite sure" he was the assailant (R. 8).

When accused left the house Mrs. Frolander telephoned for assistance, stating to an officer that she "had been attacked by a nigger" (R. 7) and giving the "impression" that she had been raped (R. 17, 19). First Lieutenant Joseph J. Friedman, 297th Infantry, an officer of the military police, went to her home and interviewed her (R. 16-18). He testified, for the defense, that she appeared to be excited and that she told him that she had been attacked but had "gotten away before anything happened" (R. 18). Mrs. Frolander testified that she might have made such a statement "because I did get away. He didn't kill me", but did not recall the statement (R. 19).

A search was instituted (R. 9, 12) and some change, the purse and the rings were found in various places along a trail within a few hundred feet of the house. The currency was not found (R. 9, 10). Accused's regimental commander testified that accused's identification tags were found in some bushes by a searching party and that accused was discovered in his tent. The officer testified that "as I recall there was no particular reason why he should have been there at that time". After the tags had been found and after accused had been warned that whatever he said might be used against him he stated to his regimental commander, "Yes, I am the man" (R. 12). On May 2, in the course of an investigation by Major A. M. Jacoby, 93rd Engineers, and after he had been warned that he was not required to say anything and that whatever he said might be used against him accused made an oral statement which was later reduced to writing and signed by accused as follows:

> "I went to the home of Mr. Ludwig Frolander about 10:30 AM on April 30, 1942, and asked Mrs. Frolander for a glass of water. After Mrs. Frolander had given me three glasses of water, I pushed my way into the door with intention of raping her. Mrs. Frolander tried to keep me out. I pushed her down on the floor of the bathroom by choking her. The reason I didn't rape her was because she told me her husband was coming home and I was afraid he would come in while I was there. I pushed her down again in the living room. She told me to take her money and leave, after show-

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ing me where the pocket book was hid, I took it. I saw a pretty hunting knife on the piano and took it also. I left the house running down a cliff to my company. I left the knife and pocket-book on a cliff near the house. I cut my hand on the knife when I jumped over the cliff" (R. 13).

Mrs. Frolander was examined by medical officers between 2 p.m. and 3 p.m. on April 30. One of the officers, Major John D. Southworth, Medical Corps, 93rd Engineers, testified that she appeared to be "somewhat emotionally upset" and complained of pains in her throat. Her neck was bruised externally on both sides. Examination of the labia and vagina was negative. No bruise or injury of the genital organs was observed. A microscopic study was not made (R. 15).

Accused made an unsworn statement as follows:

"Mrs. Frolander, she was right about a few things. But I didn't have my pants open, or anything hanging out. I went up the hill, it was, I don't know what day it was, but I know it was Thursday. I was working around the hill, and she come to the door and I don't know what she was doing inside the house, and if anybody else was in the house when she came to the door. After she come to the door I asked for a glass of water, and she give it to me, and we was talking between each glass, which lasted about 15 minutes between each glass—about 15 minutes. She was standing like this (he pointed so that she was standing to one side of him, and he had a clear view of the inside), and I could see the whole kitchen in her house, I do not call that breaking into a lady's house. She was standing inside the door, and if anybody was standing inside the door like she was there, then the outside of the door is the door sill. I don't call that breaking into the house, but it is entering the house without a permit. It was entering her house without a permit. She said I turned around to the door and unlocked the door, and I don't know that the key was inside the door. I didn't grab her and didn't know who was in the inside of the house. She said after I turned around to the door, if a man had a glass in his hand, how could he choke a person without breaking the glass. And if there was anything, she would have thrown that glass there and hit me with it. My clothes wasn't

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open. She said I had a knife. But I would like to know that after I told Captain Jacoby, why the Captain didn't want to hear what I had to say. I had write a statement. Someone wrote the statement. Captain and Captain Jacoby was the ones that was supposed to write, and Colonel was standing up besides me, and there was officers in front of me. There was three officers in front of me, and Captain Jacoby (?), I told him what this was and asked him to believe. He did not get the dog tags from the bushes as he said he did. (Here referring to Mr. Frolander's testimony to the affect he had found them in the brush.) They was around my neck on a short string. (Here he indicated a string around his neck.), and Mrs. Frolander broke the string. How is a man going to lift a woman's skirt when she is breaking the string with the dog tags around his neck? I asked Mrs. Frolander what time it was. Mrs. Frolander stated the time, that it was 10:30. She didn't tell you she said that herself. She told me it was 10:30. And when the guards was there all around there it was almost 11:30. (Referring to Mrs. Frolander's testimony as to when all this occurred.)

"They told us when you are off you can walk the hill. He said (referring to Colonel Johnson) that I didn't have no cause to be in my tent by that time, but by that time we had been all dismissed in 'C' Company. I didn't tell him (the Colonel) about the knife. I had a little knife under my bed, but I said I didn't have no knife. I am not begging for mercy--just to believe what I say. I expect to do time for what have been said. Mrs. Frolander scratched me by my neck, but this was with one hand. There was a glass on that door. When a man breaks your door open it (the glass) don't fall in that position. (Referring, supposedly, to the position of the glass as found by Mr. Frolander, according to Mrs. Frolander's testimony). My hat was between the door sills. (Indicating here the door wasn't locked, and that he didn't unlock it, as Mrs. Frolander claimed). I know my dog tags were missing when I got back to the tent, but the guard was out. I picks up my hat from the floor from the two doors. Larceny counts

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every place, but larceny is not a crime when a person gives you a pocket book" (R. 20-21).

4. The evidence amply supports the findings that at the place and time alleged accused unlawfully entered the dwelling of Mrs. Evelyn Frolander with intent to commit rape (Spec. 2, Charge II), that with intent to rape he committed an assault upon Mrs. Frolander by choking her and throwing her to the floor, (Spec. substituted for the Spec., Charge I) and by force and violence he stole rings of substantial value, a pocket book and money from Mrs. Frolander (Spec. 1, Charge II).

The unsworn statement by accused was not wholly consistent with his pleas of guilty in that he suggested by his statement that he did not break into the house and that Mrs. Frolander gave her pocket-book to him. Regardless of the pleas, the evidence clearly establishes housebreaking and robbery as alleged. The findings under Charge I and its Specification were irregular in form but clearly show the purpose of the court to find accused guilty, by substitutions, of assault with intent to rape. Such findings were legally authorized as findings of a lesser offense included in the rape charged (par. 148 b, M.C.M.).

5. In the course of the cross-examination of Major Southworth, who testified that he had physically examined Mrs. Frolander, the defense, apparently in the hope of securing expert opinion testimony as to the probable degree of resistance offered by the woman in the course of the attack upon her as evidenced by the physical injuries, or absence of injuries, sustained, asked the witness, "If it is true that the woman was forced down in her bathroom, and her legs forced apart—" (R. 15). The prosecution interposed an objection upon the ground that the witness could not speak "from hearsay", and the question was not completed. The objection was sustained (R. 15, 16). The inquiry was based on facts in evidence and the objection should have been overruled. Inasmuch, however, as the nature of the woman's physical injuries was fully proved and since the testimony of Mrs. Frolander as to the degree of her resistance was not contradicted, it is clear that accused's substantial rights could not have been injuriously affected within the meaning of Article of War 37.

6. The charge sheet sets forth the age of accused as 19 years, and shows that he was inducted into the military service on August 12, 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. Confinement in a penitentiary or correctional institution is authorized

by Article of War 42 for the offenses found, each of which is regognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year, assault with intent to rape by section 455, Title 18 of the United States Code, robbery by section 463, Title 18 of the United States Code, and housebreaking by section 1801, Title 22 of the Code of the District of Columbia.

Judge Advocate.

Judge Advocate.

Judge Advocate.

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

SPJGN
CM 228022

JAN 27 1943

UNITED STATES	)	FORT MEARS, ALASKA
v.	)	Trial by G.C.M., convened at Fort Mears, Alaska, October 2, 1942. Dishonorable discharge (suspended) and confinement for twenty (20) years. Penitentiary.
Private WILLIAM MARQUEZ, (39151531), Company I, 37th Infantry.	)	

REVIEW by the BOARD OF REVIEW
CRESSON, SNAPP 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. The accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 58th Article of War.

Specification 1: In that Private William Marquez, Company I, Thirty Seventh Infantry, did, at Fort Mears, Alaska, on or about June 5, 1942, desert the service of the United States, by absenting himself without proper leave from his organization and place of duty, with intent to avoid hazardous duty, to wit; service in an area under imminent enemy attack and did remain absent in desertion until he surrendered himself at Fort Lewis, Washington or or about July 6, 1942.

Specification 2: In that Private William Marquez, Company I, Thirty Seventh Infantry, did at Fort Lawton, Washington, on or about July 15, 1942, desert the service of the United States by absenting himself without proper leave from his

place of duty with intent to shirk important service, to wit, service overseas in the combat zone and did remain absent in desertion until he was apprehended at Los Angeles California on or about July 22, 1942.

He pleaded not guilty of the Charge and both Specifications but guilty of absence without leave in violation of the 61st Article of War. He was found guilty of the Charge and both Specifications, and, three-fourths of the members of the court present concurring, was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for forty years. The reviewing authority approved the sentence but suspended the dishonorable discharge and remitted twenty years of the confinement. The United States Penitentiary, McNeil Island, Washington, was designated as the place of confinement and the record was forwarded for action under Article of War 50½.

3. The evidence for the prosecution shows that on the evening of June 2, 1942, Company I, 37th Infantry, of which organization the accused was present as a member, arrived at Fort Mears, Unalaska, on board the transport President Fillmore. The company was immediately disembarked and moved to the Quonset Hut Area on Unalaska Island. On June 3, 1942, an enemy air raid occurred and the company was moved out to Unalaska Valley. This movement was completed by noon of that day. On the morning of June 4, 1942, another air raid occurred. When the company was disembarked from the transport an unloading detail of eight men under the charge of a noncommissioned officer was left on board to handle the baggage, but accused was not a member of this detail. The accused was a truck driver but there were no trucks and he was assigned to regimental headquarters for special duty (R. 3, 4, 5). Other members of the company were assigned to various other special duties not under the immediate control of the company commander and on June 15, 1942, a check was made to determine if each man was accounted for on the special duty to which he was assigned. This check disclosed that accused was missing. A search was instituted and continued until it was apparant that he could not be found. On June 25, 1942, an entry was made on the morning report showing the accused absent without leave as of June 5, 1942, the reason being, as stated by the company commander, that he was last seen on said date (R. 9, Exhibit 3). It seems, however, that the last time the accused was seen by any one in authority in his organization was on June 7, 1942, when he was observed by his company platoon sergeant on the President Fillmore. The platoon sergeant had not authorized him to go there and had not ordered him there on any detail. When interrogated as to the reason for being on the ship the accused stated that he was still working for the battalion (R. 15, 16). Sometime later the commanding officer of Company I received a letter from the accused in which he represented that he

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had become unavoidably separated from his company and wished his commanding officer to send him his service records in order that he might effect his transfer to the Air Corps. The cancellation stamp indicates that this letter was mailed at Olympia, Washington, on June 15, 1942 (R. 11, Exhibit 4).

There was admitted in evidence, without objection, as Prosecution's Exhibit 5, an unidentified document which purports to be a copy of a paraphrased radiogram received at Fort Mears, Alaska, signed "Carr" and stating, in substance, that accused was absent without leave at Fort Lewis, July 15, 1942, and if apprehended would be returned to Fort Mears, Alaska, by first available transportation.

There was also admitted in evidence, without objection, as Prosecution's Exhibit 6, an unidentified document which purports to be a copy of a letter from John L. Hamilton, Lt. Col., F.A., Adjutant (unsigned) Fort Lewis, Washington, to Captain John I. Ladd, Staging Area, Fort Lewis, Washington, and which recites that accused reported at Fort Lewis, Washington, on July 6, 1942, as absent without leave from June 21, 1942, on which date he debarked at Seattle Port of Embarkation.

There was also admitted in evidence, without objection, as Prosecution's Exhibit 7, a document described as a Delinquency Report and Certificate, which purports to be a provost marshal's report made at Los Angeles, California, and forwarded through channels to the Commanding Officer at Fort Lawton, Washington, and which recites that accused was "picked up" by civilian police on July 22, 1942, at Los Angeles, California, dressed in uniform. The report (Exhibit 7) is accompanied by a certificate by Robert L. Dennis, Captain, CMP. CMDG, Assistant Provost Marshal, initialled but unsigned, dated July 22, 1942, which recites that accused

> "* * * was apprehended by Civilian Police and turned over to the Military Police on a charge of AWOL. Private Marquez was held at Central Police Station, Los Angeles, Calif., until transferred to the stockade at Camp Haan, Calif., for further disposition of his case."

4. The accused testified in his own behalf, in substance, as follows:

After the raid on June 3 the company moved to an area one mile away from Unalaska, and accused assisted in digging fox holes and unloading ammunition. During the day he saw the Fillmore sailing out of port. Later in the day the Fillmore returned and accused went aboard to get his winter clothes. He looked for his barracks bag but they were all mixed up. He spent the night on the boat and did

not return to his company. On the morning of June 4 there was an alert and he was prevented by the guards from leaving the ship. On the afternoon of the 4th there was an attack, and accused picked up a rifle and fired eight or nine clips. Between alerts he assisted in unloading ammunition and other cargo from the ship. This went on day and night and one day he was informed that the ship would not leave until noon the following day (June 8). The accused worked late into the night, on the day he got this information, and then went to sleep. When he woke up the ship was far out at sea. The boat reached Seattle on June 21 and he went up to Camp Murray but there was no one there. From there he went home and later turned in at Fort Lewis and told them his story. They sent him to Camp Murray where he remained five days, and from Camp Murray to Fort Lawton. When he got to Fort Lawton he found that a boat had just left for Alaska and was informed that there would not be another one for two weeks. While at Fort Lawton he went to McChord Field to make a check on his transfer to the Air Corps, which had been approved at Fort Lewis, and found that they did not have his record. He then wrote a letter to his commanding officer and a letter to the Commanding General at Fort Douglas, Utah. He then went home, to Los Angeles, intending to spend a week and return to Fort Lawton. He visited his folks and started to return, when the civilian authorities came (R. 23-31). On examination by the court, and with reference to his transfer to the Air Corps, accused made the following statement:

> "I went to McChord Field before we sailed up here. I obtained approval and full sanction of the Squadron Adjutant at McChord Field. I brought the letter of recommendation to my Company Commander, he approved it, Regimental Headquarters approved it, I returned it to airbase headquarters, from there it had to go to Ninth Corps Area for Approval" (R. 36).

In regard to his reason for staying on the Fillmore for five days before it sailed instead of going back to his company or to the assignment for which he had been detailed he testified that the ship was "filled with dynamite"; that he thought the company was in a safe place but he elected to go back on the ship because "I thought that was the best service I could perform, by assisting in fighting from the ship, sir, I didn't know whether the ship was going to be blown up or not" (R. 32).

5. With reference to Specification 1 of the Charge, the evidence is undisputed that the accused was absent without leave from his organization and place of duty on or about June 5, 1942. There is no competent evidence as to when he afterwards returned to military

control, but such evidence is unnecessary. The only question to be determined is whether his unauthorized presence on the transport for five or more days before it sailed was for the purpose of being carried away from his organization and station to a place of comparative safety so that he might escape hazardous duty in Alaska. Considered in its entirety, the evidence is legally sufficient to justify the inference that such was the accused's intention.

Specification 2, in substance, alleges that the accused, in the State of Washington, on July 15, 1942, deserted, and remained absent until he was apprehended at Los Angeles, California, on July 22, 1942, in violation of the 58th Article of War. It was shown that "Fort Lewis" in Specification 2 should read Fort Lawton (R. 20). To this he pleaded "not guilty but guilty of the 61st Article of War", and to the Charge, "not guilty but guilty of the 61st Article of War". This plea was not strictly in accord with the usual and regular form, but by it the accused admitted he violated the 61st Article of War by being absent from July 15, 1942, until apprehended on July 22, 1942. The original absence was shown in the extract copy of the morning report, Exhibit 3, and the apprehension in the testimony of the accused, under oath, that he went to Los Angeles, visited his folks and "then the civilian authorities came" (R.28). The accused also testified that he knew he was going A.W.O.L. the second time he "left Fort Lawton to go to Los Angeles to visit" (R.29). The accused knew that duty in Alaska was hazardous as he had participated in the firing there on June 3 and 4, 1942. He also knew that his proper station was at Fort Mears, Alaska, stated he intended to return there, thought he would be sent back, and he could well be presumed to know that there was a state of war, of which the court could take judicial notice.

Upon leaving Fort Lawton, Washington, on July 15, 1942, he made no effort to return to Alaska, but deliberately went in the opposite direction several hundred miles to Los Angeles, California, where he remained until apprehended by civilian authorities (Ex.7).

In Exhibit 5 it is stated that accused was absent without leave on July 15, 1942, and if apprehended would be returned to Fort Mears, Alaska, by the first transportation.

From these circumstances the court was warranted in finding the accused guilty of deserting at Fort Lawton on July 15, 1942, with intent to shirk important service.

6. The charge sheet shows that accused is 28 years of age. He enlisted January 30, 1941, and his present period of service is governed by the Service Extension Act of 1941. His record shows prior service in the U.S. Naval Reserve from November, 1934, to November, 1938, from which he was discharged as a seaman, first class, by reason of expiration of term of enlistment.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of the Charge and both Specifications thereunder and the sentence. 41

Confinement of the accused in a penitentiary is authorized.

Chas. L. Dresson, Judge Advocate.

Lorrain D. Snoff, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

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

SPJGH
CM 228046

FEB 5 1943

UNITED STATES N.D.	FOURTH SERVICE COMMAND
v.	Trial by G.C.M., convened at Fort Oglethorpe, Georgia, August 22, 1942. Dismissal.
Second Lieutenant HARRY H. JOHNSON (O-1030046), Corps of Military Police.	

OPINION of the BOARD OF REVIEW
HILL, LYON and SARGENT, Judge Advocates

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

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

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

Specification: In that Second Lieutenant Harry Herbert Johnson, Corps Military Police, The Provost Marshal General's School Center, Fort Oglethorpe, Georgia was at or near 912½ Cypress Street, Chattanooga, Tennessee, on or about July 18, 1942, drunk and disorderly.

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

Specification 1: In that Second Lieutenant Harry Herbert Johnson, Corps Military Police, The Provost Marshal General's School Center, Fort Oglethorpe, Georgia did at South Post, Fort Oglethorpe, Georgia, on or about July 19, 1942, with intent to deceive Captain Anthony E. Papa, in reply to an official question

asked him by the said Captain Anthony E. Papa, which question was substantially as follows:

"Were you involved in any difficulty in Chattanooga or vicinity on Saturday night that was brought to the attention of the Military Police?"

answer substantially as follows:

"No."

which said answer was known by Second Lieutenant Harry Herbert Johnson to be false in that the said Second Lieutenant Harry Herbert Johnson had gotten into a brawl in Chattanooga at 912½ Cypress Street, a district occupied by negroes, and had fought several negroes; and further, that the said Second Lieutenant Harry Herbert Johnson was accosted by Second Lieutenant Jack B. Krebs and Sergeant Cauley H. Tindall, on duty as Military Policemen, in the Club Mayfair, in the vicinity of Chattanooga, Tennessee, and was returned to Barrack T-19 at Fort Oglethorpe, Georgia, in a Military Police vehicle.

Specification 2: In that Second Lieutenant Harry Herbert Johnson, Corps of Military Police, The Provost Marshal General's School Center, Fort Oglethorpe, Georgia, on or about July 19, 1942, with intent to deceive First Lieutenant Walter Hoyle, falsely answer an official question in that Second Lieutenant Harry Herbert Johnson was asked the following question by First Lieutenant Walter Hoyle:

"Did you have any experience last night with the Military Police; were you picked up or returned to Fort Oglethorpe by the Military Police; or were you involved in any trouble in Chattanooga?"

to which said question Second Lieutenant Harry Herbert Johnson answered as follows:

"No."

which said answer was known by Second Lieutenant Harry Herbert Johnson to be false in that the said Second Lieutenant Harry Herbert Johnson had on Saturday night, July 18, 1942, been involved in difficulties with one or more negroes at or near

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912½ Cypress Street, in Chattanooga, Tennessee, and had been picked up by the Chattanooga police and carried to the Chattanooga Police Headquarters and after some time had been released by the Chattanooga police; and further, that the said Second Lieutenant Harry Herbert Johnson had later on that same night been questioned at the Club Mayfair on Rossville Boulevard between Chattanooga, Tennessee and Rossville, Georgia by Second Lieutenant Jack B. Krebs and Sergeant Cauley H. Tindall, who were on duty as Military Policemen, and had thereafter been returned in a Military Police vehicle to Barrack T-19, Fort Oglethorpe, by the said Military Policemen, Second Lieutenant Jack B. Krebs and Sergeant Cauley H. Tindall.

He pleaded not guilty to all Charges and Specifications. He was found of the Specification, Charge I, guilty except the words "drunk and", of the excepted words not guilty, of Charge I guilty; of Specification 1, Charge II, guilty except the word "fought", substituting therefor the words "been involved in difficulties with"; of Specification 2, Charge II, guilty, and of Charge II guilty. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence, remitted the forfeiture of pay and allowances, and forwarded the record of trial for action under Article of War 48.

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

a. Charge I. On the night of July 18, 1942, accused with Second Lieutenant Harold E. Peterson entered a dwelling house at 912½ Cypress Street, Chattanooga, Tennessee. They went up two flights of stairs to the third floor, and into the kitchen which was occupied by two negro girls. When asked the purpose of their presence, Lieutenant Peterson, in the presence of the accused, said several times "We are going to hold this place up". One of the girls became frightened and as she started to leave the room, she was shoved back by Lieutenant Peterson, who said, "Hold them in, troop, don't let them out". Accused said nothing, and did nothing except that he was "nodding and laughing and going on like that, when the other man was telling us he was going to hold us up". The girl jumped under a banister rail, ran down stairs to a nearby store, and called the police. When she returned, several people had congregated. In the meantime a fight had occurred in the house between Lieutenant Peterson and a negro, Wesley Anderson. Ac-

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cused took no part in the fight other than to hold the negro's arm as he drew back to strike Lieutenant Peterson. One of the girls shoved accused down the steps. The officers came "falling" and "tumbling" down the stairs from the third floor to the porch, but they walked down the stairs from the porch to the sidewalk. As they reached the sidewalk one said, "let's go through the alley". The officers had been in the house 20 or 25 minutes before the police were called (R. 5, 6, 11, 17).

Two patrolmen of the Chattanooga City Police Department responded to the call, arriving at 912½ Cypress Street at 9:51 p.m. A large number of colored people were in the street. The two officers were overtaken in the alley leading from Cypress Street to Cedar Street. Lieutenant Peterson was bleeding. Accused said they had gotten into the wrong house; that the negroes had jumped on Lieutenant Peterson, and that that was all there was to it. The officers were placed in arrest and taken to police headquarters in the patrol wagon under a technical charge of drunkenness. Accused appeared to have been drinking, but he was not drunk, and acted like a gentleman. After taking the officers to police headquarters, the patrolmen returned to the negro house, where they found the officers' caps. The city patrolmen stated that but for the fact the officers were in a dangerous negro district they would not have been molested; and that the arrest was made as a measure of protecting the officers. Later in the evening, the assistant chief of police of the city of Chattanooga saw accused and Lieutenant Peterson in the police station, and was advised by the desk sergeant that they were in for being drunk. The assistant chief talked with them 15 or 20 minutes to satisfy himself as to their condition, concluded that the charge could not be sustained, and ordered their release. Their appearance was normal, except their faces were flushed and clothing somewhat disheveled (R. 32-35, 65, 66, 67).

Later that evening, after the accused and Lieutenant Peterson had been released from the city police station, First Lieutenant Jack B. Krebs, C.M.P., Fourth Service Command, Military Police Detachment, Fort Oglethorpe, Georgia, and Sergeant Claude H. Tindall, Military Police Detachment, saw accused and Lieutenant Peterson at the Club Mayfair, a road house, near Chattanooga, standing at the bar with a drink before them. Accused took two drinks, but was apparently alright. The Club Mayfair had not been put off limits, but the instructions were to notify all officers seen there to leave the area. Accordingly, the witness advised accused of the situation, told him to dismiss his taxi, and that he would have to return to the post with witness. Accused accepted the advice in a gentlemanly manner, accompanied Lieutenant

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Krebs to the post in his official military police car, and thanked him for the trip. While at the Club Mayfair, accused related to Lieutenant Krebs that he and Lieutenant Peterson had been in a brawl in a colored district in Chattanooga, that they had been taken into custody by the city police, but released, and that as far as the city police were concerned everything was alright. Lieutenant Krebs and the military police sergeant had on military police badges, and sidearms. Nothing was said, in the presence of accused, about filing any disciplinary report (R. 35, 36, 39-40, 45, 51).

b. Charge II. Captain Anthony E. Papa, C.M.P., Adjutant, Provost Marshal General's School Center, SouthPost, Fort Oglethorpe, Georgia, learned that two officers were involved in some difficulty on Saturday night, July 18, 1942, and detailed First Lieutenant Walter Hoyle, Provost Marshal, on Sunday morning, July 19, 1942, to have accused report to the adjutant so that he could determine whether or not accused was one of the officers involved. The directive was to locate the men, and have them report to Captain Papa (R. 46, 50, 51).

Lieutenant Hoyle proceeded to barrack T-19 and located the accused and Lieutenant Peterson. He told them he had been requested by the adjutant and Colonel Parmley to locate a Lieutenant Johnson and a Lieutenant Peterson, whose names had been turned in as involved in some kind of trouble in Chattanooga on the preceding night, and who had been picked up by the military police patrol and returned to barrack T-19. He asked if either of them had been so involved. The accused answered, "No". Lieutenant Hoyle then remarked that someone must have given the wrong names in reporting the incident, and took accused and Lieutenant Peterson in a staff car to post headquarters. Lieutenant Hoyle stated, on cross-examination, that his question to the officers was loosely worded, and may have been understood as asking if they had been involved in any trouble with the military patrol (R. 56-57).

On arriving at headquarters accused reported to Captain Papa, who asked him the question whether or not he was involved in any difficulty in Chattanooga or vicinity the night before, that was brought to the attention of the military police. The accused replied, "No". Lieutenant Krebs, assistant provost marshal, a military police sergeant, and his assistant, were present during the interview. When accused gave a negative answer, the adjutant turned to Lieutenant Krebs and asked if he recognized accused and Lieutenant Peterson, to which he replied in the affirmative. The adjutant then turned to accused and Peterson and asked if they had anything to say, and both readily acknowledged they were the officers concerned. They proceeded into

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Colonel Parmley's office. The adjutant at no time advised the officers that he was making an official investigation, nor did he advise them of their rights. When they entered his office Colonel Parmley asked the adjutant if he had advised accused it was an official inquiry and if he had warned accused of his rights. When the adjutant replied that he had not, Colonel Parmley fully advised accused of his rights, and asked accused if he had any statement to make. The accused said that he would not make any statement at that time. The adjutant said, in effect, it was entirely probable that his original question to the accused could have been understood as asking if accused had been involved in any difficulty with the military police (R. 47, 48, 49).

At the close of the evidence on the part of the prosecution, the motion of defense for findings of not guilty of all Charges and Specifications, upon the ground that the evidence was not legally sufficient to support the findings of guilty, was denied.

4. Defense. It was stipulated that if Lieutenant Colonel Loren F. Parmley, J.A.G.D., Fort Oglethorpe, Georgia, were present, he would testify that on July 19, 1942, the accused, with Lieutenant Peterson, was ushered into his office by the Post Adjutant, Captain Anthony E. Papa; that he advised accused that he was conducting an official investigation, and that accused had a right not to answer any question that might tend to incriminate him; that upon being so advised, accused stated that he did not desire to make any statement. And, further, that at that time Colonel Parmley asked Captain Papa if he had advised or warned the accused, and Captain Papa replied that he did not (R. 67).

It was likewise stipulated that Major Joseph C. Jackson, C.M.P., and Major Alexander H. Gilfillan, C.M.P., Fort Oglethorpe, Georgia, if present, each would testify that he had known accused since early June of 1942, that the general reputation of accused for character, traits, and habits was good (R. 67, 68).

William R. Hyatt, Assistant Chief of Police, Chattanooga, testified that he saw accused in the police station sometime after 9:30 on the night of July 18, 1942. He had been advised that accused and his companion, Lieutenant Peterson, had been brought to the station under a technical charge of drunkenness. After talking with accused it was apparent that such a charge could not be sustained, and accused was released from custody and no record of the incident was made on the police blotter (R. 65, 66).

Accused testified that he is 30 years of age, was born in the

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state of Florida, and has been in the service 12 years. He enlisted at Valdosta, Georgia, July 7, 1930, and was assigned to Headquarters Battery, First Field Artillery, Fort Sill, Oklahoma. He remained with that organization 3 years, and was then assigned to and continued with the Military Police Detachment at the United States Military Academy, West Point, New York, until March 3, 1942, during which period he held the grade of sergeant. He was transferred from the Military Police Detachment at West Point to the Cavalry School as an officer candidate, from which he was graduated and commissioned a second lieutenant on May 30, 1942, and assigned to duty at Fort Oglethorpe as of June 12, 1942 (R. 68, 69).

Concerning the Charges and Specifications, accused stated that he and Lieutenant Peterson visited the Stirrup Cup, in the city of Chattanooga, on the evening of July 18, 1942. Here they purchased and, within an hour's time, drank one-half pint of whiskey. While they were sitting at the table discussing the town and the lack of entertainment, a civilian approached them, saying that he knew of several nice places where officers could go and dance. The officers accepted the suggestion, had a drink with the civilian, and then entered the civilian's car. While in the car they took another drink. After a ten-minute drive, the civilian pulled his car to the curb, stopped, and pointed to a house across the street. Accused and Lieutenant Peterson dismounted. Upon entering the house they noticed that it was filthy, but kept going until they reached a room occupied by a group of negroes. Lieutenant Peterson remarked "Jesus Christ, this is a negro joint". One of the negroes lunged at him and a general fight or scuffle took place. Accused called to Lieutenant Peterson "come on let's go out of here, this is the wrong place". Accused was pushed down the steps. As they reached the street they were taken into custody by civilian police, under a technical charge of drunkenness, and driven to city police headquarters in a patrol wagon. The assistant chief of police concluded that they were not drunk, and released them. Leaving police headquarters, accused and Lieutenant Peterson drove in a taxi to the Club Mayfair, where they had two more drinks. Here they saw Lieutenant Krebs and Sergeant Tindall of the military police. Accused told Lieutenant Krebs of the incident at the negro house and about their arrest and release by the civil police. Lieutenant Krebs wanted to know how they were traveling, and when told that they had a taxi waiting, said "there is no reason why you should pay taxi fare, I am going out, you may ride with me". Accused accordingly dismissed the taxi and he and Lieutenant Peterson returned to the post with Lieutenant Krebs and Sergeant Tindall.

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Accused spent the night with Lieutenant Peterson. The next morning Lieutenant Hoyle, Provost Marshal, came to Lieutenant Peterson's quarters and asked Peterson if he were with "Lieut. Johnson last night". Lieutenant Peterson said "Yes". Lieutenant Hoyle asked Lieutenant Peterson, "did you have any trouble with the police in Chattanooga last night?" Accused was standing across the hall, and hearing this conversation, walked up to Lieutenant Hoyle and stated that he was Lieutenant Johnson. Lieutenant Kreb thereupon asked accused if he had had any trouble with the military police the night before, to which he answered "No". Lieutenant Krebs said that Colonel Parmley and the post adjutant wanted the accused and Lieutenant Peterson to report at post headquarters.

While at post headquarters, the Adjutant, Captain Anthony E. Papa, asked accused and Lieutenant Peterson, in the presence of Lieutenant Krebs and Sergeant Tindall, if they had been involved in any trouble with the military police and civilian authorities in Chattanooga the night before. Both accused and Lieutenant Peterson answered "No". The adjutant turned to Lieutenant Krebs and asked if he identified them as the officers at the Club Mayfair the night before. Lieutenant Krebs identified Lieutenant Peterson, but Sergeant Tindall was doubtful as to accused, whereupon accused voluntarily stated that he was the other officer concerned (R. 69, 70, 71).

Accused had never been arrested. There is nothing in his record of 12 years' service which reflects upon his character and integrity.

Referring to the incident at the Club Mayfair, accused stated that Lieutenant Krebs did not say or do anything which indicated to accused that he had been placed in arrest (R. 71, 72). On cross-examination accused stated that he lost his hat at the negro house on Cypress Street, and that it was returned to him at the police station; that he and Lieutenant Peterson had consumed one-half pint of whiskey before meeting the civilian and he took two drinks with the civilian before going to 912½ Cypress Street; that he was not looking for a bawdy house but if women had been found he would not have been surprised. He knew when he reached the top of the steps at 912½ Cypress Street he was in the wrong place, but that he went in through curiosity (R. 73).

With reference to Charge II and the two Specifications, false official statement to Captain Papa, Post Adjutant, and to Lieutenant Hoyle, accused testified that he knew Lieutenant Hoyle was the provost marshal; that when asked by Lieutenant Hoyle if he had had any trouble

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with the military police in Chattanooga the night before, accused knew that he was one of the officers concerned. In telling Lieutenant Hoyle that he had had no trouble with the military police, he intended no deceit. Accused understood the purpose of the order to report to the post adjutant and Colonel Parmley. In the opinion of accused, his answer of "No", was a true answer to Captain Papa's question - if accused had been involved in any trouble with the military police or civilian authorities in Chattanooga the night before. Accused did not consider that he had been involved in any trouble (R. 74, 75).

5. Viewing the evidence in the light most favorable to the accused, it is apparent that at the time alleged, accused and his companion, Lieutenant Peterson, deliberately and without any authority entered dwelling 912½ Cypress Street, in the city of Chattanooga. Accused admitted that while going up the stairs he realized he was in the wrong place, but continued through curiosity. This intrusion by accused and his companion was an unlawful trespass. It precipitated a fight or disorder, attracted the attention of a large number of negroes who congregated in front of the house, and resulted in the officers being taken into custody by the civil police. The civil authorities very frankly stated that the accused was not drunk and that he and his companion were taken in custody for their own protection. The court properly found that accused was not drunk, but all the evidence clearly shows that accused was involved in an episode, disorder, or disturbance of a nature to bring discredit upon the military service, and fully supports the findings of guilty under Charge I and its Specification.

With respect to Charge II and its Specifications, alleging false official statements by accused to Captain Papa and Lieutenant Hoyle, there is little conflict as to the facts between the testimony for the prosecution and that of the defense. The evidence shows that accused, after his release from custody of civil police, stopped by the Club Mayfair. While at the club he was approached by Lieutenant Krebs, military police officer, and was advised by him that officers were not supposed to visit the Mayfair and that he should leave the area. Accused offered no protest or objection to this admonition, and said that he would get in his taxi and return to camp. The testimony of Lieutenant Krebs indicates that he told accused to dismiss his taxi, as he would have to go to the post with him. The testimony of accused is that he understood Lieutenant Krebs' statement in this regard as an invitation and not an order. At any rate, accused and Lieutenant Peterson returned to the post with Lieutenant Krebs and a military police sergeant, in an official military police car.

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Regardless of the interpretation of the accused as to the events of the evening before, it was known to him that he had been involved in Chattanooga with the civil police, and that he had been admonished by a military police officer at the Club Mayfair and returned to the post in an official military police car. It follows that when accused told Lieutenant Hoyle and the post adjutant, Captain Papa, that he had not been so involved, he was guilty of making a false statement. It is obvious that the statements were made under such circumstances that their official character cannot be challenged. All the facts and circumstances warrant the inescapable conclusion that the false statements were made for the purpose of misleading and deceiving the officers to whom they were made.

6. The accused is 30 years of age. The records of the Office of The Adjutant General show his service as follows:

Enlisted service July 8, 1930, to May 29, 1942; appointed second lieutenant, Army of the United States, from Officer Candidate School, and extended active duty, May 30, 1942.

7. Six of the eight members of the court recommended that the sentence to dismissal be suspended. The recommendation was based upon the good record and long military experience of the accused and upon the further ground that accused "* * * except for the incidents considered at the time of the trial, is an efficient soldier and officer and that the act complained of is not a matter of trait or habit".

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

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

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SPJGH
CM 228046 1st Ind.

War Department, J.A.G.O., 1943 - 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 Harry H. Johnson (0-1030046), Corps of Military Police.

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

3. The record discloses that the accused is 30 years of age; that he has had 12 years of honorable enlisted service; that while holding the grade of sergeant with the Military Police Detachment, United States Military Academy, he was transferred to an Officer Candidate School, from which he was graduated and commissioned a second lieutenant on May 30, 1942.

In view of the recommendation of clemency by six of the eight members of the court, and in view of the previous good record and military experience of the accused and of his apparent capability of rendering useful service as an officer, I recommend that the sentence of dismissal be suspended during the pleasure of the President.

4. Inclosed herewith are the draft of a letter for your signature, transmitting the record of trial to the President for his action, and a form of Executive action designed to carry into effect the recommendation made above.

E. C. McNeil,
Brigadier General, U. S. Army,
Acting 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.

(Sentence confirmed but execution suspended, G.C.M.O. 29, 10 Mar 1943)

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

SPJGK
CM 228053

DEC 23 1942

FOURTH SERVICE COMMAND
SERVICES OF SUPPLY

UNITED STATES v. Second Lieutenant HAROLD E. PETERSON (0-1030078), Corps of Military Police.	Trial by G. C. M., convened at Fort Oglethorpe, Georgia, October 16, 1942. Dismissal.

OPINION of the BOARD OF REVIEW
HOOVER, COPP and SARGENT, Judge Advocates.

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

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

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

Specification: In that Second Lieutenant Harold E. Peterson, Provost Marshal General's School Center, South Post, Fort Oglethorpe, Georgia, did, without proper leave, absent himself from his post of duty at South Post, Fort Oglethorpe, Georgia, from September 3, 1942 to about September 5, 1942.

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

Specification 1: In that Second Lieutenant Harold E. Peterson, Provost Marshal General's School Center, South Post, Fort Oglethorpe, Georgia, was at the Ross Hotel, 816 Georgia Avenue, Chattanooga, Tennessee, on or about September 5, 1942, drunk while in uniform.

Specification 2: In that Second Lieutenant Harold E. Peterson, Provost Marshal General's School Center, South Post, Fort Oglethorpe, Georgia, did on or about September 5, 1942 register at the Ross Hotel, 816 Georgia Avenue, Chattanooga,

> Tennessee with a woman not his lawful wife under the names of "H. E. Peterson and wife" and did on or about said date physically occupy a room in said hotel with said woman, all to the scandal and disgrace of the military service.

He pleaded guilty to Charge I and its Specification and not guilty to Charge II and its Specifications. He 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 only so much of the findings of guilty of Specification 1, Charge II, as involves findings of guilty of being drunk while in uniform, as alleged, in violation of Article of War 96, approved the sentence and forwarded the record for action under Article of War 48.

3. The evidence shows that accused absented himself without leave from his place of duty, the Provost Marshal General's School Center, Fort Oglethorpe, Georgia, on September 3, 1942, and remained absent until he was returned to military control as hereinafter appears on September 5, 1942 (Exs. 1, 2).

At about 11 p.m. (R. 13), September 4, 1942, accused registered for and rented a room for occupancy at the Ross Hotel, Chattanooga, Tennessee (R. 9, 15). He was accompanied by a woman (R. 9). He registered as "H. E. Peterson & Wife, Ft. Oglethorpe, Ga." and the two were assigned to room 316. Accused paid the hotel charges in advance (R. 9; Ex. 4). He was apparently sober at the time he came to the hotel (R. 14). In the early afternoon of September 5 (R. 11), following receipt of a telephone call to Fort Oglethorpe (R. 30), Captain Walter Hoyle and Captain Roy E. Stone, both of the Corps of Military Police, went to room 316 of the Ross Hotel. The door of the room was opened, in response to a knock, by a young woman who was later ascertained to be Mrs. Louise Kersey, a resident of Chattanooga. (R. 23, 24, 26, 36) She was fully dressed (R. 30). The window shade in the room was drawn and a "bed lamp" was lighted. There was no luggage in the room. (R. 29) The room "smelled very strongly of some kind of liquor, there was a very strong odor in the room like someone had mixed some drinks or had vomited them" (R. 35). Accused was lying on the bed fully clothed in service uniform (R. 23) except that his necktie was not on (R. 23). He was in a stupor and did not appear to be in full possession of his mental faculties (R. 24). He had a wet towel on his head and after the military police officers entered the room the woman sat down and

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"changed the towel over his head". Captain Hoyle told accused to sit up and he complied, asked for a cigarette and got to his feet. Captain Hoyle testified that accused was not "exactly steady on his feet" (R. 25). In about 15 or 20 minutes he "apparently tended to snap *** out of it" (R. 27) and to regain possession of his faculties to some extent (R. 24, 28). Accused said that a small amount of money lying on a table belonged to the woman (R. 26). He did not become "loud or boisterous" (R. 37).

From 10 to 20 minutes after the military police officers entered the room two civil police officers and the hotel manager joined them (R. 24). The woman was then questioned. She gave her name and address and said she was divorced or separated from her husband (R. 26, 30). In the presence of accused she said that she had met accused

> "at the Read House and that the boy had been drinking for two or three days. She had tried to sober him up, had stayed all night with him that she loved him and there hadn't been any relations between them, that she was just trying to do what she could for him" (R. 42).

On being questioned accused stated that the "girl had been up there with him the night before" (R. 42). Accused was taken by automobile to Fort Oglethorpe for physical examination (R. 26, 27). He staggered while walking to the car (R. 28).

Captain Hoyle testified that in his opinion, while at the hotel in witness' presence and while leaving, accused was drunk (R. 27, 28). Captain Stone testified that when he saw accused in the hotel room accused "was dazed. He could smoke a cigarette but he seemed rather weak at the time" (R. 32). Accused told this witness that he had been drinking over a period of about three days (R. 32).

A copy of accused's pay voucher for September, 1942, stating his wife's name and address (Ex. 5) and a classification questionnaire signed by accused, dated July 10, 1942, stating that accused was married (Ex. 6), were received in evidence (R. 33, 34). Captain Stone testified that in his capacity as a member of the local military police he had had many contacts with the citizens of Chattanooga and that he had never seen Mrs. Kersey prior to the incident at the hotel (R. 37). One of the police officers testified that Mrs. Kersey "seemed like a lady" (R. 39) and that witness thought she did not have a police record (R. 40).

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Accused did not testify or make an unsworn statement.

4. The findings of guilty of absence without leave as alleged in the Specification, Charge I, are fully supported by the evidence and by the pleas of guilty.

The evidence leaves no doubt that at the place and time alleged in Specification 1, Charge II, accused was drunk in uniform. Violation of Article of War 96 was established.

The evidence also shows, without contradiction, that at about the time alleged in Specification 2, Charge II, accused registered for himself and a woman not his wife, as man and wife, at the Ross Hotel in Chattanooga, Tennessee, and occupied a room in the hotel with the woman over night and until the afternoon of the day following registration. The two were seen in the room together by members of the military and civil police and by the manager of the hotel. In so far as appears no public scandal resulted from the occurrence but accused was a married man and the circumstances are strongly indicative of adulterous relations between him and Mrs. Kersey. Accused's act in registering himself and the woman at the hotel and his act in illicitly occupying a room with her were indecorous and disgraceful and amounted to conduct unbecoming an officer and gentleman within the meaning of Article of War 95 (CM 203719, Sullivan; CM 208296, Huskea; CM 216152, Wells).

5. War Department records show that accused is 34 years of age. He is a high school graduate. He attended Carnegie Technical Institute for one year. He served as an enlisted man from March 20, 1941, to May 30, 1942, when, upon graduation from an officers' candidate school, he was appointed a second lieutenant, Army of the United States.

6. The records of the Office of The Judge Advocate General show that accused was tried by general court-martial on August 21, 1942, convicted of being disorderly in Chattanooga, Tennessee, on July 18, 1942, and of deceitfully making a false statement to an officer on July 19, 1942, in violation of Article of War 96, and was sentenced to be reprimanded and to forfeit $50 pay per month for four months (G.C.M.O. No. 955, Fourth Service Command, Nov. 21, 1942).

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

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the reviewing authority and the sentence and to warrant confirmation thereof. Dismissal is mandatory upon conviction of violation of Article of War 95 and is authorized upon conviction of violation of Article of War 61 and of Article of War 96.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

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1st Ind.

War Department, J.A.G.O., DEC 28 - 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 Harold E. Peterson (0-1030078), Corps of Military Police.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings as approved by the reviewing authority and the sentence and to warrant confirmation thereof. Accused absented himself without leave for two days. During his absence he registered at a hotel and occupied a room with a woman as man and wife, the woman not being his wife. Accused was a married man. He was found in the hotel with the woman, in a stuporous drunken condition. He was sentenced to dismissal. He was recently convicted by general court-martial of disorderly conduct and of deceitfully making a false statement to an officer and was sentenced to be reprimanded and to forfeit $50 per month for four months. I recommend that the sentence to dismissal be confirmed and carried into execution.

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

Myron C. Cramer

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

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

(Sentence confirmed, G.C.M.O. 8, 18 Feb 1943)

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

SPJGK
CM 228072

DEC 4 9

UNITED STATES	)	28TH INFANTRY DIVISION
v.	)	Trial by G. C. M., convened at Camp Livingston, Louisiana, September 11, 1942. Dishonorable discharge and confinement for two (2) years. Federal Reformatory, El Reno, Oklahoma.
Private CLARENCE WALLACE (20314413), Battery C, 229th Field Artillery Battalion.	)	

HOLDING by the BOARD OF REVIEW
HOOVER, COPP and SARGENT, 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 reformatory as the place of confinement. Paragraph 90b of the 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).

3. Confinement in a penitentiary is not authorized in this case for the reason that no offense of which accused was found guilty is recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by any statute of the United States of general application within the continental United States or by the law of the District of Columbia. See Article of War 42. The values of the various articles larceny of which was found

under the several specifications may not be aggregated for the purpose of authorizing confinement in a penitentiary (CM 226579, Evans; sec. 399 (2), Dig. Op. J.A.G., 1912-40).

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

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

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1st Ind.

War Department, J.A.G.O., DEC 5 1947 - To the Commanding General, 28th Infantry Division, Camp Livingston, Louisiana.

1. In the case of Private Clarence Wallace (20314413), Battery C, 229th Field Artillery Battalion, 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 reformatory or correctional institution, which holding is hereby approved. Upon designation of a place of confinement other than a penitentiary, Federal reformatory or correctional institution, you will have authority to order the execution of the sentence.

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

(CM 228072).

Myron C. Cramer

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

1 Incl.
Record of trial.

DEC 5 42 PM

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DISPATCHED
WAR DEPARTMENT
SERVICE

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

SPJGH
CM 228091

DEC 15 1942

UNITED STATES v. Second Lieutenant ALBERT J. SIMONE (0-660317), Air Corps.	GULF COAST ARMY AIR FORCES TRAINING CENTER Trial by G.C.M., convened at Bombardier School, Midland, Texas, November 6, 1942. Dismissal.

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 Charge and Specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that Second Lieutenant ALBERT J. SIMONE, Air Corps, did, at Army Air Forces Bombardier School, Midland, Texas, on or about October 2, 1942, feloniously take, steal, and carry away one summer gabardine shirt, value about $14.50, and one summer gabardine trouser, value about $15.00, the property of Second Lieutenant Ralph E. Hansen.

He pleaded not guilty to and was found guilty of the Charge and the Specification thereunder. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for three years. The reviewing authority approved only so much of the sentence as provides "to be dismissed the service" and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution shows that the accused was on duty at Midland Army Flying School, Midland, Texas, that he was

assigned on May 22, 1942, and thereafter occupied Apartment No. 139 in Building No. 29-10 (R. 13, 19, 21; Exs. 4, 6).

At about 3:30 p.m., October 2, 1942, Second Lieutenant Ralph E. Hanson, Air Corps, who occupied Apartment 66, "B.O.Q." Building No. 29-7, in going from his room to the Officers' Club stopped at a rack where clothing returned by the cleaners was hung, and saw his shirt (Ex. 1) and trousers (Ex. 2) which he had previously sent to be cleaned. When he came back by the rack later the shirt and trousers were missing. He reported the loss to Corporal Langsford and later to Major Warren (R. 4-5).

Corporal Irving Langsford, Charge of Quarters at the "B.O.Q." searched the barracks several days later under instructions from Major Warren and found in a clothes closet in Apartment 139, Building 29-10, a shirt with an ink spot over a pocket (Ex. 1) and trousers (Ex. 2), each bearing a marking of "4813", which was the number of the ticket placed by the U. S. Cleaners and Hatters, on one shirt and one pants received on September 30, 1942, from Lieutenant R. E. Hansen, "B.O.Q." Building 29-7, to be cleaned and pressed. Major P. R. Warren, Provost Marshal, First Lieutenant A.D. Hudson and Lieutenant Hansen went to apartment No. 139, Building 29-10, where Hansen looked in the closet and identified his uniform by the cleaners number 4813, by his name on the button seam of the shirt (Ex. 1), and inside the belt of the trousers, and by a faded bluish green ink spot over the left pocket of the shirt. The uniform had been worn since it was pressed. The uniform was removed to the office of Major Warren. Upon a closer examination Lieutenant Hansen found the name "Lt. Simone" written in pencil on the inside of the collar of the shirt and the name "Simone" on the inseam of the trousers, which names were not on the clothes before he lost them. Lieutenant Hansen had not given any person permission to use this uniform (R. 6-10, 10-13, 13-15, 15-17, 17-18).

After being warned by the Investigating Officer, Major Walter H. Brummund, Air Corps, that he did not have to make a statement and any statement he made would be used against him, the accused wrote in his own hand and signed the following statement:

"October 23, 1942

"On either Friday, October 2, or Saturday October 3, I went into the B.O.Q. Barracks where the clothes are kept which are returned from the cleaners. I had a cotton uniform which I had sent to the Fashion Cleaners and I picked it up. Right next to my cotton uniform hanging on the clothes rack was a gabardine summer uniform. I do not know what possessed me but I took this

gabardine uniform which did not belong to me and carried it to my room in Building 29-10. My room number is 139. I wore the gabardine uniform that night only for about 10 minutes. I did not ever leave my room.

"Before I put the gabardine uniform on I put my name in both the shirt and trousers. The uniform did not fit very well. It was too long. I knew Lt. Hansen only by sight and did not have his permission to either take or use the uniform. At the time I took it, I did not know whom it belong to. I had no intention of stealing the uniform and was going to return it to Lt. Hansen whose name I saw in the uniform, but during the first part of the week following I was busy flying and did not get a chance to send it to the cleaners. Ordinarily, I send my clothes to the cleaners in the latter part of the week, and when I got back from flying the following Wednesday or Thursday, I'm not sure which, the uniform was gone.

"I have been warned of my rights by Major Brummund and know that I do not have to make this statement, and that it might be used against me. It is made voluntarily, and no pressure has been put on me and I have not been promised anything. I was not under the influence of intoxicating liquor at the time I took the uniform.

Albert J. Simone-2nd Lt. A.C."

(Ex. 3).

It was stipulated that the shirt was valued at $8 and the trousers at $9 (R. 20).

4. For the defense the accused testified that he was 26 years old and single, and left New York University and enlisted in the Army in February 1941. He received a cadet appointment in August 1941, was eliminated from flying, trained as a bombardier, commissioned as second lieutenant, Air Corps, in May 1942, and placed on duty at Midland as bombardier instructor at training school and in flying.

"I went to the BOQ barracks that contains the clothes that are returned from the cleaners, and took my uniform which was hanging on a rack. I don't know what entered my mind, but I took another one that was next to mine. I went to my barracks and while I was there I put my name on both pants and shirts. At the time I was so confused. I

tried it on to see how it fit and wore it in the room about ten minutes. Then I thought about sending it to the cleaners, but I had to fly Saturday, Sunday, Monday and Tuesday, as we were far behind, and I didn't have time to send my own uniform to the cleaners. The afternoon I was free I went and began taking out my uniforms for the cleaners and I noticed the uniform I was going to send was gone. The only think I knew about it was when I was called to Major Warren's office and he asked me if I recognized the uniform and I said 'yes' and the name on there was Lt. Hansen. I told him I wanted to return it but I had not had time. He asked me to make a statement and I did and signed the statement. That is all." (R. 22-23)

He had never been tried by court-martial nor reprimanded nor tried by a civil court. He made no attempt to sell or dispose of the clothes but hung them on his own clothes rack. There was nothing wrong with his physical condition, he was not in any financial difficulty, had no unpaid obligations, and had no need for this uniform as he had a great deal of his own. His father is a custom tailor (R. 21-25).

First Lieutenant Richard W. Stillwagon, Air Corps, testified that accused had been subordinate to him both while a cadet and an instructor. The services of accused in both capacities were excellent. The accused had very good qualities as an officer, he had never been in trouble and was respected by and got along with the "boys" (R. 26-28).

Major Donald K. Bennett, Air Corps, testified that he was the commander of the squadron in which accused was an instructor, mainly in the use of the Sperry bombsight. The performance of his duties by accused in the squadron had been very satisfactory. Major Bennett had been rather hesitant in signing the charge sheet and had only done so after acquainting himself with the full facts (R. 28-30).

5. The record shows and the accused admits facts which constitute larceny of the uniform. The taking of this uniform along with one of his own from the cleaners rack was not by inadvertance nor was the writing of his own name in the garments in which he recognized the name of Lieutenant Hansen an act consistent with innocence, notwithstanding his assertion that he had no intention of stealing the uniform.

6. The accused is 26 years of age. The records of the Office of The Adjutant General show his service as follows:

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Enlisted service from February 18, 1941; aviation cadet from February 28, 1942; appointed second lieutenant, Air Corps Reserve, and extended active duty May 21, 1942.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed at the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 93rd Article of War.

_____, Judge Advocate.

Chas. I. Jesson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

SPJGH
CM 228091 1st Ind.

War Department, J.A.G.O., DEC 19 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 Albert J. Simone (O-660317), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence, and to warrant confirmation of the sentence. I recommend that the sentence be confirmed, but in view of the showing that accused is an efficient officer, and of his apparent capability of rendering useful service as an officer, recommend that the execution of sentence of dismissal be suspended during the pleasure of the President.

3. Inclosed herewith are the draft of a letter for your signature, transmitting the record of trial to the President for his action, and a form of Executive action designed to carry into effect the 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.

(Sentence confirmed but execution suspended, G.C.M.O. 23, 6 Mar 1943)

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

SPJGK
CM 228146

JAN 6 1943

U N I T E D S T A T E S	)	FOURTH AIR FORCE
	)	
v.	)	Trial by G. C. M., convened at Hamilton Field, California, October 16 and 17, 1942. Dismissal.
	)	
First Lieutenant CLAIRE L. MENEFEE (0-231275), 46th Air Base Squadron.	)	

OPINION of the BOARD OF REVIEW
HOOVER, COPP and ANDREWS, Judge Advocates.

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

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

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

Specification 1: (Finding of not guilty).

Specification 2: (Finding of not guilty).

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

Specification 1: In that 1st Lt. Claire L. Menefee, 46th Air Base Squadron, was, at San Rafael, California, on or about August 13, 1942, in a public place, to wit, on Fourth Street in San Rafael, California, drunk while in uniform.

Specification 2: In that 1st Lt. Claire L. Menefee, 46th Air Base Squadron, did, at San Rafael, California, on August 13, 1942, wrongfully drive and operate a Willys Reconnaissance Car, property of the United States, while drunk.

Specification 3: (Finding of not guilty).

CHARGE III: Violation of the 96th Article of War.
(Motion for finding of not guilty sustained).

Specification: (Motion for finding of not guilty sustained).

He pleaded not guilty to the Charges and Specifications. The court sustained a motion by the defense for findings of not guilty of Charge III and its Specification (R. 113). Accused was found not guilty of Charge I and its Specifications, guilty of Charge II and Specifications 1 and 2 thereunder and not guilty of Specification 3, Charge II. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved only so much of the finding of guilty of Specification 2, Charge II, as involves a finding that accused did, at the place and time alleged, wrongfully drive and operate a reconnaissance car, property of the United States, while drunk, and only so much of the finding of guilty of Charge II as involves a finding of guilty of violation of Article of War 96, approved the sentence, recommended that the sentence be commuted to restriction to the limits of the station where accused may be serving for three months and forfeiture of fifty dollars per month for six months, and forwarded the record of trial for action under Article of War 48.

3. The evidence shows that on August 13, 1942, accused was assistant provost marshal and police and prison officer at Hamilton Field, California (R. 63, 116). A Government owned quarter ton truck or "jeep" was assigned to him for official use (R. 9, 94, 95, 116). On the evening of August 13, 1942, accused had the car in the nearby town of San Rafael, California (R. 7). He was in uniform with field jacket and garrison cap (R. 36).

Sergeant Richard D. Self, 862nd Guard Squadron, a military policeman assigned to duty in San Rafael, testified that at about 10:30 p.m., August 13, he saw accused in the town at a bar known as the "Tropics" (R. 8, 20). Accused was drinking beer and was "half lying on the bar and had a glass of beer in his hand" (R. 8), and "his face was very flushed like" (R. 9). Witness again saw accused at about 11:40 p.m. at a bar known as "Tognoli's", located on Fourth Street in San Rafael (R. 10, 17, 20). Accused was drinking beer at the time (R. 10, 20, 21). Later, a few minutes after midnight, witness again saw accused. This time accused was on Fourth Street, accompanied by a Medical Corps enlisted

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man. (R. 10, 17, 22) Accused was "leaning very heavily upon the Private for support" (R. 10, 22). He "had an arm extended around the man's neck resting on his shoulders" (R. 11). In returning witness' salute accused "almost fell to the ground" (R. 11, 22). When he raised his hand he "bent over", and when he dropped his hand "it seemed so heavy it nearly pulled him down" (R. 22). Accused asked witness whether witness had seen accused's jeep (R. 11). In the opinion of witness accused was drunk (R. 11, 25). Witness based his opinion upon the fact that accused almost fell to the ground and that when he talked he "seemed to have a very thick tongue" (R. 11).

Self further testified that he found accused's car and then located accused and his enlisted companion (R. 11, 23). Witness told accused that he had found the jeep and would take accused to it. Accused entered a car used by witness and another member of the military police. It took accused approximately three to five minutes to enter "as his feet seemed to be very heavy and he had trouble getting himself inside the car (R. 11). He was then driven to the place where his own car was parked, "back of Tognoli's" (R. 11, 22, 23, 24). Accused got out of witness' car and "rather staggered over to the jeep" (R. 12). He climbed into it from the driver's side and slid underneath the wheel. He had "quite a bit of trouble inserting the key into the ignition switch". (R. 12) Finally, witness inserted the key for accused (R. 12). In witness' opinion accused was drunk at this time (R. 25). Witness suggested that accused was not able to drive and that he should let the companion of accused operate the car. Accused responded that he was able to drive. (R. 12)

Self testified that the accused's car was parked in an alley, more than 250 feet from the street. The alley was 15 or 20 feet wide and unlighted. (R. 24) Accused successfully backed out of the alley (R. 12, 24, 25). He then drove by various streets to a United States highway 101, traveled some distance on that highway, then to the left, then back on a road parallel to the highway. He drove in excess of 50 miles per hour. Except for the speed accused drove the car very efficiently (R. 26). Somewhere along the highway he stopped. Witness drove up to him. Accused was "half lying—he was sitting over under the wheel" (R. 13). Witness asked accused whether he knew the way out of San Rafael toward Hamilton Field. Accused replied that he did. Accused then drove a little farther up the street and turned around in the center of the street, causing traffic from both directions to stop and wait for him. He then drove away. Later witness saw accused, still accompanied by his enlisted companion, in the "New Deal

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Restaurant" in San Rafael. This was at about 1 a.m., August 14. (R. 13) Witness did not arrest accused becaue he was an officer and witness did not wish to embarrass him (R. 29, 36, 37). Witness made statements prior to the trial which did not contain certain matters (not otherwise described) included in his testimony, the omissions being due to witness' belief that the matters in question were "unnecessary" (R. 18).

Miss Marjorie Noon, secretary of a director of a U.S.O. club at San Rafael (R. 34), testified that she saw accused in the Tropics about 10 p.m., August 13 (R. 32, 33). He asked her to dance and she refused. She deemed accused definitely under the influence of liquor. (R. 33) Witness based her opinion on the "blurry condition" of his eyes. She was not close enough to him to smell liquor on him. (R. 33) His speech was "coherent enough and plain enough" (R. 35).

Accused testified that inspection of the military police in San Rafael was one of his duties (R. 117). On August 13, 1942, he left the post about 8:45 p.m. to inspect the activities of the military police and "conditions" in San Rafael (R. 117, 124, 128). Driving his jeep he "cruised around" the streets (R. 117, 129). He entered some of the "establishments" in order to investigate "conditions" (R. 117, 130, 131, 132). Among the establishments were Tognoli's and the "Top Hat" (R. 130, 131). During these inspections accused had nothing to drink (R. 130, 131, 132). About 10:15 p.m. he drove to the Tropics bar (R. 117, 132), and left his jeep parked in front (R. 117, 118). At this point his inspection was complete (R. 118, 132, 134). He stayed in the Tropics about 15 or 20 minutes (R. 118) and had one glass of beer there - the first of the evening (R. 129, 132). There were some enlisted men present (R. 135). He asked Miss Noon to dance (R. 133). Leaving the Tropics accused drove to the center of town, parked his jeep, and removed the keys (R. 118, 133). He went to the Top Hat, where he had a glass of beer (R. 133, 134). A few enlisted men were at the bar (R. 135). About 11:30 p.m. he discovered that his car was no longer where he had parked it (R. 119). About 11:45 he went to Tognoli's and had another beer (R. 118, 119, 134). There were a few enlisted men at the bar at this time (R. 135). In Tognoli's he entered into a conversation with an enlisted man and they left the place together (R. 119, 120, 136). Walking down the street they met Self (R. 120). Self saluted and accused returned the salute (R. 136). He was not leaning upon the enlisted man for support (R. 121, 136). He asked Self about accused's car (R. 120, 136).

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Shortly thereafter accused was taken to the place where the car was located (R. 120). He denied taking three to five minutes getting into Self's car (R. 122). Self remarked that in his opinion accused was unable to drive. Accused said he was able to do so. (R. 138) Accused got into his car (R. 120) and put the key in the switch, having no difficulty finding the keyhole (R. 137). He backed out of the alley and drove away (R. 120, 137, 138). To his displeasure the military policemen followed him and he "tried to shake them" (R. 120, 138, 142) and finally succeeded in doing so (R. 120). His speed was probably "a little excessive" (R. 139). He denied turning the vehicle around in the middle of the road, thus stopping traffic in both directions (R. 139). He denied having a conversation with Self on the highway (R. 140). He had only three beers all evening (R. 141, 154, 159) and no other intoxicants (R. 154), although there was a "possibility" that he had a drink before leaving Hamilton Field (R. 128). In his own opinion he was not drunk (R. 122, 154) but was sober (R. 153, 154), and had full exercise of all his mental and physical faculties (R. 154). Although accused "didn't feel high", he could feel the beers "some" and possibly felt a "little different" from the way he felt at the trial (R. 159).

Accused also testified that at one time Self was prison sergeant and complained to accused about the conduct of the prisoners. Accused thereupon altered the system so as to have one permanent prison sergeant. He relieved Self of his duties. (R. 123, 124) Answering the question, "Did his attitude toward you change following that?", accused testified, "Well, I guess he kind of resented it" (R. 124).

4. The evidence proves beyond a reasonable doubt that at the place and time alleged in Specification 1, Charge II, accused was drunk in uniform in a public place, to wit, on Fourth Street in San Rafael, California, and that, while drunk, as alleged in Specification 2, Charge II, he wrongfully drove and operated a reconnaissance car, property of the United States, in the town. Accused denied that he was drunk but the court had the witnesses before it and its conclusion, implicit in the findings, as to the veracity and accuracy of the prosecution witnesses, as well as the veracity and accuracy of accused, is entitled to great weight. Self's positive testimony was substantially corroborated by that of Miss Noon. The "blurry" eyes of accused, his flushed face, his thick tongue, his dependency upon another for physical support, his near fall to the ground in returning Self's salute, his difficulty in entering Self's jeep and his staggering, show such impairment of his mental and physical faculties as to amount to

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drunkenness (par. 145, M.C.M.). Accused's acts were discreditable and violation of Article of War 96 was established.

5. Counsel for the accused objected to the introduction of any testimony by Miss Noon for the reasons that no statement of her testimony was furnished accused prior to the trial, that she was not brought before the investigating officer, and that accused was not given an opportunity to be present at any time when she was interviewed by the prosecution (R. 32). The objection was overruled and properly so. The competency of the witness was not affected by any failure of the prosecution to advise the defense that it intended to present her or by her non-appearance before the investigating officer. No application for a continuance to meet any element of surprise to the defense was made.

6. War Department records show that accused is 41 years of age. He graduated from high school, but did not attend college. He was a member of the National Guard of Iowa for eight years. He was appointed a second lieutenant, Infantry Reserve, on May 7, 1926, promoted to first lieutenant on November 11, 1931, and ordered into the active military service on February 10, 1942. In October, 1931, before a civil court at Pasadena, California, he pleaded guilty to charges of intoxication and illegal possession of intoxicating liquor and was convicted and sentenced.

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 thereof. Dismissal is authorized upon conviction of violation of Article of War 96.

Robert H. Haavig, Judge Advocate.

Andrew S. Rapp Jr., Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

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1st Ind.

War Department, J.A.G.O., JAN 9 1943 - 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 Claire L. Menefee (O-231275), 46th Air Base Squadron.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings as approved by the reviewing authority and the sentence and to warrant confirmation thereof. Accused was drunk in the streets of a small town in the neighborhood of his post and, while drunk, drove a Government quarter ton truck about the streets of the town. He was sentenced to dismissal. The reviewing authority recommended that the dismissal be commuted to restriction for three months and to forfeiture of $50 per month for six months. I recommend that the sentence be confirmed but, in view of all the circumstances and the recommendation for clemency, recommend that the sentence be commuted to restriction for three months and forfeiture of $50 per month for a like period and that the sentence as thus modified be carried into execution.

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

Myron C. Cramer

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

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

(Sentence confirmed but commuted to restriction for three months and forfeiture of $50. per month for three months, G.C.M.O. 36, 16 Mar 1943)

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

SPJGH
CM 228147

JAN 21 1943

UNITED STATES	FIRST DISTRICT ARMY AIR FORCES TECHNICAL TRAINING COMMAND.
v.	Trial by G.C.M., convened at Miami Beach, Florida, October 26, and November 14, 1942.
Second Lieutenant RICHARD M. DAY (0-559083), Air Corps.	Dismissal.

OPINION of the BOARD OF REVIEW
HILL, LYON and SARGENT, Judge Advocates

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: In that 2nd Lieutenant Richard M. Day, Air Corps, Assistant Tactical Officer, 31st Training Squadron, Officer Candidate School, Miami Beach, Florida, was on or about September 1, 1942, entrusted with the sum of one hundred dollars ($100.00) in the form of a negotiable instrument, the property of Officer Candidate William Roy Chapin, Jr., and did fail to make an accounting of his trust in a manner worthy of an officer and a gentleman, to wit, by wrongfully converting to his own use the sum of fifty dollars ($50.00) lawful currency of the United States, the property of Officer Candidate William Roy Chapin, Jr.

Specification 2: In that 2nd Lieutenant Richard M. Day, Air Corps, Assistant Tactical Officer, 31st Train-

ing Squadron, Officer Candidate School, Miami Beach, Florida, was on or about September 5, 1942, entrusted with the sum of two hundred dollars ($200.00), in the form of a negotiable instrument, the property of 1st Lieutenant Christopher P. Miller, Air Corps, and did fail to make an accounting of his trust in a manner worthy of an officer and a gentleman, to wit, by wrongfully converting to his own use the sum of fifty dollars ($50.00), lawful currency of the United States, the property of 1st Lieutenant Christopher P. Miller, Air Corps.

Specification 3: In that 2nd Lieutenant Richard M. Day, Air Corps, Assistant Tactical Officer, 31st Training Squadron, Officer Candidate School, Miami Beach, Florida, was on or about September 14, 1942, entrusted with the sum of sixty dollars ($60.00) lawful currency of the United States, and the sum of thirty-one dollars and fifty four cents ($31.54) in the form of a negotiable instrument, the property of Officer Candidate William A. Gossett, and did fail to make an accounting of his trust in a manner worthy of an officer and a gentleman, to wit, by wrongfully converting to his own use the sum of ninety-one dollars and fifty-four cents ($91.54), lawful currency of the United States, the property of Officer Candidate William A. Gossett.

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

3. The evidence for the prosecution shows that about September 1, 1942, Officer Candidate William R. Chapin, Jr., 31st Training Squadron, Officer Candidate School, Miami Beach, Florida, indorsed and gave to the accused, an officer of that squadron, a check payable to Chapin in the sum of $100 to cash and return the proceeds to Chapin. Within the next 10 days, the accused, when questioned, first informed Chapin that he had deposited the check for clearance in his own bank, and later that he had not had the opportunity to get to the bank again. Some time later, accused paid $50 to Chapin, stating that he had not had an opportunity to get the cash, but would do so after taking a troop train to Camp Upton, New York. The next day accused stated that he was not going to Camp Upton and would pay the balance in a day or so. The ac-

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cused paid the remaining $50 about September 30, 1942, by means of a Western Union money order. Chapin had asked accused for his money about six times before he received the total amount (R. 5-13).

Second Lieutenant Christopher P. Miller, then an officer candidate, on September 5, 1942, indorsed and gave to the accused, to be cashed, a check from his father in the sum of $200. He requested payment six or seven times before he received any of the proceeds of the check. Accused told Miller on one occasion that the bank was holding the check and had wired to verify it. At another time, the accused stated that he would go to the finance office and get the money. On September 16, 1942, the accused paid Lieutenant Miller $150 in cash. The balance of $50 was, on October 13, 1942, paid by check of the father of accused. A money order for that amount, however, had been telegraphed September 30, 1942, to Lieutenant Miller, but canceled because of his absence on leave. At no time did Lieutenant Miller offer to lend the accused money, nor did the accused request a loan (Exs. 3 and 7).

Officer Candidate William A. Gossett gave the accused, on September 14, 1942, three $20-bills and a travel allowance check in the sum of $31.54, to obtain money orders which Gossett desired to send home to his wife and father. The accused stated that he would leave the orders at the desk in the Boulevard Hotel, but failed to do so. Two days later the accused went on emergency leave. Candidate Gossett next saw accused on September 30, 1942, and on that same day received a wire stating that the money was waiting for him at the Western Union office (R. 27-30).

4. For the defense the accused testified that Officer Candidate Chapin, about September 1, 1942, gave him a check for $100 to cash. He cashed the check at the Miami Beach Schools Post Exchange on that day or the next day. When accused met Chapin, accused stated that he had deposited the check in the bank and would have to wait until it was cleared. Accused did not deposit the check, but had $100, the proceeds of the check, in his pocket while talking to Chapin. He paid Chapin $50 on some day prior to September 16, 1942, and told Chapin that he would pay the balance upon his return from taking out a troop train. He used the remaining $50 in a payment on account to a doctor in New York for current treatment of his wife. After charges were preferred against him, accused repaid the $50 balance to Chapin by a money order sent by his father from money which belonged to accused (R. 37-38, 42-46).

The accused received from Lieutenant Miller, about September 5, 1942, a check for $200, which he cashed at the post exchange, either that day or the next. When Miller later asked how soon he would get

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the money, accused, who then had the $200 in his pocket, stated that he had taken the check to get it cashed and that Miller would get the money in a few days. He paid $150 to Miller and used the balance of $50 in a payment on account, about September 12, to the doctor in New York for current treatment of his wife. The $50 due Miller was paid by the father of accused from money belonging to accused (R. 38-40, 42-43).

The accused received, about September 14, 1942, from Officer Candidate Gossett three $20-bills and a check for $31.54, with which to get two money orders for Gossett. On September 16, 1942, accused received a call from New York that his wife was very sick, and left 30 minutes later on an emergency furlough, without giving a thought to anything else. He did not purchase the money orders, but spent the entire $91.54 on telephone calls, telegrams, and his train fare returning to Miami Beach. Upon return to Miami Beach, he was informed of the charges against him, and immediately went out and made arrangements to pay back the sums of money, and did so on September 30th by Western Union (R. 36, 44-45, 47).

The accused denied that he intended to keep or convert to his own use any of the money which he had received from the three officer candidates, or had he intended at the time to use any of the money of Miller or Chapin in payment of the doctor's bills of his wife. He fully intended to pay back by the first of the month, or before, the moneys used to pay the bills of the doctor (R. 36, 38, 41, 44).

Four officers testified to the good character of accused, and to his excellent reputation for veracity and integrity (Exs. A, B, C, and D).

5. The record shows, and the accused admits, the receipt of the checks alleged in Specifications 1 and 2, to be cashed for Officer Candidates Chapin and Miller, and of the money and checks alleged in Specification 3, to be used in obtaining money orders for Officer Candidate Gossett. He cashed at once the checks of Chapin and Miller, but failed to return the proceeds to them. The accused falsely stated to Chapin that he had deposited the check in the bank and would have to wait for its clearance, when in fact he had the proceeds of the check in his pocket. He did pay to Chapin one-half of the proceeds of Chapin's check about 2 weeks after receiving the check, and the balance about 1 month after he received the check, and after charges had been preferred. The accused falsely stated to Officer Candidate Miller that the bank was holding the check to verify it, and at another time that he would have to go to the finance

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office to get the money, although he had cashed the check within a day of its receipt. Accused paid Miller $150 11 days after he had received the check, and the balance of $50 a month and 7 days after the receipt of the check, and after charges had been preferred. The accused admitted that he used $50 each from the proceeds of the Chapin and Miller checks in paying $100 to the doctor who was attending his wife in New York. The accused did not purchase the money orders with the cash and check given him by Gossett on September 14, 1942, and leave them at the hotel desk as he had agreed, but admitted that after he departed for New York on September 16, 1942, on an emergency furlough to see his sick wife, he spent the entire $91.54 on telephone calls, telegrams, and his train fare returning from New York. It does not appear when accused returned from New York, but Gossett was next able to find him on September 30, 1942, and on the same day Gossett received a wire stating that the money was at the Western Union office and, thereupon, himself purchased his money orders.

The record shows, with respect to each Specification, that the accused, an officer of the training squadron, converted to his own use, negotiable checks and money entrusted to him by three officer candidates of his squadron to perform a specific service for each candidate which the candidate could not conveniently do for himself. The conversion was aggravated with respect to Chapin and Miller by the fact that the accused made false statements to each of them in response to their complaints as to their failure to receive the proceeds of the checks, and by the fact that accused had cashed the checks and had the money in his possession at the time each made his first request for the proceeds. While no such false statements were shown with respect to Gossett, the accused admitted that he spent the entire amount, $91.54, in payment of his own expenses. Full restitution has been made of the moneys involved in the three Specifications.

The acts of accused were clearly, in each case, a breach of trust, and were aggravated with respect to two of the three Specifications by the making of false statements with respect thereto to his inferiors in rank. Winthrop cites a breach of trust, official, semi-official, or personal, as an instance of conduct unbecoming an officer and a gentleman, chargeable under the 61st (95th) Article of War (Winthrop's Military Law and Precedents, Reprint, p. 714).

6. The accused is 29 years of age. The records of the Office of The Adjutant General show his service as follows:

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Enlisted service from June 1, 1929, to July 29, 1933; appointed second lieutenant, Air Corps, Army of the United States, from Officer Candidate School, and extended active duty, May 11, 1942.

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

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

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SPJGH
CM 228147 1st Ind.

War Department, J.A.G.O., JAN 23 1943 - 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 Richard M. Day (0-559083), Air Corps.

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

3. Inclosed herewith are the draft of a letter for your signature, transmitting the record of trial to the President for his action, and a form of Executive action confirming the sentence and directing that the sentence be carried into execution.

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.

(Sentence confirmed, G.C.M.O. 65, 27 Mar 1943)

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

SPJGK
CM 228148

DEC 9 1942

UNITED STATES	THIRD AIR FORCE
v.	Trial by G. C. M., convened at Drew Field, Florida, November 3, 1942. Dismissal and confinement for three (3) years.
Second Lieutenant CHARLES W. GREEN (O-561136), Air Corps, 98th Fighter Squadron, 337th Fighter Group.	

OPINION of the BOARD OF REVIEW
HOOVER, COPP and SARGENT, 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: Violation of the 93rd Article of War.

Specification 1: In that 2nd Lieutenant Charles W. Green, 98th Fighter Squadron, 337th Fighter Group did, at Drew Field, Florida, on or about August 12, 1942, with intent to defraud, falsely make in its entirety a certain check, in the following words and figures, to-wit: "The Army National Bank of Fort Leavenworth, Kans. 83-831. Fort Leavenworth, Kans. August 12, 1942. No.___. Pay to the order of Lt. John H. Redman, $15.00. Fifteen and 00/100 Dollars. Lt. J. L. Heib," and appearing on the reverse side "Lt. John H. Redman," which said check was a writing of a public nature which might operate to the prejudice of another.

Specification 2: In that 2nd Lieutenant Charles W. Green, 98th Fighter Squadron, 337th Fighter Group did, at Drew Field, on or about August 13, 1942, with intent to defraud, falsely make in its entirety a certain check, in the following words and figures, to-wit: "The Army National Bank of Fort

Leavenworth, Kans. 83-831. Fort Leavenworth, Kans. August 13, 1942. No.___. Pay to the order of Lt. John N. Redman, $15.00. Fifteen and 00/100 Dollars. Lt. J. L. Heib," and appearing on the reverse side "Lt. John N. Redman," which said check was a writing of a public nature, which might operate to the prejudice of another.

Specification 3: In that 2nd Lieutenant Charles W. Green, 98th Fighter Squadron, 337th Fighter Group did, at Drew Field, Florida, on or about August 20, 1942, with intent to defraud, falsely make in its entirety a certain check, in the following words and figures, to-wit: "The Army National Bank of Fort Leavenworth, Kans. 83-831. Fort Leavenworth, Kans. August 20, 1942. No.___. Pay to the order of Dale R. Smith $15.00. Fifteen and 00/00 Dollars. Lt. J. L. Heib," and appearing on the reverse side "Dale R. Smith," which said check was a writing of a public nature, which might operate to the prejudice of another.

Specification 4: In that 2nd Lieutenant Charles W. Green, 98th Fighter Squadron, 337th Fighter Group did, at Drew Field, Florida, on or about August 24, 1942, with intent to defraud, falsely make in its entirety a certain check, in the following words and figures, to-wit: "The Army National Bank of Fort Leavenworth, Kans. 83-831. Fort Leavenworth, Kans. August 24, 1942. No.___. Pay to the order of Lt. Dale R. Smith, $15.00. Fifteen and 00/00 Dollars. Lt. Jack L. Heib," and appearing on the reverse side "Lt. Dale R. Smith," which said check was a writing of a public nature, which might operate to the prejudice of another.

Specification 5: In that 2nd Lieutenant Charles W. Green, 98th Fighter Squadron, 337th Fighter Group did, at Drew Field, Florida, on or about September 12, 1942, with intent to defraud, falsely make in its entirety a certain check, which is in words and figures following, to-wit: "No.___. Tampa, Florida. September 12, 1942. Pay to the order of

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Charles W. Green, $32.50. Thirty-two and 50/100 Dollars. First National Bank of Tampa 63-26/6 Tampa, Florida. G. C. Warren," and appearing on the reverse side "Charles W. Green," which said check was a writing of a public nature, which might operate to the prejudice of another.

Specification 6: In that 2nd Lieutenant Charles W. Green, 98th Fighter Squadron, 337th Fighter Group did, at Drew Field, Florida, on or about September 18, 1942, with intent to defraud, falsely make in its entirety a certain check, which is in words and figures following, to-wit: "No.___. Tampa, Florida. September 18, 1942. Pay to the order of Charles W. Green. $15.00. Fifteen and 00/100 Dollars. First National Bank of Tampa 63-26/6 Tampa, Florida. George C. Warren," which said check was a writing of a public nature, which might operate to the prejudice of another.

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

Specification: In that 2nd Lieutenant Charles W. Green, 98th Fighter Squadron, 337th Fighter Group, having been duly placed in arrest in quarters at Drew Field, Tampa, Florida, on or about October 16, 1942, did, at Drew Field, on or about October 25, 1942, break his said arrest before he was set at liberty by proper authority.

He pleaded 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, to forfeit all pay and allowances due or to become due and to be confined at hard labor for three years. The reviewing authority approved the sentence and forwarded the record for action under Article of War 48.

3. No evidence was introduced by the prosecution.

Accused made an unsworn statement as follows:

"I want to remain in the army, and I only hope that I will be given an opportunity to show that I am worthy. It is difficult to explain the thing that

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> I did, but if you gentlemen could only understand the difficulties of one who goes to Officers Candidate School, and who is required to purchase expensive uniforms and keep up appearances, possibly you will give me another chance. Our pay checks were late, and for that reason I became desperate. As for my breaking arrest, my wife was sick and I just had to see her. I enlisted on September 17th, 1941, and graduated from Officers Candidate School on August 5th, 1942". (R, 7)

It was stipulated that full restitution of the sums covered by the six forged checks was made prior to the trial.

4. The pleas of guilty fully support the findings of guilty.

5. War Department records show that accused is 21 years of age. He attended a college (not identified) for one and one-half years. He was formerly employed in a motion picture studio on make-up work. He served as an enlisted man from September, 1941, to August 5, 1942, when he was appointed a second lieutenant, Army of the United States.

6. Confinement in a penitentiary, Federal reformatory or correctional institution is authorized by Article of War 42 for the offense of forgery, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by section 1401, Title 22, of the Code of the District of Columbia.

7. 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 and sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of violations of Articles of War 93 and 69.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

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1st Ind.

War Department, J.A.G.O., DEC 15 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 Charles W. Green (0-561136), Air Corps, 98th Fighter Squadron, 337th Fighter Group.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. Accused forged a series of six checks in amounts aggregating $107.50. He later broke his arrest. Restitution of funds realized on the checks was made prior to the trial. I believe that punishment by dismissal and forfeitures will suffice and accordingly recommend that the sentence be confirmed but that the confinement imposed be remitted and that the sentence as thus modified be carried into execution.

3. Consideration has been given to a letter from accused to the Secretary of War, dated November 10, 1942, attached hereto, in which accused requests clemency.

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

Myron C. Cramer

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

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

(Sentence confirmed but confinement remitted, G.C.M.O. 19, 5 Mar 1943)

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

SPJGN
CM 228197

JAN 21 1943

UNITED STATES	)	27th INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M. convened at
	)	Schofield Barracks, T. H.,
Captain JOHN KENNEDY	)	November 14, 1942.
(0-293893), Company K,	)	Dismissal.
105th Infantry.	)	

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Captain JOHN KENNEDY, 105th Infantry, did, on or about 10 August 1942, at or in the vicinity of Kukui, in the County and District of Hawaii, T.H., in the presence and hearing of certain enlisted personnel of the Army of the United States, make statements disloyal to the United States of America, and to the discredit of the United States Army, by saying, "We were fighting on the wrong side, that Germany is fighting for a better democracy than we have," "Hitler, Mussolini, Stalin, Marx and a couple of others should be given a medal for awakening the people in their countries," or words to that effect.

Specification 2: In that Captain JOHN KENNEDY, 105th Infantry, did, on or about 10 August 1942, at or in the vicinity of Kukui in the County and District of Hawaii, T.H., and at divers other times, in the presence and hearing of personnel of the Army of the United States, use language of a vile, abusive,

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and contemptuous nature in respect to certain allies of the United States of America, in Violation of section 5794 of the Revised Laws of Hawaii, 1935, and the provisions of General Orders No. 31, Office of the Military Governor, Fort Shafter, T.H., Dated 17 December 1941, by saying, "England always joins the weaker side, so that she can hold the balance of power," "The United States would be a colony of England after the war and that he would resist it," or words to that effect.

Specification 3: (Finding of not guilty.)

Additional Specification 1: (Finding of not guilty.)

Additional Specification 2: (Finding of not guilty.)

He pleaded not guilty to the Charge and all Specifications. He was found guilty of the Charge and Specifications 1 and 2, and not guilty of Specifications 3 and Additional Specifications 1 and 2. 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 shows that on August 10, 1942, the accused was serving as the commanding officer of Company K, 105th Infantry in the Territory of Hawaii. On that date a group of enlisted men and several officers of Company K were engaged in discussing the war and were "condemning Hitler up and down". When the accused joined the group he engaged in the discussion. The accused told the group that "Germany was fighting for a better democracy than we were and we were fighting on the wrong side" (R.4, 11). Accused also stated that "England always joined the weaker side" (R. 4, 11), and that after the war was over the United States would be a colony of England and he would resist it" (R. 5, 12, 16, 19). In addition, he accompanied the above statements with the admonition that we "ought to think it over". The record also shows that the accused on various occasions had made similar remarks to the men of his company or to his fellow officers (R. 5, 7, 10, 12, 13, 16).

On a second occasion, on or about September 26, 1942, First Lieutenant Gerber, and Lieutenant Brown, and the accused were at dinner together when a newspaper mentioning the name of Marx came to their attention. During the conversation which followed, the accused made the statement that "Hitler, Mussolini, Stalin, and Marx should be given medals for waking up the people in their countries" (R. 13, 14).

4. The evidence for the defense is as follows:

First Lieutenant Alton I. Tiller testified that he had served the accused as his executive officer from January 12, 1942, to August 1, and that during that time he had known the accused both in their professional relationship and socially and that he had never heard the accused make any statement which could be characterized as contemptuous of our allies or derogatory of the United States (R. 22-27).

Lieutenant Colonel Charles K. Dillingham testified that he had been in command of the battalion in which the accused served since Christmas, 1941, and that during that time he had known the accused both socially and professionally; that the accused had told him of his experiences in the Irish Army and that he had in turn told the accused of his experiences in fighting the Germans in 1918; and that he had never heard the accused "express himself in a manner which would be considered derogatory against the United States Army, the allies, or the common war effort." The witness also testified that the accused had "a reputation for loyalty, faithfulness, and diligence" (R. 28, 29).

The accused testified that in 1920, when he was 17 years of age he joined the Irish Republican Army, and that in 1922 he left Ireland and came to the United States. In 1924 he joined the United States Army and was promoted during that year to the grade of corporal. A year later he was promoted to the grade of sergeant and in 1932 he was discharged in order to be commissioned a second lieutenant. In 1936 he was promoted to the rank of a first lieutenant and in June, 1937, to the rank of a captain. In 1936 while he was commanding Headquarters Company, 3rd Battalion, 106th Infantry, the company was awarded a prize for the best attendance at drill of any organization in the regiment. In 1941 the accused was officially commended by Colonel Conroy and General Heskell for troop leadership during maneuvers in Tennessee. (See paragraph 7 for record of service.)

The accused explained that on one occasion since his arrival in Hawaii when a group of the men of his company were discussing the war and propoganda which they had heard over the radio in which the statement had been made that England always backed the weaker side in order to retain a balance of power, and that Germany was planning to take over the British Empire after the War, the accused had listened to the discussion for a time and then said:

> "***'Well, what if they are; we are fighting on the wrong side. What I meant was the opposite side of the war and our job was to fight the Japs, that's what we are here for. With that, I broke the discussion up and told him to get back to work" (R. 31).

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Concerning the alleged statement that Germany was fighting for a better democracy than we have, the accused explained that he had observed to his men that such statements were German propaganda and that they should pay no attention to them. Concerning the alleged statement that Hitler, Mussolini, Stalin, and Marx should be given medals for awakening the people of their countries, the accused explained what he had really said was that these men would get a "bunch of medals for themselves and retire to some neutral country like the Kaiser".

5. Specification 1 alleges that on or about August 10, 1942, the accused while in the Territory of Hawaii, did, in the presence and hearing of certain enlisted personnel of the Army make statements disloyal to the United States of America and to the discredit of the United States Army by saying,

> "*** 'We are fighting on the wrong side, that Germany is fighting for a better democracy than we have,' and that 'Hitler, Mussolini, Stalin, Marx, and a couple of others should be given medals for awakening the people in their countries,' or words to that effect."

The evidence shows beyond a reasonable doubt that on August 10, 1942, the accused made the first of the above quoted statements relative to Germany in the presence of a group of enlisted men of his own company. The evidence also shows beyond a reasonable doubt that on September 26, 1942, the second of the above quoted statements relative to Hitler and Mussolini, was made by the accused in the presence of two officers. Although the accused denied making the statement that Hitler and Mussolini should be given medals for awakening the people of their countries, he admitted saying "we are fighting on the wrong side," explaining that what he meant was that we were fighting on "the opposite side of the war and our job was to fight Japan." Both statements were alleged to have been made on or about August 10, 1942, whereas, the proof shows that the first statement was made on the date alleged and the second statement was made on September 26, 1942. Further more, the latter statement concerning Hitler and Mussolini was made when only officers were present. Because of this variance between the allegation and the proof as affecting the second statement concerning Hitler, Mussolini, Stalin, and Marx, and because this statement is not clearly disloyal, so much of the findings of guilty as involve this statement should be disapproved.

The statement that "We were fighting on the wrong side, that Germany is fighting for a better democracy than we have," clearly implies that Germany is fighting for better government than we have and that our Government is clearly wrong in making war upon Germany and that we

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NAVY DEPARTMENT

should be fighting with Germany rather than against Germany. Obviously, such statement, in praise of an enemy nation and in criticism of our own nation, which was made to our military personnel and which was accompanied by the admonition that they "ought to think it over" was disloyal to the United States and a discredit to the United States Army. It is equally clear that the making of this statement in the presence of military personnel was prejudicial of good order and military discipline within the purview of the 96th Article of War.

6. Specification 2 alleges that on or about August 10, 1942, the accused while in the Territory of Hawaii and in the presence and hearing of personnel of the Army did use language of a

> "*** vile, abusive, and contemptuous nature in respect to certain allies of the United States of America in violation of section 5794 of the Revised Laws of Hawaii, 1935, and the provisions of General Orders No. 31, Office of the Military Governor, *** by saying, 'England always joins the weaker side, so that she can hold the balance of power, The United States would be a colony of England after the war and that he would resist it,' or words to that effect."

The evidence shows beyond a reasonable doubt that the accused, at the place and time alleged, made the statement in the presence and hearing of personnel of the Army that "England always joins the weaker side" and that "The United States would be a colony of England after the war and he would resist it". The first statement that England always joins the weaker side is neither vile, abusive, or contemptuous of England. The latter part of this statement was not shown to have been made as alleged. The second statement, however, that the United States would be a colony of England after the war and that he would resist it, carries the logical implication that England is so ambitious for power and territorial expanse as to have political or territorial designs upon the United States which might reduce the United States to an inferior political position to England after the war. Although such a statement is not vile it is clearly abusive and contemptuous of the honorable purposes of our ally. The statement, therefore, clearly violates both the Revised Laws of Hawaii, and the provisions of General Order No. 31, Office of Military Governor of the Territory of Hawaii and is prejudicial to good order and military discipline within the purview of the 96th Article of War.

7. The records of the Office of The Adjutant General show that the accused was born in Ireland on June 19, 1903, and that he became a naturalized citizen of the United States on March 15, 1925. He was

enlisted in the 165th Infantry, New York National Guard on July 2, 1924, and was serving as an enlisted man in that organization on October 1, 1929. He was appointed a second lieutenant, New York National Guard, February 25, 1932, federally recognized as first lieutenant, Infantry, New York National Guard, March 6, 1936; and federally recognized as captain Infantry, New York National Guard, January 11, 1937. One efficiency report covering the period from October 15, 1940, to June 30, 1941, reports his service as very "satisfactory" and as "superior" and carries the notation that "this officer has high potential value as an infantry battalion commander or as an infantry regimental staff officer".

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support so much of the findings of guilty of Specification 1 as involves a finding that the accused, did, at the time, the place, and in the manner alleged, make a statement disloyal to the United States of America, and to the discredit of the United States Army, by saying, "We are fighting on the wrong side, that Germany is fighting for a better democracy than we have"; legally sufficient to support so much of the findings of guilty of Specification 2 as involves a finding that the accused, did, at the time, the place, and in the manner alleged use language of an abusive and contemptuous nature in respect to an ally of the United States of America, in violation of section 5794 of the Revised Laws of Hawaii, 1935, and the provisions of General Orders No. 31, Office of the Military Governor, Fort Shafter, Territory of Hawaii, dated December 17, 1941, by saying, "The United States would be a colony of England after the war and that he would resist it"; and legally sufficient to support the sentence and to warrant confirmation thereof. A sentence of dismissal is authorized upon conviction of violation of the 96th Article of War.

Thos. L. Gresson, Judge Advocate.

Dorrance D. Snapp, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

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1st Ind.

War Department, J.A.G.O., JAN 28 1943 - 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 John Kennedy (0-293893), 105th Infantry.

2. I concur in the opinion of the Board of Review and for the reasons therein stated recommend that only so much of the finding of guilty of Specification 1 be approved as involves a finding that the accused did, at the time, the place, and in the manner alleged, make a statement disloyal to the United States of America, and to the discredit of the United States Army, by saying, "We are fighting on the wrong side, that Germany is fighting for a better democracy than we have", and only so much of the finding of guilty of Specification 2 be approved as involves a finding that the accused did, at the time, the place, and in the manner alleged use language of an abusive and contemptuous nature in respect to an ally of the United States of America, in violation of section 5794 of the Revised Laws of Hawaii, 1935, and the provisions of General Orders No. 31, Office of the Military Governor, Fort Shafter, Territory of Hawaii, dated December 17, 1941, by saying, "The United States would be a colony of England after the war and that he would resist it".

The conduct of the accused in making a disloyal statement, and statements abusive of the British Government to officers and enlisted men of his own company obviously raises serious questions as to his true loyalty and show him to be entirely unfitted and unworthy to remain an officer of the Army. I recommend, therefore, that the sentence of dismissal be confirmed and ordered executed.

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 designed to carry into effect the foregoing recommendations.

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

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

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(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed. G.C.M.O. 43, 18 Mar 1943)

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

(105)

SPJGK
CM 228239

DEC 16 1942

UNITED STATES	)	80th INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Camp Forrest, Tennessee, November 6, 1942. To be shot to death with musketry.
Private EARL D. PARKS, (14005853), Company "B" 318th Infantry, Camp Forrest, Tennessee.	)	

OPINION of the BOARD OF REVIEW
HOOVER, COPP and SARGENT, 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. Accused was tried upon the following Charges and Specifications:

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

Specification 1: In that Private Earl D. Parks, Company B. 318th Infantry did, at Camp Forrest, Tennessee, on or about August 8, 1942 desert the service of the United States and did remain absent in desertion until he was apprehended by civil authorities at Clarksdale, Mississippi on or about August 25, 1942.

Specification 2: In that Private Earl D. Parks, Company B, 318th Infantry did at Camp Forrest, Tennessee, on or about September 22, 1942 desert the service of the United States and did remain absent in desertion until he was apprehended at Clarksdale, Mississippi on or about October 13, 1942.

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

Specification: In that Private Earl D. Parks, Company B, 318th Infantry, having been duly placed in confinement in the Camp Guardhouse, Camp Forrest, Tennessee on or about September 18, 1942 did, at the Camp Guardhouse, Camp Forrest, Tennessee on or about September 22, 1942 escape from said confinement before he was set at liberty by proper authority.

He pleaded not guilty to and was found guilty of the Charges and Specifications. Evidence of one previous conviction for absence without leave in violation of

Article of War 61 and larceny in violation of Article of War 93, was introduced. All of the members of the court present concurring, he was sentenced to be shot to death with musketry. The reviewing authority approved the sentence, recommended that it be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for ten years and forwarded the record of trial for action under "Article of War 50½." The record has been treated as if forwarded for the action of the President under Article of War 48.

3. The evidence shows that on August 8, 1942, at Camp Forrest, Tennessee, accused absented himself without leave from Company B, 318th Infantry, to which he had recently been assigned (R. 5, 8, 10), and remained absent until he was apprehended by civil authorities at Clarksdale, Mississippi, on August 25, 1942 (R. 17). He was returned to military control at Camp Forrest, Tennessee, on September 3, 1942 (R. 9, 14), and confined in the Guard House, 318th Infantry (R. 5, 9). At the time of his return to Camp Forrest he was in uniform (R. 6). On September 18, 1942, accused was transferred to the Camp Forrest Guard House (R. 6). Early on August 8, the day of his disappearance, he had been told that he would be given disciplinary punishment for being late in falling out with his platoon (R. 11). He had expressed no dissatisfaction with his organization (R. 9, 11), but had at one time made a request to the first sergeant to see his company commander about a transfer to Second Army Headquarters (R. 10). The request had been denied as no transfers were being made or were in prospect at that time (R. 9).

On September 22, 1942, while in confinement and working under guard at the rubbish dumps at Camp Forrest (R. 18), accused escaped from confinement by concealing himself in a cloud of smoke and thus eluding the sentinel (R.19). He remained absent without leave until he was apprehended in Clarksdale, Mississippi, by a deputy sheriff on October 16, 1942 (R. 17). When accused escaped he was wearing prison denim (R. 19). At the time of his return to military control he was wearing civilian clothes (R. 16). The defense offered and the court received in evidence a copy of a letter from accused to the Commanding General, 80th Infantry Division, as follows:

"Oct. 9th 1942
Memphis Tenn.

Dear Sir:

Last month I ran off from confinement at Camp Forrest. My reason was that I have been in so much trouble since I enlisted in the Service that it has worked on my brain. I just can't stay a long term in confinement. My hearts desire is to return and be a real soldier. I will go across any time if only I had a chance to make amends. I ask you this chance for my peoples sake and my countrys.

I am not afraid to fight. That is what I want to do. It seems I can't stay out of trouble here so why not send me over so I can prove my self a man. If I stay in confinement I am not any

good to anyone. If you will give me just this chance I promise to be one of the best soldiers in the 80th division. In closing my letter I beg you for one last chance.

Yours Truly
Pvt. Earl D. Parks

I am turning myself in." (R. 17; Def. Ex. A).

Accused testified that his parents separated at Jackson, Mississippi (R. 22), when he was two years old (R. 21). He was adopted in Columbia, Mississippi, by some people named Butler and assumed their name until 1937, when he located his real parents. While living with his foster parents he attended school. For three or four years he "straggled" from one place to another but was induced by his father to enlist in the Army, which he did at Fort Benning in 1940. He first served in the Second Armored Division and later in the Infantry where he found the services very different. Desiring a transfer from the 318th Infantry, he vainly requested permission to see his company commander about a transfer. He testified, "The First Sergeant seemed like he disliked me from the start. I didn't see any reason why he shouldn't let me talk to the Company Commander. So it just bore on my mind 'till it got almost unbearable, so I takes off." He also testified,

> "Well, the reason I left, I was downhearted and sick. Seemed like everybody was down on me - just didn't have a chance. I had to get out and sympathize with somebody and have somebody sympathize with me. I just wanted to get away a little." (R. 23). He intended to return (R. 23).

He went to see his fiancee in Georgia, then to his father to get money sufficient to get married. His father was ill and unemployed and unable to give financial aid. Then he decided to go to Camp Polk, Louisiana, for the purpose of turning himself in, but changed his mind and went to Tennessee. When he reached Mississippi he was arrested, put in confinement and brought back to Camp Forrest and confined in the Regimental Guard House (R. 22). After about two weeks of confinement in the Regimental Guard House he was transferred to the post stockade where "The food they put on the table is pitiful" (R. 23). He was obliged to work on rock piles with sixteen-pound sledges (R. 22). "I stayed there three or four days and never got enough to eat - never a meal out of that mess hall." (R. 23). He was sincere in what he said in his letter of October 9, 1942 (R. 23), and still would like to go overseas and "make amends for the things and trouble" he had caused the Army and the disgrace to his family and self (R. 23). He bought civilian clothes about two days after leaving camp (R. 25) to change from prison denims (R.26). He did not have enough money to buy an Army uniform (R. 26).

4. The evidence, including the testimony of accused clearly shows that accused absented himself without leave on August 8, 1942, because of dissatisfaction with the service and resentment on account of his inability to arrange a transfer. He remained absent until apprehended seventeen days later. While in confinement following his apprehension he escaped and again absented

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himself. While absent on this occasion he wore civilian clothes. He was again apprehended. The circumstances amply show intent to desert on both occasions. The evidence, together with the pleas of guilty, supports the findings of guilty of the charges and specifications.

5. After announcing the findings and sentence, the president of the court addressed the following remarks to accused:

> "In awarding the death sentence for the capital offense of desertion in time of war, the court unanimously feels that by deserting the service after having been previously restored to duty following dishonorable discharge, you have forfeited the right to live in a country that other men are now dying to protect." (R. 27).

6. The charge sheet shows that the accused is twenty-four years of age. He enlisted August 9, 1940, with no prior service.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. The death penalty is authorized upon conviction of desertion in time of war.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

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1st Ind.

War Department, J.A.G.O., DEC 19 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 Earl D. Parks (14005853), Company B, 318th Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. Accused was found guilty of desertion on August 8, 1942, terminated by apprehension on August 25, 1942, and of escape and a second desertion on September 22, 1942, terminated by apprehension on October 13, 1942. He was previously convicted by general court-martial of absence without leave and larceny. He was sentenced to be shot to death with musketry. The reviewing authority approved the sentence to death but recommended that it be commuted to dishonorable discharge, total forfeitures, and confinement at hard labor for ten years. I recommend that the sentence be confirmed but commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for ten years, and that the sentence as thus commuted be carried into execution but that the dishonorable discharge be suspended and that a detention and rehabilitation center be designated as the place of confinement.

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

Myron C. Cramer

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

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

(Sentence confirmed but commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for ten years. Execution of that portion thereof adjudging dishonorable discharge suspended until soldier's release from confinement. G.C.M.O. 11, 1 Mar 1943)

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

SPJGH
CM 228274

DEC 31 1942

UNITED STATES	)	81st INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Camp Rucker, Alabama, November 17, 1942. Dishonorable discharge and confinement for fifteen (15) years. Penitentiary.
Private MASON O. SMALL (36506588), Company A, 322nd Infantry.	)	

REVIEW by the BOARD OF REVIEW
HOOVER, COPP and SARGENT, Judge Advocates.

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

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

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

Specification: In that Private Mason O. Small, Company "A", 322d Infantry, did, at Camp Rucker, Alabama on or about July 20, 1942 desert the service of the United States and did remain absent in desertion until he was apprehended at Highland Park, Michigan on or about August 21, 1942.

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

Specification: In that Private Mason O. Small, Company "A", 322d Infantry, did at Dothan, Alabama, on or about July 22, 1942, feloniously take, steal and carry away, one Ford Coach, M1941, blue, motor number 6269280, license number Alabama 38C1612, value of about eight hundred dollars ($800.00), the property of Henry Floyd, U.S. Deputy Marshal, Dothan, Alabama.

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

Specification 1: (Finding of Not Guilty.)

Specification 2: In that Private Mason O. Small, Company "A", 322nd Infantry, did, on or about July 23, 1942, transport from the State of Florida to the State of Georgia one Ford Coach, M1941, blue, motor number 6269280, license number Alabama 38C1612, knowing the same to have been stolen in the violation of the National Motor Vehicle Theft Act (Sec. 408, Title 18, U.S. Code).

Specification 3: In that Private Mason O. Small, Company "A", 322nd Infantry, did, on or about July 26, 1942, transport from the State of Alabama to the State of Tennessee one Ford Coach, M1941, blue, motor number 6269280, license number Alabama 38C1612, knowing the same to have been stolen, in violation of the National Motor Vehicle Theft Act (Sec. 408, Title 18, U.S. Code).

Specification 4: In that Private MASON O. SMALL, Company "A", 322d Infantry, did, on or about July 24, 1942, transport from the State of Georgia to the state of Alabama one Ford Coach, M1941, blue, motor number 6269280, license number Alabama 38C1612, knowing the same to have been stolen, in violation of the National Motor Vehicle Theft Act (Sec. 408, Title 18, U.S. Code).

He pleaded not guilty to Charges I and II and their Specifications, not guilty to Specification 1, Charge III, and guilty to Charge III and specifications 2, 3 and 4 thereunder. He was found guilty of Charge I and its Specification, guilty of Charge II, guilty of the Specification, Charge II, "with the exception of the words 'Dothan, Alabama', and to be substituted therein 'Marianna, Florida, or vicinity'", not guilty of Specification 1, Charge III, and guilty of Charge III and Specifications 2, 3 and 4 thereunder. 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 fifteen years. The reviewing authority approved the sentence, designated the United States Penitentiary, Atlanta, Georgia, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that accused absented himself without leave from his organization at Camp Rucker, Alabama, on July 20, 1942 (Ex. A). He was apprehended by civil police in Highland Park, Michigan, on August 21, 1942 (R. 13; Ex. D). When arrested he was dressed in civilian clothes (R. 14).

During the afternoon of July 22, 1942, Mr. Henry Floyd, a Deputy United States Marshal, parked his car at the corner of Troy and Foster Streets, Dothan, Alabama. The car was a 1941 blue, two-door Ford coach, motor number 6269280, Alabama license number 38C1612. Upon his return, the car had disappeared. As the result of a call from the highway patrol, Clarksville, Tennessee, he recovered it one week later at that town. When stolen, the car was equipped with four new tires which had travelled less than 1000 miles. When recovered,

there were four worn tires on the car and two fenders of the vehicle had been damaged (R. 7, 8).

On July 26, 1942, a policeman patrolling the highway near Clarksville, Tennessee, arrested accused for reckless driving and for being without a driver's license. When arrested, accused was in civilian clothes and was driving a light blue 1941 Ford coach with an Alabama license number beginning with "38C", in which were found paid grocery bills which were charged to "Mr. Floyd." Accused at no time stated to the arresting officer that he was in the military service. Accused was convicted of the offenses for which he was arrested and being unable to pay the fine imposed was sentenced to 31 days on the chain gang. A girl who was with accused when arrested was fined for vagrancy (R. 8-10; Ex. D). Accused escaped from the chain gang (R. 10).

On October 14, 1942, in the course of an investigation, accused was advised of the contents of Article of War 24 and was told he did not have to make a statement in any form (R. 11, 12). He then made a written statement that he absented himself without leave while on a drinking spree, went to Dothan, Alabama, "drank for a long time," became acquainted with a girl, and remained in Dothan for three days. On the third day, while drinking with two civilians, accused suggested that "if we had a car we could go somewhere". The civilians left saying they would obtain a car, and returned with a blue 1941 Ford coach. Accused drove with the two civilians to Florida. They picked up a girl on the highway and drank while en route. They continued drinking after arriving in Florida. On the morning of July 23, in the vicinity of Marianna, Florida, accused awakened in the car. The girl was in the front seat. Accused and the girl drove to Marianna, Florida, and then to Chipley, Florida, where she obtained some clothes at her home. They drove to Georgia, then to Alabama, and finally to Tennessee. The girl drove most of the way because accused "was drinking all the time". The girl bought accused some civilian clothes because his uniform was soiled. They were arrested in Clarksville, Tennessee, on July 26. Accused was sentenced to the chain gang but escaped. He was again arrested but revealed his identity as a soldier and was released after a few days in order that he might return to his organization. His father telegraphed him $30. Accused went to Detroit, Michigan, and then to Highland Park, Michigan, where he was apprehended. (Ex. D)

Accused testified in substantial accord with his statement made at the investigation. He testified, in addition, that he was drunk when he left Dothan and that he did not attempt to learn where his men companions obtained the car (R. 14). When he awoke in Marianna, Florida, the men had disappeared. It then occurred to him that the car was stolen, but he took no action and did not turn the car over to the civil authorities (R. 15). When arrested at Clarksville, Tennessee, he wanted to return to Camp Rucker and accordingly informed the civil authorities that he was in the military service and inquired several times as to whether they had informed his organization of the fact of his arrest (R. 13, 14). When sentenced to the chain gang, he informed the court that he was a soldier (R. 16). When he escaped, he did not return to his organization because he had no transportation (R. 14). When released from his second arrest, he had the $30 which he had obtained by wire from his

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father in order to return to Camp Rucker (R. 16). He took a train to Bowling Green (Kentucky) where he planned to take a bus to Camp Rucker (R. 17, 18). At Bowling Green he unsuccessfully tried to get an Army uniform, and bought some civilian clothes instead, which purchase left him with $20. The ticket from Bowling Green to Camp Rucker would cost about $8 (R. 19, 20). While in Bowling Green he knew he was "in a tough spot" (R. 13) but began drinking again and "got to thinking a few more days would not make it much worse" (R. 17). He decided that if the bus left for Detroit before a bus left for Camp Rucker, he would take it, as he wanted to see his parents and his children. The fact of his drinking had no bearing on this decision. He then went to Louisville and from there to Detroit. He was drunk most of the time (R. 20, 21). Upon arriving in Detroit he rented a hotel room, slept there for about 16 hours, "began to sober up and began to realize more then" (R. 21). He did not attempt to see his parents or children in Detroit as he knew they would wonder at his presence and "it wouldn't make them feel very good". He remained away from their neighborhood (R. 13, 17, 21). He telephoned his sister who lived in Kenmore, New York, told her he was absent without leave and requested that she send him money for his fare to Camp Rucker. His sister told him to return to where he was staying and to wait till he heard from her. She also said she knew something was wrong as some men had been at her home to inquire about accused. Accused returned to his hotel at Highland Park in about 3 hours, and was there apprehended in civilian clothes by the civil authorities on August 21, 1942. Accused also testified that he had worn civilian clothes during part of his absence because his uniform was soiled and he had tried unsuccessfully to have it cleaned (R. 13, 14). He could not account for the car's damaged fender (R. 16), nor could he recall whether the tires on the car were new or worn (R. 17).

4. The evidence amply supports the findings of guilty of desertion (Charge I and Specification). When first apprehended by civil authorities at a considerable distance from his home station he was wearing civilian clothes and was driving a stolen car the possession of which he could not satisfactorily explain. He was sentenced to serve on a chain gang but escaped before expiration of his sentence. Three days later he was again arrested by the civil authorities. Upon his release, he requested and obtained from his family sufficient funds for the avowed purpose of returning to his organization. However, he did not return because he knew he "was in a tough spot". Instead, accused took a bus to his home city, Detroit, Michigan, ostensibly to see his parents and his children. However, while in Detroit he did not visit them, but purposefully remained away from the neighborhood because he knew it would be necessary to explain his presence. He was apprehended a third time by the civil authorities and finally returned to military control. When apprehended, he was still dressed in civilian clothes and was at a considerable distance from his home station. Intent not to return was proved.

The evidence also clearly supports the findings of the court, by means of exceptions and substitutions, that accused on or about July 22, 1942, at Marianna, Florida, or vicinity, committed larceny of the vehicle described,

of ownership as alleged (Charge II and Specification). Accused suggested to the two civilians that they could go for a ride if they had a car. When his companions returned with the car he made no inquiries as to the ownership of the vehicle or as to their method of obtaining it. When accused awoke one morning near Marianna, Florida, to find that the two civilians had unexplainably disappeared, he admitted that he then thought that the car might possibly have been stolen. However, he made no attempt to pursue the obvious courses of returning the car to Dothan, Alabama, or of surrendering the car to the civil authorities in the immediate vicinity. Instead, he drove with the girl to her home at Chipley, Florida, and the couple then drove from Florida to Georgia, then to Alabama and then to Tennessee where he was ultimately apprehended by the civil authorities for a traffic violation. In view of such actions the inevitable conclusion is that accused took the vehicle with the intent permanently to deprive the owner of it. Identity of the stolen vehicle was sufficiently established by the fact that the car which accused was driving when apprehended was of the same color, make, and year of manufacture as that owned by Mr. Floyd, by the fact that grocery bills bearing the name of Mr. Floyd were found in the car and by the similarity, in part at least, of the license numbers. Although the value of the car was not proved, in view of its use and its year of manufacture, type and make, it may properly be inferred that it was of a market value in excess of $50. Larceny, in violation of Article of War 93 was established.

It was similarly clearly established by the evidence and by the pleas of guilty that accused, knowing the vehicle in question to have been stolen transported it from Florida to Georgia, from Georgia to Alabama, and from Alabama to Tennessee, offenses denounced by the National Motor Vehicle Theft Act (18 U.S.C. 408) and violative of Article of War 96 (Specifications 2, 3, and 4, Charge III).

5. The action of the court in finding accused guilty, by exceptions and substitutions, of the theft of the car at Marianna, Florida, or vicinity, instead of at Dothan, Alabama, as alleged, did not result in a finding of guilty of an offense distinct from that alleged. It merely indicated that the court accepted the view that although accused participated in the wrongful taking of the car at Dothan, his drunkenness then precluded an intent on his part permanently to deprive the owner of his property, and that such an intent was not formed by accused until he awoke in the car at or near Marianna. Although in the ordinary case of larceny, intent permanently to deprive the owner of his property must exist at the time of the trespass where the original taking was wrongful, and the taker later fraudulently converts the goods involved, intending permanently to deprive the owner of his property therein, the offense of larceny has been committed (par. 149g M.C.M. p. 173).

6. The charge sheet sets forth the age of accused as 26 years, and shows that he was inducted into the military service on June 18, 1942.

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

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opinion of the Board of Review, the record of trial is legally sufficient to support the findings of guilty and the sentence. Confinement in a penitentiary is authorized by Article of War 42 for the offense of larceny of property of value in excess of $50 and for the offenses of interstate transportation of a stolen motor vehicle, recognized as offenses of a civil nature and so punishable by penitentiary confinement for more than one year, larceny by Section 466, Title 18, and interstate transportation of a stolen motor vehicle by Section 408, Title 18 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.

SPJGN
CM 228333

JAN 12 1943

UNITED STATES v. Second Lieutenant BUELL STANLEY LAW, JR. (0-474845), 391st Infantry.	98TH INFANTRY DIVISION Trial by G.C.M., convened at Camp Breckinridge, Kentucky, November 24, 1942. Dismissal.

OPINION of the BOARD OF REVIEW
CRESSON, SNAPP 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 Charge and Specification:

CHARGE: Violation of the 95th Article of War.

Specification: In that Second Lieutenant Buell Stanley Law, 391st Infantry, did, at Camp Breckinridge, Kentucky, on or about November 14, 1942, in the presence of officers of the United States Army, conduct himself in a manner unbecoming an officer and gentleman by saying, "I would like to fuck Captain Fletcher's wife," or words to that effect.

He pleaded not guilty to and was found guilty of the Charge and Specification. 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 shows that at approximately 10:50 p.m. on November 14, 1942, the accused was engaged in a friendly argument with Second Lieutenant Rizzuto in the 3rd Battalion Officers' Club at Camp Breckinridge. The argument was concerned purely with military matters which had no bearing on the subsequent remark made by the accused which remark is set forth in the Specification. The accused called Captain Day over to settle the argument. The group was also joined by Captain Sooter, and proceeded from the club room

toward the foot of the stairs leading to the officers' bedrooms. This particular place at the foot of the stairs was a common place for the officers to stop and talk after leaving the club room. At this point the discussion of military affairs suddenly stopped and the accused abruptly made the remark, "I would like to fuck Captain Fletcher's wife". Captain Day attempted to stop the remark, but the remark was completed before he could do so. Captain Day then told the accused to go to his room. The accused asked Captain Day if his direction was an order, and Captain Day replied that it was. The remark was made by the accused and heard by the three officers present. Although the accused had been drinking during the evening, he was not drunk when the statement concerning Captain Fletcher's wife was made. Furthermore, the earlier conversation between the accused and the officers present had been entirely unrelated to women, sexual matters or to Captain Fletcher or to Captain Fletcher's wife. Captain Fletcher and his wife had been at the club earlier in the evening and had been gone only five or ten minutes prior to the time when the remark concerning Captain Fletcher's wife was made. (R. 5-6, 7-9, 12-13)

A few minutes after the incident above described, the accused returned to the club room and asked Captain Robert K. Leiding, his company commander, if he might talk with him privately. The two officers went to Captain Leiding's room where the accused told Captain Leiding why he had been ordered to his room and admitted that he had said, "I would not mind fucking Captain Fletcher's wife". Captain Leiding suggested to the accused that he present his apologies to Captain Day on the following morning. Captain Leiding testified that the previous conduct of the accused around his company, and with other officers, had been that of a gentleman (R. 13-15).

4. The evidence for the defense is as follows:

Lieutenant Colonel Phillip M. Johnson, who had known the accused for three months, testified that during that time he had been in the home of the accused, had met his wife and family, and that the conduct of the accused had been that of a gentleman. In support of this statement he testified that when the accused had first been assigned to his present organization he had voluntarily presented to his company commander an unfavorable report concerning himself from Camp Wheeler. The accused at that time had also sought the advice of Colonel Johnson as to whether he should resign from the service as he had been advised to do by a reclassification board. The witness cited these acts as substantiating his opinion that the accused was a gentleman. (R. 16-20)

The accused testified that he was 22 years of age and married. Concerning the statement which he had made about Captain Fletcher's wife, the accused testified, in part, as follows:

> "*** I stated that I did not care about the field manuals of the last war or this war, that I would like to fuck Captain Day's, or Captain Fletcher's wife. Captain Day at once told me that

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statement was uncalled for, showed lack of respect on my part and that I had no right to make any statement about an officer or his family like that. I told him that I was married, had a family and the statement was not made with any intent or insult whatsoever, but more in the line that the lady in question was nice enough looking and it is likely that I did think such a thing. He told me, he went and dressed me down about it, finally telling me I had better go upstairs and go to bed, I was not fit to be there that evening. I tried to apologize but he would not listen to me. He said no excuses could be offered for anything like that and turned around and walked away. I continued to go upstairs and upon reaching my room reconsidered the matter and thought it best that I tell my company commander before he heard it other ways and pick up a wrong story. I went back downstairs, approached him and told him I would like to talk to him in private. We went to his room and I told him what we were talking about, which he already knew, how we drifted to the doorway, what I said, what Captain Day said, and I told him that I was telling him myself so that he would not think any less of me when he heard it other ways. I asked him if he thought an apology was in order and he said yes, but not that night, to wait until the morning. He told me to go on upstairs and go to bed and be sure I was fit for duty in the morning, which I was. Approximately 10:30 on the 15th I approached Captain Day in the Blue Room, the sitting room, and called him over and said I would like to apologize for my actions of last night. He said he was not taking any excuses and again turned around and walked away. I more or less let the matter ride after that until Tuesday I was summoned before the Colonel and the Colonel placed me under arrest" (R. 21).

In addition the accused testified that,

"*** I tried to explain that there was no intent or insult meant whatsoever. It was a passing statement that could have been heard over any bar in the country. In fact it could be classed as more of a compliment than an insult for the lady in question" (R. 21).

"It could be taken as an ungentlemanly act or it could be taken as it was meant; just to close a conversation and go to bed" (R. 23).

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5. The Specification alleges that the accused on November 14,

1942, in the presence of officers of the United States Army, conducted himself in a manner unbecoming an officer and a gentleman by saying, "I would like to fuck Captain Fletcher's wife". The facts show clearly that this statement was openly made by the accused in the presence and within the hearing of at least three officers of his regiment. Although every officer cannot be expected to meet ideal standards of gentility, there is a reasonable, minimum standard of morality, decency, and honor below which the conduct of no officer must fall. In the present case, the conduct of the accused, even when viewed with tolerance, falls below such standard, and shows the accused to be unworthy to remain an officer of the Army.

6. The accused is 22 years of age. The records of the Office of The Adjutant General show that the accused was commissioned a second lieutenant in the Army of the United States on May 27, 1942, and entered upon active duty on June 14, 1942.

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 thereof. A sentence of dismissal is mandatory upon conviction of a violation of the 95th Article of War.

Charles Bresson, Judge Advocate.

Dorrance D. Smith, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

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1st Ind.

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

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Buell Stanley Law, Jr. (0-474845), 301st 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 thereof. The conduct of the accused in making an obscene remark in the presence of three fellow officers concerning his licentious desire for the wife of a brother officer is an offense which immeasurably injured a fellow officer and clearly revealed the moral unfitness of the accused to remain an officer or to be considered a gentleman. Furthermore, the attitude of the accused in making light of his error by contending that his remark "was a passing statement that could have been heard over any bar in the country" reveals such a low standard of morality as cannot be tolerated in an officer. I recommend, therefore, that the sentence of dismissal be confirmed and ordered executed.

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 designed to carry into effect the foregoing recommendation.

Myron C. Cramer

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

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

(Sentence confirmed, G.C.M.O. 47, 20 Mar 1943)

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

SPJGK
CM 228338

JAN 21 1943

UNITED STATES	)	IV CORPS
	)	
v.	)	Trial by G. C. M., convened at Camp Beauregard, Louisiana, November 16 and 17, 1942. Dismissal.
	)	
First Lieutenant WILLIAM J. MITCHELL (O-450170), 106th Cavalry (Mecz).	)	

OPINION of the BOARD OF REVIEW
HOOVER, COPP and ANDREWS, Judge Advocates.

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

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

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

Specification 1: (Finding of not guilty).

Specification 2: In that First Lieutenant William J. Mitchell, 106th Cavalry (Mecz), APO #304, c/o Postmaster, Leesville, Louisiana, was, on or about 11:30 P.M., 4 September, 1942, disorderly in uniform in a public place, to wit: the Casino Club near Marksville, Louisiana.

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

Specification: In that First Lieutenant William J. Mitchell, 106th Cavalry (Mecz), APO #304, c/o Postmaster, Leesville, Louisiana, having seen Technician V Grade George W. Myers draw a pistol and point it at Sergeant John L. Brown, Military Police, who was attempting to arrest Technician V Grade George W. Myers, did, on or about 4 September, 1942, at the Casino Club near Marksville, Louisiana, assist Technician V Grade George W. Myers to escape and evade arrest.

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He pleaded not guilty to the Charge and Specifications. He was found guilty of Charge I and Specification 2 thereunder, not guilty of Specification 1, Charge I, guilty of Charge II and guilty of the Specification, Charge II,

> "except the words ' having seen', and, 'draw', and, 'Sergeant John L. Brown, Military Police, who was attempting to arrest Technician V Grade George W. Myers', substituting therefor, respectively, the words, 'knowing that', and, 'had drawn', and, 'certain Military Police personnel, such personell being in the proper performance of their duties, and knowing that such action made Technician George W. Myers subject to arrest by the Military Police', of the excepted words not guilty, of the substituted words, guilty".

Evidence of one previous conviction of being disorderly in uniform and of appearing in a public place in an enlisted man's uniform in violation of Article of War 96, 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 during the night of September 4, 1942, which fell on a Friday, Sergeant John L. Brown, Military Police Detachment, Camp Beauregard, Louisiana, was in charge of a detail of military police consisting of Private First Class Edmund P. Trask, Privates D. T. Migues and Bernard J. P. Paukner, all of the same detachment, and two other soldiers (R. 6). Accused was stationed at Camp Livingston, near Alexandria, Louisiana (R. 105). The detail of military police was under orders to patrol Marksville, a town of 2500 population, 30 miles distant from Alexandria (R. 23) and to cover night clubs in and near Marksville (R. 6). Among other things, it was the duty of the military police to enforce Eighth Service Command and IV Corps curfew regulations including one requiring enlisted men visiting towns from Sundays to Fridays, inclusive, to leave not later than 11:30 p.m. (Ex. B), and instructing the military police to take into custody enlisted men found loitering on the streets or in public places after 11:30 p.m. on such days (Ex. C).

There were three night clubs in the vicinity of Marksville: the Moonlight Inn, south of town, the Emerald Club, about one mile north of town, and the Casino Club, about one and one-half miles north of town (R. 7). These clubs were types commonly called "honky tonks" (R. 7).

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They were equipped with bars and were combination gambling houses, saloons and dining and dance halls (R. 6, 8). They were nightly frequented by about two hundred enlisted men and by many civilians (R. 8).

Brown testified that while on duty at the Moonlight Inn (R. 34) at about 8 p.m., September 4, he was called to a table by accused (R. 23) who was then in uniform (R. 31), and asked, "what time did the soldiers have to be off the street" (R. 23). Brown informed him that the hour was 11:30 p.m. (R. 23). Accused then said in reference to Technician 5th Grade George W. Myers, a member of accused's troop who was seated at the table, "'This is a man from my outfit, and I want to take care of him'" (R. 23). There were two women at the table. On the table there was a pint bottle of whiskey with glasses containing ice and "brownish drinks" (R. 25). Witness later saw accused, Myers and the same two women at a table at the Emerald Club at 9 or 9:30 p.m. (R. 24), at which place and time accused again called witness and asked him if he "would give him a break". There were glasses on the table at this place. Witness told accused again that all soldiers had to be out of the clubs at 11:30 p.m. (R. 24). Paukner testified that while at the Moonlight Inn accused offered drinks to witness and invited him to join his party, which included Myers and a girl (R. 70, 80), and to be seated at his table. Paukner accepted, remaining for an hour or more. Witness testified that there were "drinks" and a "quart bottle" on the table. During the conversation that ensued accused related to Paukner that he had at one time been a provost marshal and had been in a "scrap in New Mexico". Myers was in a "very disorderly" uniform. His shirt was unbuttoned. He had no tie or cap (R. 70). Migues testified that he saw accused and Myers come out of the Moonlight Inn. Myers was dressed in boots, breeches and shirt, but was without a necktie, a cap and a belt. His shirt was torn "from the right elbow down to the cuff. From the right shoulder down to the cuff". Witness told Myers to get his necktie, cap and belt and put them on. Myers replied that they were in "the car" (R. 35).

After leaving the Emerald Club accused and Myers went to the Casino Club (R. 9). Brown and Migues testified that at about 12:30 a.m., September 5, they saw accused, Myers and other soldiers in the gambling room of this place at a "kind of corner of the gambling table (R. 9, 26, 31, 35, 36). Both accused and Myers rolled dice (R. 37).

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Brown twice told the soldiers present that it was time for them to leave (R. 10, 36). Brown and Migues forcibly evicted an R.O.T.C. student from the building (R. 11, 38, 55) but discovered that the student was not subject to their jurisdiction (R. 10), released him and apologized for the incident (R. 11). A soldier approached Brown and inquired if men on furlough had to get off the streets and was told they did (R. 11). Accused and Myers joined a group at the bar, accused holding a glass partially filled with a "brownish drink" and ice (R. 27). Accused and Myers were again told that enlisted men would "have to get off the street". Myers told accused "the military police said they would have to go", and Brown said, "'Yes, that is our orders. You will have to go'" (R. 11).

Accused and Myers went outside and joined the R.O.T.C. student and others (R. 55). Accused asked Trask who was in charge of the military police, stated that Myers was on furlough and asserted that the military police had no jurisdiction over men on furlough (R. 56). Brown testified that while outside the club accused asked him who had given him his orders (R. 12, 57). Witness replied, "Lt. Colonel Heath and the Eighth Corps Service Commander." Accused then said,

> "Colonel Heath and General Krueger are both wrong *** they are going to get in some serious trouble, and Colonel Heath will lose his rank and job *** they didn't have any jurisdiction over men on furlough" (R. 12).

Brown asked for and obtained accused's name for the purpose of reporting the incident (R. 12, 59, 60). Accused stated it would not be necessary for the military police to turn in a report as he would attend to it himself. Accused asked for and was given Brown's name (R. 13, 42). One witness testified that accused appeared to be angry and cursed (R. 52, 58). Brown told Myers to "get going" before he took his name (R. 42). Myers, who appeared to be drunk (R. 17), did not comply (R. 43, 52). The R.O.T.C. man, some girls and some other soldiers remained nearby (R. 41).

At this point Brown asked Myers for his name "to book him for violation of the curfew". Myers said, "You can't get my name". Brown then told him he "would get his name". Myers

> "took his left hand and opened his shirt in that manner (indicating) and reached in and pulled out a pistol and cocked it with his left hand" (R. 14),

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and declared, "There is nobody getting my name" (R. 15). Myers also told the group to "clear out in a hurry" before anyone was hurt (R. 74). He pointed the pistol, an issue .45 caliber automatic (R. 14), waist high in the general direction of Brown and other military policemen who were standing about five feet away, and moved the pistol about (R. 15, 33, 44, 60). The yard was well lighted with "very bright" neon lights (R. 25, 153).

Accused was standing at a distance estimated by Migues and Trask as about five feet (R. 43, 61), by Brown as about 10 feet (R. 15) and by Paukner as about 15 feet from Myers (R. 73). Migues and Trask testified that accused was facing Myers (R. 44, 61), and Brown testified that Myers was "standing in the view of everybody in the crowd" (R. 15). Paukner testified that accused and Myers were standing at right angles to each other (R. 73). Brown, Migues and Trask each testified that accused said, "'It looks like you boys have run into a little trouble'" (R. 15, 45, 61). Paukner testified that accused said, referring to Myers, "Leave him alone or somebody will get hurt" (R. 74). Migues told accused Myers had a "gun" and asked accused to secure it but accused "turned his back" (R. 45). All persons in the vicinity except accused and a deputy sheriff backed away (R. 15, 33, 45, 46, 74). Migues told accused a second time that Myers had a gun. Accused's only response was, "'Who's got a gun'" (R. 45, 61, 66). The military policemen were unarmed (R. 20, 47) except for "night sticks" (R. 20, 47, 64, 75). Brown, Migues, Trask and Paukner each testified that none of the military policemen drew his night stick (R. 20, 47, 64, 65, 76). Brown testified that he began to approach Myers with the intention of arresting him for drawing a weapon (R. 32). He halted a few paces away, however, when Myers said, "'You have come far enough'" (R. 44, 62, 75). Eyewitnesses testified that Myers held the pistol exposed for from three to five minutes (R. 16, 46), and then put it back in his belt or shirt at the command of the deputy sheriff (R. 16, 46, 62, 74). Myers did not remove his hand from the butt of the pistol. He went to accused's car, got in and said to accused, "'Come on Mitchell and let's go'" (R. 17). Accused immediately occupied the driver's seat of the automobile (R. 17) and drove off at high speed in the direction of the Emerald Club (R. 18).

In leaving the scene accused drove from one side of the road to the other in "weaving" fashion (R. 18, 63, 75). Two of the military policemen testified that he did not turn on his lights until he was about 50 yards down the highway (R. 63, 75). He stopped at the Emerald Club

(R. 22, 48, 63, 75), turned around and drove back past the Casino Club, and on at a speed of from 60 to 65 miles per hour (R. 64, 75).

Brown testified that he believed accused had been drinking, for he was "unsteady on his feet" (R. 18) and

> "He would weave. His talk was kind of tongue tied talk. You could just tell by his talk. It seemed like when he was talking he would—it seemed like he would sometimes talk with what I would call extra sober and then he would be off. Kind of tongue tied" (R. 20).

Migues testified that accused did not appear to witness to be drunk or to have been drinking (R. 52). Trask testified that accused staggered, did not walk straight and talked with a "lisp in his voice", and that witness believed he had been drinking (R. 65). Paukner testified that from the condition of accused witness

> "would say he had had enough to drink. I wouldn't say he had had to_ many" (R. 76).

In the course of an investigation of the events above described, conducted by Major Charles R. Beam, 106th Cavalry, accused's squadron commander, accused was asked for a statement (R. 82-86). He voluntarily submitted a written, signed statement that (on September 4) Myers said he had been injured in a motorcycle accident and asked accused to drive him to his home. En route to Myers' home accused asked Myers to go to town with him to buy some parts for repair of accused's car. Myers agreed but he had his field equipment and the two returned to Camp Livingston in order that Myers might leave his pistol there. They then went to town and unsuccessfully tried to purchase some automobile parts. They drove toward Marksville to test the car. At about 6:45 or 7 p.m. they went to the Moonlight Inn in order that Myers might visit relatives there. At the inn Myers danced while accused sat apart. They remained until about 11:15 p.m. Returning to camp they stopped at the Casino. Accused followed Myers inside. All soldiers left the dance hall at about 11:30 p.m., following a statement by the military police that the "time was up". Accused stated,

> "I left the Casino by the front door. Sgt. Meyers left ahead of me and went on to my car. When I

> came out the door three sergeants were talking to the MP's about whether they had to go or not, as they were on furlough. The three sergeants stopped me and asked me if I knew of any order as to whether they were under the jurisdiction of the MP's when they were on furlough. I told them that they were in that they would have to clear out of the casino when ordered to by the MP's but as to whether they had to go home I could not say. I suggested that they call the sergeant of the MP's and ask his opinion. The sergeant MP came up to where we were and asked me my name and regiment. This I gave to him. I then asked him if the men were required to go home. He said yes, and I said that that did not seem right. He then got mad and started taking names and said that he was going to make a report. Sgt. Meyers came up and said that he was ready to go back to camp then. The MP's then asked him for his name and he did not answer. I was getting names of witnesses ***. I knew that there would be an investigation made. The MP's then rushed Sgt. Meyers. I did not see what happened to Sgt. Meyers. The MP's came back by me at a run and said that the man (Sgt. Meyers) had a gun. I told him to go and get in the car and he did. I started to get into the car and Sgt. Meyers said that the MP's said that they were going to get the Sheriff. I got into the car and followed them into town in the car, and Meyers still had not shown me a gun, and I asked him and he said that he did not have a gun" (R. 93-94).

Accused thought that the military policemen were angry and would abuse Myers if accused turned him over to them at this time. He drove about and finally left Myers at his home. Accused "did not have anything to drink" (R. 94; Ex. A).

Later in the course of the same investigation after he had been warned that whatever he said might be used against him, accused made and signed a sworn statement and answered questions asked by the investigating officer (R. 83, 84). Accused reiterated his previous statement in substance except that he stated that when the military policemen "rushed" Myers they did so with their "clubs in the ready position", that accused did not see a pistol in Myers' possession, and that,

> "I went to the car and asked Private Myers if he had a gun and he stated that he did not. Myers said to me that the M.P.s were going to get the sheriff. The M.P.s pulled out in their car towards town. I followed them to the edge of town and turned around and came back down to the Emerald Club, parked my car in front of the club and waited for the M.P.s and the sheriff to come back. I was there about ten minutes. We then left and came on to Camp Livingston. I let Private Myers out at his home and came on to the Post" (R. 89).

Accused also stated that he had one "drink" at the Casino Club, that he did not say that he was going to "get" Lieutenant Colonel Heath's job, and that he thought he said to the military policemen in reference to Myers "to not start a brawl with him to let me try and take care of him" (R. 91). The military police asked accused who had been with him and accused told him falsely that a "civilian" had been with him (R. 91, 92).

Accused testified in substantial conformity with his statements prior to the trial as to the events leading up to his arrival at the Casino Club (R. 105-107). He also testified that accused first learned that Myers had a pistol when they reached Myers' home early in the evening (R. 114). Myers was drinking prior to arrival at the Casino Club and began to show its effects. Accused felt responsible for him (R. 122). At the Moonlight Inn accused forbade Myers to join him at the table (R. 107). After leaving the Moonlight Inn they went to the Emerald Club where Myers wished to see a friend. Upon reaching the Casino Club at about 12:30 a.m. (R. 123) another stop was made (R. 107, 123). Myers entered by the back door and went through to the bar in front(R. 107). Accused followed Myers into the building (R. 108) and went to the latrine and then to the gambling table (R. 108, 123) where he remained for about five minutes (R. 124). A set of dice still lay on the table (R. 108). These dice accused picked up and rolled (R. 108). There was no betting or gambling at that time (R. 108). At this point the military police told the men to leave (R. 109). Accused testified, "I knew that the MP's should have already run the men out prior to that time" (R. 125). Drinks on the house were distributed (R. 109). Accused accepted and drank a "jigger" of whiskey (R. 109, 134) and a "chaser" of 7-Up (R. 109), the only drink consumed by him that evening (R. 134). Myers was in the barroom conversing with some military police who were trying to get him to leave (R. 109). Accused approached the group and told Myers to go and he would follow (R. 109). Myers left by

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the front door and got in the automobile. Accused went outside and observed a dispute going on between two military policemen and an R.O.T.C. student. Accused was asked if men on furlough were required to leave at 11:30 p.m. On accused's suggestion, the sergeant in charge of the military police detail was called and asked the same question. The sergeant stated that he had orders from Colonel Heath to enforce the curfew order against men on furlough. (R. 109) Accused then said,

> "'I believe there is a mistake there because I have never been run off on a furlough on no occasion ***. There is a lot of young politicians in the army and the Colonel might not get by with running men home'" (R. 109, 110).

Accused did not say that he was going "to get" Colonel Heath's job or that the Eighth Service Commander was in error (R. 113). The military police became angry and Brown took accused's name stating that he was going to report the matter. Myers came from the car to the group where accused was standing. (R. 110) Accused then took names of soldiers and civilians present, anticipating an investigation (R. 110, 127). While accused was taking names, the military police said, "'That man has a gun'" (R. 110). Accused asked who had the gun. At about this time four military police lay down in the truck and the fifth entered the building (R. 111). Myers was standing alone (R. 138). Accused observed Myers going to the car but saw no gun in his hands (R. 111, 128). Accused went to the car and asked the sheriff what had happened. The sheriff replied, "'That man with you pulled a gun out'". Accused testified that "at that time I knew it was a tough spot for Myers". Accused asked Myers if he had a gun and Myers said, "'Yes, I have a gun'". (R. 111) Accused asked him to turn it over to him (R. 129, 132, 139), but Myers refused (R. 132) and cursed the military police (R. 111) for whom he seemed to have a hatred (R. 129). Accused testified,

> "The MP's have a standing by-word, they say 'There is another man that hates the MP's'. These men walk around with chips on their shoulders in that area. They are quite cocky. They have run over some officers down there too" (R. 129).

The military police had their clubs drawn but accused did not see them rush Myers (R. 130). Myers said, "'Hurry and get me away from here. They have gone after the sheriff'" (R. 111). Myers was "scared" and

was "crying practically" (R. 140). Accused turned his car around with his parking lights on and turned on his driving lights when he reached the highway. He stopped at the Emerald Club where he vainly tried to separate Myers from his weapon. Myers lowered the car window and said, "'I will shoot the first man that tries to arrest me'" and pulled out of his pocket some ball ammunition. (R. 111) Accused decided to deliver Myers to his home and keep him away from the military police, and did so (R. 111, 112). Accused drove fast, fearing that there would be shooting if the military police overtook his car while Myers was in it (R. 112). He also testified that when he drove Myers from the Casino Club he knew that the military police had said they were seeking the sheriff. Accused intended to take Myers' gun away and turn him over to the military police. (R. 139) Accused knew that a man carrying a weapon contrary to regulations was subject to arrest and when he drove Myers away from the Casino Club he knew that Myers was carrying a weapon and had ammunition (R. 143). Accused did not recall cursing when conversing with Sergeant Brown and the other military police (R. 113). Accused did not refuse to leave the Casino Club when requested to do so. Accused had been in the Army since June 18, 1927, had served on military police details and had respect for the military police in the discharge of their duties (R. 114).

Colbert Mayeaux, a deputy sheriff, testified for the defense that he saw Myers "pull out a gun on the MP's " but that when he did so the military police ran inside the building (R. 149). Accused was standing talking to other persons at a spot about 30 or 40 feet distant from Myers (R. 151). While the military police were about some had their "clubs" in their hands (R. 154). Witness induced Myers to put his pistol away (R. 150).

4. There is evidence in the testimony of the several military policemen that at the place and at about the time alleged in Specification 2, Charge I, and in the Specification, Charge II, accused, while in uniform, after consorting for several hours with the enlisted man Myers, publicly engaged in a wordy and unseemly dispute with the military policemen concerning their jurisdiction over Myers in the enforcement of curfew regulations. In the course of the dispute accused made disdainful remarks concerning officers responsible for the regulations. On account of the late hour Myers had been ordered by the military police to leave the Casino Club. Myers was at the time improperly clothed in disheveled and incomplete uniform. The military police attempted to obtain from Myers his name in order that they might report his failure to leave the Casino Club when instructed to do so. Myers, in the presence

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of accused, drew and presented a pistol, declaring that he would not furnish his name. He told Sergeant Brown to stop when Brown approached to arrest him. The military police asked accused to control Myers but he made no effort to do so and told them to leave Myers alone "or somebody will get hurt". He then entered a car with Myers and drove away, eluding the military police and preventing the arrest of Myers at that time.

Accused denied that he made the improper remarks attributed to him, denied that he saw Myers present the pistol, and contended that he only sought to protect Myers from possible abusive treatment by the military police. On all the evidence the court was fully justified in concluding that the version of the events as related by the members of the military police was substantially correct and that, as found by the court, accused, knowing Myers had drawn the pistol and pointed it at the military police while they were in the proper performance of their duties, and knowing that Myers was subject to arrest, encouraged and assisted Myers in evading arrest.

The proof that accused was disorderly (Specification 2, Charge I) lies wholly in the proof relating to accused's interference with the military police and his encouragement and assistance to Myers in Myers' evasion of arrest (Charge II and its Specification). The duplication of charges arising out of the transaction does not affect the legal propriety of the sentence. The findings of guilty of the Specifications need not be disturbed.

The question arises as to whether the disorderly conduct as generally alleged by Specification 2, Charge I, and as proved in its specific particulars was of such an aggravated nature as to amount to conduct unbecoming an officer and a gentleman within the meaning of Article of War 95. In Winthrop's Military Law and Precedents it is stated that the word "unbecoming" as used in Article of War 95

> "*** is understood to mean not merely inappropriate or unsuitable, as being opposed to good taste or propriety *** but morally unbefitting and unworthy" (Reprint, p. 711).

It is further stated that the conduct contemplated by the Article

> "*** must offend so seriously against law, justice, morality or decorum as to expose to disgrace, socially or as a man, the offender, and at the same time must

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> be of such a nature or committed under such circumstances as to bring dishonor or disrepute upon the military profession which he represents" (Reprint, pp. 711, 712).

The Manual for Courts-Martial contains the following:

> "Not every one is or can be expected to meet ideal standards or to possess the attributes in the exact degree demanded by the standards of his own time; but there is a limit of tolerance below which the individual standards in these respects of an officer or cadet can not fall without his being morally unfit to be an officer or cadet or to be considered a gentleman. This article contemplates such conduct by an officer or cadet which, taking all the circumstances into consideration, satisfactorily shows such moral unfitness".

Among the instances of violations of the Article listed by the Manual is the use of insulting or defamatory language addressed to military persons and concerning another officer. (Par. 151, M.C.M)

The utterances and acts of accused at the Casino Club which may properly be classified as disorderly conduct were certainly prejudicial to military discipline and to this extent tended to compromise accused's position as an officer of the Army. They were not, however, of a nature to bring disgrace or dishonor upon accused in his personal capacity. He entered into a dispute and uttered some disdainful remarks but his disputations and utterances were in essence breaches of military discipline and little more. He aided Myers to evade arrest but in doing so did not engage in any violent or riotous act. The gravamen of his disorder in this connection lay in his inaction, his failure to perform his military duty in the premises, and in his use of a taunting remark to the military police. His inaction and taunting remark were prejudicial to good order and military discipline but were not of a nature which marked him as morally unfit to be considered a gentleman. All circumstances considered, the disorderly conduct alleged and proved was not of such aggravated character as to amount to conduct unbecoming an officer and gentleman within the purview of Article of War 95. Violat[illegible] of Article of War 96 was established.

5. In its finding of guilty under the Specification, Charge II, the court excepted certain words descriptive of the circumstances under which accused assisted Myers in effecting his escape and evading arrest, and substituted other words. The excepted words alleged in substance that accused had seen Myers draw his pistol and point it at Sergeant Brown while the latter was attempting to arrest Myers. The substituted words of which accused was found guilty allege in substance that before assisting Myers in evading arrest accused had known that Myers had drawn his pistol and had pointed it at the military policemen (names omitted) while they were in the proper performance of their duties and had known that Myers' acts had made him subject to arrest by the military policemen. Inasmuch as the essence of the offense charged was accused's assistance to Myers in his evasion of arrest and inasmuch as the exceptions and substitutions did not change the nature or identity of that offense the finding was not legally improper (par. 78c, M.C.M.).

6. The record shows that the court adjourned on November 16, 1942, and reconvened on November 17, 1942 (R. 104). It does not contain, at the end of the proceedings of November 16, the customary signature of the trial judge advocate as required by paragraph 41d and Appendix 6 of the Manual for Courts-Martial. Inasmuch as the entire record is properly authenticated at the end, the omission is harmless.

7. War Department records show that accused is 33 years of age. He attended high school for one year. He served as an enlisted man, with minor interruptions, from June 18, 1927, to September 27, 1941, when, upon completion of a course of instruction at an officers' candidate school, he was commissioned a second lieutenant, Army of the United States. He entered upon active duty as an officer on September 27, 1941. He was promoted to first lieutenant on July 30, 1942. He was tried by general court-martial on December 22, 1941, and upon conviction as noted above, was sentenced to be restricted for three months, to forfeit $25 per month for six months and to be reprimanded. In 1928 he was convicted in a civil court of the larceny of an automobile and was sentenced to confinement for six months.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support only so much of the findings of guilty

of Charge I and Specification 2 thereunder as involves findings of guilty of this Specification in violation of Article of War 96, legally sufficient to support the findings of guilty under Charge II and its Specification 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.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., JAN 23 1943 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant William J. Mitchell (0-450170), 106th Cavalry (Mecz).

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty of Charge I and Specification 2 thereunder as involves findings of guilty of this Specification in violation of Article of War 96, legally sufficient to support the findings of guilty under Charge II and its Specification and legally sufficient to support the sentence and to warrant confirmation thereof. While in uniform in the company of an enlisted man of his troop, at a night club frequented by enlisted men and civilians, accused assisted his enlisted companion to evade arrest by military police after the enlisted men had drawn a pistol and had threatened the military police. Accused was further disorderly in that he publicly entered into a wordy and unseemly dispute with the military police and made disdainful remarks concerning officers responsible for certain curfew regulations which the military police were enforcing. He was sentenced to be dismissed the service. He was previously convicted of being disorderly in uniform and of appearing publicly in an enlisted man's uniform, and was sentenced to restriction, forfeitures and reprimand. I believe accused's usefulness as an officer is at an end. I recommend that only so much of the findings of guilty of Charge I and Specification 2 thereunder be approved as involves findings of guilty of this Specification in violation of Article of War 96, and that the sentence be confirmed and carried into execution.

3. Consideration has been given to a letter from the commanding officer, 106th Cavalry (Mecz), forwarded to this office on January 13, 1943, by the reviewing authority, the Commanding General, IV Corps, in which it is stated that subsequent to trial and since December 3, 1942, accused has been guilty of breaches of discipline on five occasions, his derelictions including drunkenness, undue familiarity with enlisted men, false official statements, disorderly conduct and failure to obey a lawful order. The writer of the letter states:

> "This officer was an enlisted man in my organization in 1929. At that time he was addicted to the

excessive use of liquor. He habitually associates with enlisted men of doubtful character and women of easy virtue. He is in no sense of the word qualified to wear the uniform of an officer of the Armed Services".

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

Myron C. Cramer

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

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

(Only so much of the findings of guilty of Charge I and Specification 2 thereunder approved as involves findings of guilty of this Specification in violation of Article of War 96. Sentence approved. G.C.M.O. 38, 16 Mar 1943)

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

SPJGH
CM 228394

MAR 26 1943

UNITED STATES N.D.	)	104TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Camp Adair, Oregon, November 5, 1942. Dismissal and confinement for six (6) months. Disciplinary Barracks.
Second Lieutenant GEORGE R. JARBECK (0-1289092), 415th Infantry.	)	

OPINION of the BOARD OF REVIEW
HILL, LYON and SARGENT, Judge Advocates

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

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

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

Specification: In that Second Lieutenant George R. Jarbeck, Four Hundred and Fifteenth Infantry, did, without proper leave, absent himself from his place of duty at Camp Adair, Oregon, from about 7:30 AM September 21, 1942, until he was apprehended at Albany, Oregon, on or about 6:30 PM September 22, 1942.

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

Specification 1: In that Second Lieutenant George R. Jarbeck, Four Hundred and Fifteenth Infantry, having been duly placed in arrest in quarters on or about 7:00 PM September

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22, 1942, did, at Camp Adair, Oregon, on or about 7:15 PM September 23, 1942, break his said arrest before he was set at liberty by proper authority.

Specification 2: In that Second Lieutenant George R. Jarbeck, Four Hundred and Fifteenth Infantry, having been duly placed in arrest at Oregon City, Oregon, on or about September 25, 1942, did, at Albany, Oregon, on or about September 26, 1942, break his arrest before he was set at liberty by proper authority.

(Signature of Accuser) W. W. Barnes,
Captain, 415th Infantry.

A F F I D A V I T

Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above-named accuser this 29th day of September, 1942, and made oath that he is a person subject to military law and that he personally signed the foregoing charges and specifications, and further that he has personal knowledge of the matters set forth in the specifications and charges; and that the same are true in fact, to the best of his knowledge and belief.

Allen M. Button,
Lieut. Colonel, A.G.D.

1st Ind.

Headquarters 104th Infantry Division, Camp Adair, Oregon
October 8, 1942.

Referred for trial to Captain Leo A. Hoegh, 414th Infantry, Trial Judge Advocate of the general court-martial appointed by paragraph 1, Special Orders No. 18, Headquarters 104th Infantry Division, 7 October, 1942.

By command of Major General Cook.

Allen M. Button, Adjutant Gen.
Lt. Col., A.G.D.

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

Specification 1: (Finding of not guilty.)

Specification 2: In that Second Lieutenant George R. Jarbeck, Four Hundred and Fifteenth Infantry, did, at Albany, Oregon, on or about September 17, 1942, with intent to defraud, wrongfully and unlawfully make and utter to the Greyhound Tavern, Albany, Oregon, a certain check, in words and figures as follows, to wit:

Punxsutawney, Pa. Sept. 17, 1942 No. 14

PUNXSUTAWNEY NATIONAL BANK

PAY TO THE ORDER OF Cash $25.00

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

George R. Jarbeck, 2d Lt.

Serv. Co. 415th Inf

and by means thereof, did, fraudulently obtain from the Greyhound Tavern, Albany, Oregon, $25.00, he the said Second Lieutenant George R. Jarbeck, Four Hundred and Fifteen Infantry, then well knowing that he did not have and not intending that he should have sufficient funds in the Punxsutawney National Bank, Punxsutawney, Pennsylvania, for the payment of said check.

Specification 3: In that Second Lieutenant George R. Jarbeck, Four Hundred and Fifteenth Infantry, did, at Albany, Oregon, on or about September 17, 1942, with intent to defraud, wrongfully and unlawfully make and utter to the Greyhound Tavern, Albany, Oregon, a certain check, in words and figures as follows, to wit:

(FRONT) Punxsutawney, Pa. Sept. 17, 1942 No. 15

PUNXSUTAWNEY NATIONAL BANK

PAY TO THE
ORDER OF Cash $25.00

Twenty-Five - - - - - - - - - - - - Dollars

George R. Jarbeck
2d Lt. Serv. Co. 415th Inf

(REVERSE)

George R. Jarbeck
Greyhound Tavern
J. H. Christie

and by means thereof, did, fraudulently obtain from the Greyhound Tavern, Albany, Oregon, $25.00, he the said Second Lieutenant George R. Jarbeck, Four Hundred and Fifteenth Infantry, then well knowing that he did not have and not intending that he should have sufficient funds in the Punxsutawney National Bank, Punxsutawney, Pennsylvania, for the payment of said check.

(Signature of accuser) W. W. Barnes,
Captain, 415th Infantry

A F F I D A V I T

Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above-named accuser this 6th day of October, 1942, and made oath that he is a person subject to military law and that he personally signed the foregoing charges and specifications, and further that he has personal knowledge of the matters set forth in the Specifications and Charges; and that the same are true in fact, to the best of his knowledge and belief.

Roosevelt R. Pease,
Captain, A.G.D., Summary Court.

1st Ind.

Headquarters 104th Infantry Division, Camp Adair, Oregon, October 17, 1942.

Referred for trial to Captain Leo A. Hoegh, 414th Infantry, Trial Judge Advocate of the general court-martial appointed by paragraph 1, Special Orders No. 18, Headquarters 104th Infantry Division, October 7, 1942.

By command of Major General Cook:

Allen M. Button,
Lt. Col., A.G.D.
Adjutant General.

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

Specification: In that Second Lieutenant George R. Jarbeck, Four Hundred and Fifteenth Infantry, did, at Albany, Oregon, on or about September 19, 1942, with intent to defraud, wrongfully and unlawfully make and utter to the Greyhound Tavern, Albany, Oregon, a certain check, in words and figures as follows, to wit:

Punxsutawney, Pa. 9/19, 1942, No___

PUNXSUTAWNEY NATIONAL BANK

PAY TO THE ORDER OF Cash $25.00

Twenty-Five and no/100 DOLLARS

George R. Jarbeck, 2d Lt.
Serv. Co. 415th Inf.

And by means thereof, did, fraudulently obtain from the Greyhound Tavern, Albany, Oregon, $25.00, he the said Second Lieutenant George R. Jarbeck, Four Hundred and Fifteenth Infantry, then well knowing that he did not have and not intending that he should have sufficient funds in the Punxsutawney National Bank, Punxsutawney, Pennsylvania, for the payment of said check.

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(Signature of accuser) W. W. Barnes,
Captain, 415th Infantry

A F F I D A V I T

Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above-named accuser this 8th day of October, 1942, and made oath that he is a person subject to military law and that he personally signed the foregoing charges and specifications, and further that he has personal knowledge of the matters set forth in the Specification and Charge; and that the same are true in fact, to the best of his knowledge and belief.

Allen M. Button,
Lieut. Colonel, A.G.D.
Adjutant General

1st Ind.

Headquarters 104th Infantry Division, Camp Adair, Oregon, October 17, 1942.

Referred for trial to Captain Leo A. Hoegh, 414th Infantry, Trial Judge Advocate, of the general court-martial appointed by paragraph 1, Special Orders No. 18, Headquarters 104th Infantry Division, October 7, 1942.

By command of Major General Cook:

Allen M. Button,
Lt. Col., A.G.D.
Adjutant General.

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

Specification 1: In that Second Lieutenant George R. Jarbeck, Four Hundred and Fifteenth Infantry, did, at Corvallis, Oregon, on or about September 22, 1942, with intent to defraud, wrongfully and unlawfully make and utter to the Benton County State Bank, Corvallis, Oregon, a certain check, in words and figures as follows, to wit:

Punxsutawney, Pa. Sept. 22, 1942 No. 18

PUNXSUTAWNEY NATIONAL BANK

PAY TO THE
ORDER OF Cash $50.00

Fifty and no/100 - - - - - - - - - - Dollars

George R. Jarbeck
Lt. Serv. Co. 415th Inf.

and by means thereof, did, fraudulently obtain from the Benton County State Bank, Corvallis, Oregon, $50.00, he the said Second Lieutenant George R. Jarbeck, Four Hundred and Fifteenth Infantry, then well knowing that he did not have and not intending that he should have sufficient funds in the Punxsutawney National Bank, Punxsutawney, Pennsylvania, for the payment of said check.

Specification 2: In that Second Lieutenant George R. Jarbeck, Four Hundred and Fifteenth Infantry, did, at Corvallis, Oregon, on or about September 24, 1942, with intent to defraud, wrongfully and unlawfully make and utter to the Benton County State Bank, Corvallis, Oregon, a certain check, in words and figures as follows, to wit:

Punxsutawney, Pa. Sept. 24, 1942 No. 20

PUNXSUTAWNEY NATIONAL BANK

PAY TO THE
ORDER OF Cash $55.00

Fifty-Five and no/100 Dollars

George R. Jarbeck, 2d Lt.
Serv. Co. 415th Inf.

And by means thereof, did, fraudulently obtain from the Benton County State Bank, Corvallis, Oregon, $55.00, he the said Second Lieutenant George R. Jarbeck, Four Hundred and Fifteenth Infantry, then well knowing that

he did not have and not intending that he should have sufficient funds in the Punxsutawney National Bank, Punxsutawney, Pennsylvania, for the payment of said check.

Specification 3: In that Second Lieutenant George R. Jarbeck, Four Hundred and Fifteenth Infantry, did, at Salem, Oregon, on or about September 25, 1942, with intent to defraud, wrongfully and unlawfully make and utter to the First National Bank of Portland, Salem, Oregon, a certain check, in words and figures as follows, to wit:

(FRONT) Punxsutawney, Pa. Sept. 25, 1942 No. 21

PUNXSUTAWNEY NATIONAL BANK

PAY TO THE ORDER OF Cash $85.00

Eighty-Five and no/100 Dollars

George R. Jarbeck, 2d Lt.
Serv. Co 415th Inf.

(REVERSE SIDE)

George R. Jarbeck
Serv. Co. 415th Inf.

And by means thereof, did, fraudulently obtain from the First National Bank of Portland, Salem, Oregon, $85.00, he the said Second Lieutenant George R. Jarbeck, Four Hundred and Fifteenth Infantry, then well knowing that he did not have and not intending that he should have sufficient funds in the Punxsutawney National Bank, Punxsutawney, Pennsylvania, for the payment of said check.

(Signature of accuser) W. W. Barnes,
Captain, 415th Infantry

A F F I D A V I T

Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above-named accuser this 14th day of October, 1942, and made oath that he is a person subject to military law and that he personally signed the foregoing charges and specifications, and further that he has investigated the matters set forth in the specifications of the charge, and that the same are true in fact, to the best of his knowledge and belief.

Roosevelt H. Pease,
Captain, A.G.D.,
Summary Court

1st Ind.

Headquarters 104th Infantry Division, Camp Adair, Oregon, October 17, 1942.

Referred for trial to Captain Leo K. Hoegh, 414th Infantry, Trial Judge Advocate of the general court-martial appointed by paragraph 1, Special Orders No. 18, Headquarters 104th Infantry Division, October 7, 1942.

By command of Major General Cook:

Allen M. Button,
Lt. Colonel, A.G.D.
Adjutant General.

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

Specification: In that Second Lieutenant George R. Jarbeck, Four Hundred and Fifteenth Infantry, did, at Eugene, Oregon, on or about September 26, 1942, with intent to defraud, wrongfully and unlawfully make and utter to The First National Bank of Eugene, Eugene, Oregon, a certain check, in words and figures as follows, to wit:

Punxsutawney, Pa. Sept. 25, 1942 No. 22

PUNXSUTAWNEY NATIONAL BANK

PAY TO THE
ORDER OF Cash $95.00

Ninety-Five - - - - - - - - - - - - - Dollars

George R. Jarbeck, 2d Lt.
Serv. Co., 415th Inf.

and by means thereof, did, fraudulently obtain from The First National Bank of Eugene, Eugene, Oregon, $95.00, he the said Second Lieutenant George R. Jarbeck, Four Hundred and Fifteenth Infantry, then well knowing that he did not have and not intending that he should have sufficient funds in the Punxsutawney National Bank, Punxsutawney, Pennsylvania, for the payment of said check.

Signature of accuser) W. W. Barnes,
Captain, 415th
Infantry.

A F F I D A V I T

Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above-named accuser this 16th day of October, 1942, and made oath that he is a person subject to military law and that he personally signed the foregoing charges and specifications, and further that he has investigated the matters set forth in the specification of the Charge, and that the same are true in fact, to the best of his knowledge and belief.

Roosevelt R. Pease,
Captain, A.G.D.,
Summary Court

1st Ind.

Headquarters 104th Infantry Division, Camp Adair, Oregon, October 20, 1942.

Referred for trial to Captain Leo A. Hoegh, 414th Infantry, Trial Judge Advocate of the general court-martial appointed by paragraph 1, Special Orders No. 18, Headquarters 104th Infantry Division, 7 October, 1942.

By command of Major General Cook:

Allen M. Button,
Lt. Col., A.G.D.,
Adjutant General.

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

Specification: In that Second Lieutenant George R. Jarbeck, Four Hundred and Fifteenth Infantry, did, at Corvallis, Oregon, on or about September 24, 1942, with intent to defraud, wrongfully and unlawfully make and utter to the United States National Bank of Portland, Oregon, Corvallis Branch, Corvallis, Oregon, a certain check, in words and figures as follows, to wit:

Punxsutawney, Pa. Sept. 24, 1942 No. 18

PUNXSUTAWNEY NATIONAL BANK

PAY TO THE ORDER OF Cash $50.00

Fifty and no/100 Dollars

George R. Jarbeck, 2d Lt.
Serv. Co., 415th Inf.

and by means thereof, did, fraudulently obtain from the United States National Bank of Portland, Oregon, Corvallis Branch, Corvallis, Oregon, $50.00, he the said Second Lieutenant George R. Jarbeck, Four Hundred and Fifteenth Infantry, then well knowing that he did not have and not intending that he should have sufficient funds in the Punxsutawney National Bank, Punxsutawney, Pennsylvania, for

the payment of said check.

(Signature of accuser) W. W. Barnes,
Captain, 415th Infantry.

A F F I D A V I T

Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above-named accuser this 22nd day of October, 1942, and made oath that he is a person subject to military law and that he personally signed the foregoing charges and specifications, and further that he has investigated the matters set forth in the Specification of the Charge, and that the same are true in fact, to the best of his knowledge and belief.

Roosevelt R. Pease,
Captain, A.G.D.,
Summary Court.

1st Ind.

Headquarters 104th Infantry Division, Camp Adair, Oregon, October 27, 1942.

Referred for trial to Captain Leo A. Hoegh, 414th Infantry, Trial Judge Advocate of the general court-martial appointed by paragraph 1, Special Orders No. 18, Headquarters 104th Infantry Division, 7 October, 1942.

By command of Major General Cook:

Allen M. Button,
Lt. Col., A.G.D.
Adjutant General.

He pleaded not guilty to all Charges and Specifications. He was found guilty of all Specifications and Charges except Specification 1, Additional Charge. He was sentenced to be dismissed the service, and to be confined at hard labor for six months. 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 the 48th Article of War.

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3. The evidence for the prosecution upon the Specifications of which the accused was found guilty, is substantially as follows:

a. Charge I. The accused absented himself without leave from Camp Adair, Oregon, at 7:30 a.m., September 21, 1942, and remained absent until he was "picked up" by Captain Raymond M. Criswell, Provost Marshal, 104th Infantry Division, at about 6:30 p.m., September 22, 1942, and taken to Headquarters, 415th Infantry (R. 14, 24-26, 32; Ex. 1-A).

b. Charge II. The accused was placed in arrest in quarters at about 7 p.m., September 22, 1942, by his regimental commander, Colonel John H. Cochran, and the meaning of arrest in quarters was fully explained to him. He was specifically informed that he was restricted to his room except for necessary business, visiting the latrine in the same building, and the mess hall for meals. At about 7 p.m., Wednesday, September 23, 1942, Colonel Cochran found him slightly off the bounds of his restriction, and again explained the meaning of his arrest in quarters. The accused returned to his room. Shortly thereafter, he left his room and could not be found in his quarters or in the latrine. He did not return to his room that night. He had not been released from arrest. Upon being informed that the accused was being held in Oregon City, Colonel Harold C. Mandell, Chief of Staff, 104th Division, in the name of the commanding general, directed Captain Criswell to return accused to the camp and deliver him to Colonel Cochran of the 415th Infantry. Captain Criswell then directed his assistant, Second Lieutenant George West, and Staff Sergeant J. L. Weist, Military Police Platoon, 104th Division, individually, to get handcuffs, go to Oregon City, "to arrest, apprehend, or get him [accused] back anyway they could" (R. 15-16, 19-20, 22-23, 34-37, 60).

Lieutenant West and Staff Sergeant Weist found accused in police headquarters, Oregon City, about 11:30 p.m., September 25, 1942. Upon direct examination Lieutenant West testified that "I told Lieutenant Jarbeck that I was sorry but I had to pick him up and take him back". Upon later cross-examination he testified "I think my words were 'I am sorry to have to bring you back. You are under arrest'". Later he stated that he was sure that he said "You are under arrest". When recalled he reiterated that he told accused that the accused was under arrest. Sergeant Weist testified first that he heard Lieutenant West state to accused that he was under arrest, but finally that he "could not swear" that Lieutenant West made that

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statement. Sergeant Weist testified that he told accused "You are under arrest. I was ordered by General Cook to bring you back". The night was cold and they stopped in the Imperial Cafe in Albany to get some coffee. The accused then asked permission to go to the latrine. Lieutenant West accompanied the accused to the latrine. The accused came out of the latrine first, and escaped in the darkness and fog without being released from arrest (R. 39-44, 46-51, 55).

Lieutenant Homer H. Oaksford, Assistant Provost Marshal, 104th Division, arrested the accused shortly after midnight on September 27, 1942, in Eugene, Oregon, and returned him to Camp Adair early that morning, and turned him over to Captain William W. Barnes at Headquarters, 415th Infantry (R. 56-58).

c. On August 6, 1942, accused applied to his home town bank at Punxsutawney, Pennsylvania, for a loan with which to purchase uniforms, and pay transportation costs to his station at Camp Adair, Oregon. The Punxsutawney National Bank granted him a loan of $300 on August 6, 1942. From this loan he opened an account and deposited $200 with the bank on August 6, 1942. No other deposit was made to his account. On August 15, 1942, his balance was reduced to $20.80; on September 9, to $9.30; to $8.55 on September 17, the date of the first checks as to which accused was found guilty; and successively reduced to $5.55 on October 8, 1942. During that period he drew checks as follows: September 17, two checks of $25 each (Spec. 2 and Spec. 3, Add. Chg.); September 19, $25 (2nd Add. Chg.); September 22, $50 (Spec. 1, 3rd Add. Chg.); September 24, two checks, $55 (Spec. 2, 3rd Add. Chg.), and $50 (5th Add. Chg.); and on September 25, two checks, $85 (Spec. 3, 3rd Add. Chg.), and $95 (4th Add. Chg.). The above checks aggregated $385. The drawing and uttering of each of the several checks was established in evidence. The accused presented the above checks as alleged in the regular course of business and received value for them. All of the checks were returned, marked "insufficient funds", and the banks and the Greyhound Tavern which cashed them have not been reimbursed for their losses (R. 26-31, 61, 65, 66; Exs. 1-A, 2, 4, 5, 6, 7, 8; Exs. A, C, C-1, D, D-1, E, E-1, F, F-1, G, G-1, H, H-1, I, I-1, J, K, K-1).

About September 3, 1942, the accused informed his regimental commander that as soon as he received his pay he would reimburse the Tod Hotel of Youngstown, Ohio, on two checks totaling $50 which he had given the hotel and which were returned for "insufficient funds". The accused stated that he must have, through negligence, overdrawn his account. Several days later the accused showed his regimental commander a draft to the Tod Hotel, which he stated he would mail

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that day (R. 64-65).

4. For the defense the accused testified that he was born in Punxsutawney, Pennsylvania, August 17, 1920, and left high school to enlist, September 6, 1939, in the Regular Army for service in the Panama Canal Zone. After two years of service he was sent to the Officer Candidate School at Fort Benning, transferred to Camp Gordon for field training, reappointed to the Officer Candidate School, commissioned second lieutenant, August 1, 1942, and assigned to the 415th Infantry, where he served as personnel adjutant until he became involved in these charges. He described in detail the course of events which involved him in this trial. He was "going with" a married woman, Mrs. Darby, who was separated from her husband, and who was planning to get a divorce. No satisfactory agreement had been reached as to the divorce, and the husband had threatened to send to Colonel Cochran a letter which she had written to the accused. On Sunday, September 20, 1942, the accused went to Albany. He overslept on Monday morning, September 21. As he was absent without leave and worried about the letter, he decided to visit the husband in Portland in an effort to effect a settlement. He failed to find the husband, and returned to Albany. Later, Monday evening, he again went to Portland where he planned to see the husband Tuesday morning. On Tuesday he accompanied Mrs. Darby to the office of her attorney, where divorce papers were prepared. After the divorce papers were filed in the afternoon, they returned to her apartment. Captain Criswell met them on arrival there, officially placed the accused in arrest, and took him back to the camp to the office of Colonel Cochran at about 7 o'clock in the evening of September 22. Colonel Cochran placed him in arrest. Accused then went to his quarters. He had previously planned a dinner party, including Mrs. Darby and some other young officers and their guests, for Wednesday evening, September 23, in the regimental officers mess. He arranged with another officer to escort Mrs. Darby to the appointed place. They left the mess hall about 7 o'clock, and he escorted her to his car in the nearby parking lot. Colonel Cochran saw him there, and he obeyed Colonel Cochran's order to go to his quarters. When he was unable to find some one to drive Mrs. Darby to her home, he drove her himself. They went to Salem from Albany, and then back to Portland to complete arrangements with the husband of Mrs. Darby. He thought he might as well do so as he had already broken his arrest. There was a family meeting on questions of her divorce and the custody of a child, on Thursday, which was continued on Friday in Estecada. He told the sheriff who stopped him as he was coming into Portland about 4:30 Friday afternoon that he was absent without leave. He went with the sheriff

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to Oregon City, and was there when Lieutenant West and Sergeant Weist arrived. Lieutenant West did not place him in arrest, and accused disputed the authority of Sergeant Weist to do so, when Sergeant Weist said he was under arrest by order of General Cook and that he was going back to camp. Accused left Oregon City in the official car with Lieutenant West and Sergeant Weist. En route they stopped at the Imperial Cafe in Albany at about 4 o'clock Saturday morning, where accused visited the latrine in the company of Lieutenant West. When accused came out of the latrine and Lieutenant West went in, the accused walked off and just kept on going. To avoid the military police, he went to Eugene, where he slept until 11:30 a.m. On Saturday evening, September 26, he visited Albany, and returned to Eugene where he was arrested about midnight in the Eugene Hotel. He was returned to camp early Sunday morning, September 27, where Captain Barnes placed him in confinement in his quarters under guard. At 2:30 p.m., Monday, September 28, he was placed in confinement in the post stockade (R. 68-75).

The accused knew he was doing wrong when he first absented himself without leave, but at the time that did not seem to be of as great importance as the matter of being involved in a scandal. He also knew that he was doing wrong in breaching the arrest, in which he had been placed by Colonel Cochran. He did it because he was upset about the letter with which he had been threatened, and because Mrs. Darby had no way to get back to Albany. He did not violate any Article of War when he left Lieutenant West on the night of September 25, because Lieutenant West had not placed him in arrest, and Sergeant Weist had no authority to place him in arrest (R. 75).

With regard to the check in Specification 2, Additional Charge, the accused stated that it was his intention at the time (Sept. 17, 1942) he executed the check that there would be money in the bank at Punxsutawney, Pennsylvania, to cover the check. His pay was to be sent to his home bank from the finance office. He intended to put money in the bank to take care of all of the other checks which he wrote. When placed in arrest by Colonel Cochran, he had a letter which he wanted to send to his father, requesting his father to place sufficient funds to the credit of accused in the drawee bank to cover the checks. Captain Barnes informed him he could send no letters nor telephone. He did telephone his father about October 26th. He had given his defense counsel $100, the remainder of his September pay, with instructions to have it deposited to the credit of accused in the Punxsutawney National Bank. He then decided it was not enough to cover the entire sum, received the $100 back from his counsel, and decided to call his family, as he had come to the conclusion that in

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that way he could get a sufficient amount to cover the checks with which he was charged. He proposed to pay off the checks from his September and October pay if his family did not deposit the money for him. He received his August pay on September 4th, his September pay about October 22nd, had received a travel check, but had not yet received his October pay. He admitted getting the money on the checks which he cashed and had used the money for his expenses around Portland, and he gave Mrs. Darby $150 for attorney's fees in the divorce action. He realized that he "did not have the money in the bank to take care of all of those checks", but had intended to have his family place funds to his credit to cover them (R. 76-79).

The defense introduced in evidence as to the character of the accused an honorable discharge with character "Excellent", two commendations for work done in the Canal Zone as a member of searching parties, and letters of recommendation of his immediate commanding officers in support of his application for admission to the Officer Candidate School (R. 79-80).

Second Lieutenants William H. Warner and Chester R. Young, 414th Infantry, testified to the excellent reputation of accused for truth and veracity, and his good reputation for morals at Fort Benning (R. 81-83).

It was stipulated that Lieutenant Colonel Wood, Finance Officer, Camp Adair, Oregon, if present, would testify that the pay checks of accused for the month of August and the month of September should have been sent to his bank at Punxsutawney, Pennsylvania, as directed by accused, but, through mistake, were mailed direct to him; that his August check was mailed to him about September 3, 1942, and his September pay check on or about October 20, 1942 (R. 83).

Lieutenant Colonel Thomas R. Aaron, 415th Infantry, stated that during his official investigation of the Charges, Sergeant Weist stated that he did not hear Lieutenant West "put the accused under arrest" (R. 67).

5. In rebuttal for the prosecution, Captain William W. Barnes, regimental staff officer of the accused's regiment, testified that the only day on which the accused was prevented from corresponding with anyone was on the day upon which he was confined, Sunday, September 27, and that he personally posted a letter for the accused on the morning of September 28, 1942 (R. 84-85).

6. a. With respect to Charge I, the proof shows, and the ac-

cused admits, that he absented himself without leave on September 21, 1942, and was apprehended the next day by Captain Criswell. The accused stated that the fact that he was absent without leave did not seem to be of as great importance as the matter of being involved in a scandal in connection with his "fiancee", Mrs. Darby.

b. The proof also shows, and the accused admits, with respect to Specification 1, Charge II, that the accused was placed in arrest on September 22, 1942, upon return from absence without leave, and deliberately breached that arrest on September 23, shortly after his regimental commander had warned him because accused was slightly off-bounds, and again explained to him the limits of his arrest. The breach of arrest and his subsequent absence until apprehended, September 25, 1942, likewise involved Mrs. Darby.

c. Specification 2, Charge II, alleges breach of arrest at Albany, Oregon, September 26, 1942, after having been placed in arrest at Oregon City, Oregon, on September 25, 1942.

It is undisputed that at the time and place alleged the accused committed an act which would constitute a breach of arrest, but the accused challenges the allegation that he was in arrest.

The evidence shows that the accused had been placed in arrest in quarters on September 22, 1942, and that on the night of September 23, 1942, he had breached his arrest. At the instance of the military authorities a diligent search was instituted for the accused and he was apprehended by the civil authorities in Oregon City on the afternoon of September 25, 1942. The civil authorities of Oregon City immediately notified the military authorities, who in turn requested that the accused be held. Colonel Mandell, Chief of Staff, 104th Infantry Division, in the name of the commanding general, informed Captain Criswell, Provost Marshal, 104th Infantry Division, that accused had been apprehended and was being held by civil authorities in Oregon City, and directed the Provost Marshal to arrange for his immediate return to military control. Captain Criswell accordingly ordered Lieutenant West, Assistant Division Provost Marshal, and Sergeant Weist, of the Division Military Police Platoon, to proceed to Oregon City, get handcuffs, and "arrest, apprehended, or get him back anyway they could". Lieutenant West and Sergeant Weist arrived at the police station in Oregon City around midnight of September 25, 1942, and found the accused in custody of the city police authorities. In his direct testimony and on the cross-examination, Lieutenant West made two or three statements with respect to what was actually said by him to the accused as he entered the room. At one time he said, "I

told Lieutenant Jarbeck that I was sorry but I had to pick him up and take him back". Later he testified, "I think my words were 'I am sorry I have to bring you back. You are under arrest'. He told me that was my duty, and it had to be done". Later he stated that he was sure he said "You are under arrest". Upon being recalled as a witness, Lieutenant West twice reiterated that he told accused that the accused was under arrest.

The accused testified that Lieutenant West did not place him in arrest, but that Lieutenant West said, "Gee, George, I hate to do this to you, but you have to go back to camp with me", to which he replied, "that is what I have been waiting for. Are you ready". It is undisputed that Sergeant Weist told accused that he was under arrest by order of General Cook (Commanding General, 104th Infantry Division). The accused, however, disputed the authority of the sergeant to place him in arrest, and contends that the language of Lieutenant West was not sufficient to create the legal status of an arrest.

Sergeant Weist testified that he stated to accused, "You are under arrest. I was ordered by General Cook to bring you back". The accused admits that Sergeant Weist made that statement, but argued with Weist the right of a noncommissioned officer to place an officer in arrest. Sergeant Weist did not purport to make the arrest in his own right, but advised accused of the order of General Cook. By so informing accused, Sergeant Weist communicated to accused the oral order of arrest of the Commanding General, 104th Infantry Division, as authorized by paragraph 20, Manual for Courts-Martial, 1928, which Weist had received through the Chief of Staff and Provost Marshal.

Regardless of the exact words used by Lieutenant West, it is obvious that Lieutenant West conveyed to the accused the fact that he was being placed under arrest and was being returned to military control. It is equally obvious that the accused fully understood he was in arrest. This is shown by the fact that he was refused the privilege of driving his own car back to camp and was forced to ride in the Government car with the Assistant Provost Marshal, by the fact that when the party stopped at a cafe on their return, the accused asked for permission to go to the latrine, and by the admission of the accused that while at the latrine he "walked off" and kept going because he "didn't want to be brought in by the military police * * *".

The Board of Review is of the opinion that the evidence fully sustains the court in its finding of guilty of Specification 2, Charge II.

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d. With respect to the Additional Charges, the evidence shows that each of the eight checks covered by the Specifications of which accused was found guilty were uttered by the accused as alleged, that the checks were presented in the usual course of business without any special agreement, that he received the proceeds of the checks, that none of the checks were paid by the bank on which drawn, and that the tavern and the banks by whom the checks were initially cashed have suffered financial loss in an aggregate sum of $385, and have not been reimbursed therefor.

The accused opened his account with a deposit of $200 from a loan on August 6, 1942. No other deposit was made to his account. His balance was reduced to $20.80 on August 15, 1942; to $9.30 on September 9; to $8.55 on September 17, the date on which the first checks of which he was found guilty were drawn, and successively reduced to $5.55 on October 8, 1942. The checks were all dated during the period September 17 to September 25, inclusive.

That the accused knew his balance was low about September 3 is shown by his statement to Colonel Cochran that two checks aggregating $50, which he had given to the Tod Hotel, were returned unpaid because of insufficient funds, through his negligence. No deposit was thereafter made to his account. His statement that he directed that his pay check be deposited in his bank affords no basis for belief that he had sufficient funds in the bank, because he admitted that he received his August pay about September 4, and with the proceeds of the checks which he cashed paid his expenses around Portland and gave Mrs. Darby $150 for attorney fees in the divorce action. His pay for September was likewise sent to him and received about October 22. His statement that he intended to have his family place sufficient funds to cover his checks was an intention conceived while in confinement on September 27, whereas his checks were dated during the period September 17 to September 25. In any event, no such deposit was made to his account. While there might be doubt as to his intent as to a single check, if that were the only offense, his course of conduct in writing eight checks within a comparatively short period of time, and his failure to exercise ordinary care with respect to the condition of his account, reflects more than inadvertence, indifference, or carelessness. Such wrongful and unlawful acts can support but one conclusion - that the accused made and uttered the checks with knowledge and intent as alleged. The successive frequency of his acts tends to negative innocence of intent on his part. The accused could not have expected his pay check for August to have been deposited by the finance office in his bank when he received the check himself and spent the proceeds.

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Under all of the circumstances of the case, the Board of Review is of the opinion that the record establishes beyond any reasonable doubt that the accused uttered the checks specified in Specification 2, Additional Charge, and in the Specification of the Second, Third, Fourth, and Fifth Additional Charges, respectively, with knowledge and intent as alleged, and that such conduct was in violation of the 95th Article of War (CM 200248, Briggs; CM 204921, Parsons; CM 210768, Sharp; CM 213393, Casseday; and CM 219428, Williams).

7. The accused is 22 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from October 6, 1939; appointed second lieutenant, Infantry, Army of the United States, and extended active duty, August 1, 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 of guilty of all Specifications and Charges, and legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of violation of the 95th Article of War, and authorized upon conviction of violation of the 61st or the 69th Article of War.

Nerto S. Hill Jr., Judge Advocate.

Percy E. Gyon, Judge Advocate.

Ellwood W. Sargent, Judge Advocate.

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SPJGH
CM 228394

1st Ind.

War Department, J.A.G.O., APR 2 1943 - 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 George R. Jarbeck (O-1289092), 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 legally sufficient to support the sentence and to warrant confirmation of the sentence.

The accused was found guilty of absence without leave for one day, in violation of the 61st Article of War; of breach of arrest (2 Specs.), in violation of the 69th Article of War; and of making and uttering checks with intent to defraud, without having and not intending to have sufficient funds in the bank for the payment thereof (8 Specs.), in violation of the 95th Article of War. He was sentenced to be dismissed the service and to be confined at hard labor for six months. Restitution has not been made of the sum of $385 fraudulently obtained upon the checks. 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 that recommendation into effect.

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.

(Sentence confirmed. G.C.M.O. 94, 30 Apr 1943)

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

(161)

SPJGK
CM 228400

UNITED STATES v. Private ROY D. McELROY (14043864), Company E, 66th Armored Regiment.	2ND ARMORED DIVISION Trial by G. C. M., convened at Fort Bragg, North Carolina, November 20, 1942. To be shot to death with musketry.

OPINION of the BOARD OF REVIEW
HOOVER, COPP and SARGENT, 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. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that MC ELROY, ROY D., Private, Company "E", 66th Armored Regiment, Ft. Bragg, North Carolina, having knowledge of the fact that, as a member of the Third Landing Team, which was being equipped for combat duty, he would depart from Fort Bragg, N. C. for a port of embarkation on short notice, did, at Fort Bragg, North Carolina on or about October 12, 1942 with intent to avoid hazardous duty and to shirk important service, to-wit entrainment for a port of embarkation, desert the service of the United States and did remain absent in desertion until he was apprehended at Atlanta, Georgia on or about October 19, 1942.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. All members of the court present concurring, he was sentenced to be shot to death with musketry. The reviewing authority approved the sentence and forwarded the record for action under Article of War 48.

3. The evidence shows that on September 29, 1942, accused, then a member of Company E, 66th Armored Regiment, stationed at Fort Bragg,

North Carolina, was placed on special duty with Company A of that regiment. Company A was a component of the 3d Landing Team then being trained and equipped for overseas duty and particularly for landings on hostile shores. (R. 7, 14; Ex. 1) The landing team was quartered in a special area in Fort Bragg apart from the rest of the regiment (R. 8). Accused was one of a number of men similarly assigned for the purpose of giving companies of the landing team an overstrength of five per cent (R. 12). Before accused departed from Company E his company commander personally checked his baggage and field equipment (R. 14, 17) and cautioned accused,

> "to be sure that he had everything because if he was short any equipment after reporting to his new organization the service they were embarking on would preclude his receiving any replacement of equipment" (R. 14).

The company commander testified that accused was not told so expressly but that "the implication was given him when he left that he was going for good" (R. 18).

Following the assignment of accused to Company A all types of equipment except armor piercing ammunition required for combat and hostile landings were issued to the landing team (R. 7). There was much activity in the area occupied by the team in securing and issuing the equipment (R. 10, 23, 24). Shipping numbers were stenciled on the tanks of Company A and devices enabling the tanks to "go through deeper water" were attached (R. 25). On one occasion accused went to the supply sergeant of Company A and asked for certain items of equipment (R. 25, 26). The supply sergeant testified that

> "the men were very careful in checking on their equipment, sir. I had a few fellows there, for instance, that had gas masks not in very good shape and they came to me to replace them, said they wouldn't have a chance later and wanted to be sure they had good ones, and it seemed they did know that they were going somewhere for sure and right away" (R. 26).

Crates in the area were specially marked with code numbers or letters. Accused's barracks bag was so marked (R. 27).

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On October 12 accused and another soldier left the area occupied by the 3d Landing Team and went to Atlanta, Georgia (R. 31, 32). The landing team departed from Fort Bragg on October 14 (R. 11) and boarded a transport at a port of embarkation on October 15 (R. 19). Accused's barracks bag was left in the area with other articles (R. 26, 27). Accused was not present at the port and did not embark (R. 20). He was apprehended in Atlanta on October 18 (R. 31, 32). When apprehended he was in uniform except that he was wearing "brown and white oxfords" (R. 32). Subsequently, while he was in confinement at Fort Bragg, he was heard to say that if he had not been wearing brown and white shoes he "wouldn't have been caught" (R. 28).

Accused made an unsworn statement as follows:

> "Sir, I am about twenty-one years old. I enlisted in the army when I was about nineteen. Private Sapp and I were together and went to my home. We were drinking when we left. When I sobered up and knew what I was doing I had a blister on my heel where my shoes rubbed it. I changed shoes so it might get well, put on some brown and white shoes I had there that fit me better because I wanted to get the foot well so I could come back to my outfit. I didn't want to go out of the house with white and brown shoes on with my uniform and didn't intend for anybody to see me with them on, but I just stepped out for a minute to get some cigarettes and they apprehended me before I could get back" (R. 35).

4. The uncontradicted evidence shows that accused was absent without leave from his place of duty between the dates alleged in the Specification. No one testified directly that he absented himself without leave but the circumstances leave no doubt that his absence was unauthorized. Two days after accused absented himself the command with which he was on special duty entrained for a port of embarkation and on the following day embarked. The duty of entrainment for a port of embarkation was manifestly important service within the meaning of Article of War 28. Accused was specially and expressly advised that the service his new organization was "embarking on would preclude his receiving any replacement of equipment". The designation and segregation of the new command and the rapid preparations which accused and other members of the command were required to make plainly indicated an impending movement for combat service. Under all the circumstances the

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Board of Review is convinced beyond reasonable doubt that when accused quit his place of duty he knew that his command was about to entrain for a port of embarkation and that he intended by his absence to shirk that important service. Desertion is established.

5. In the course of the trial the trial judge advocate asked the court to take judicial notice that the 3d Landing Team was at the time of the trial engaged in combat in Africa (R. 34). Overseas movements being secret, the precise nature and place of the duties performed by the 3d Landing Team after embarkation were not matters of common knowledge of which the court could properly take judicial notice. The court did, of course, judicially know that the United States is at war and that embarkation from a port of embarkation might result in combat or might involve other hazardous duties.

6. The charge sheet shows accused's age as 20 years and 10 months. He first enlisted on February 6, 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 thereof. The death penalty is authorized for desertion in time of war.

Helmet C. Weaver, Judge Advocate.
Andrew Sapp Jr., Judge Advocate.
Edward N. Feigert, Judge Advocate.

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1st Ind.

War Department, J.A.G.O., [illegible] 1943 - 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 Roy D. McElroy (14043864), Company E, 66th Armored Regiment.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. Accused was properly found guilty of desertion by quitting his command at a time at which it was about to embark for overseas duty. He was sentenced to be shot to death with musketry. The offense was grave but I do not believe that imposition of the extreme penalty is required. I recommend that the sentence be confirmed but commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for twenty years. By a sentence so commuted accused may be impressed with the gravity of his offense and at the same time may be required to perform further military duty with an opportunity to redeem himself by conscientious service. To this end I also recommend that the dishonorable discharge be suspended and that a detention and rehabilitation center be designated as the place of confinement.

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

Myron C. Cramer

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.

(Sentence confirmed but commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for twenty years. Execution of that portion thereof adjudging dishonorable discharge suspended until soldier's release from confinement. G.C.M.O. 54, 24 Mar 1943)

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

SPJGN
CM 228401

FEB 5 1943

U N I T E D S T A T E S	)	2ND ARMORED DIVISION
v.	)	Trial by G.C.M., convened at Fort Bragg, North Carolina, November 21, 1942. Dishonorable discharge and confinement for life. No place of confinement designated.
Private FRANCIS Y. WEBSTER (14019747), Company A, 66th Armored Regiment.	)	

HOLDING by the BOARD OF REVIEW
CRESSON, SNAPP and LIPSCOMB, Judge Advocates

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that WEBSTER, FRANCIS, Y, Private, Company "A", 66th Armored Regiment, Fort Bragg, North Carolina, having knowledge of the fact that, as a member of the 3rd Landing Team, which was being equipped for combat duty, he would depart from Fort Bragg for a port of embarkation on short notice, did, at Fort Bragg, North Carolina, on or about October 5, 1942, with intent to avoid hazardous duty and to shirk important service, to-wit: entrainment for a port of embarkation, desert the service of the United States and did remain absent in desertion until he surrendered himself at Fort Bragg, North Carolina, on or about October 21, 1942.

The accused pleaded not guilty to and was found guilty of the Charge and Specification thereunder. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for his natural life. The reviewing authority approved the sentence, and forwarded the record of trial for action under article of War 48. The record has been considered as if forwarded under Article of War 50½.

The evidence for the prosecution shows that during September, 1942, the First Battalion, including Company A, 66th Armored Regiment, was organized into a unit called "Landing Team No. 3". The accused as a member of Company A became a member of this new unit. The new unit was moved and located in an area apart from its former area at Fort Bragg. New and different equipment appropriate for a landing team was issued to the members of the unit and to the accused. Modifications were made in the construction of the tanks used by the unit so as to provide protection for the tanks when operating in water during landing operations. During the training of the unit in the technique of landing on hostile shores, a training trip was made to Norfolk, Virginia, where actual landing operations were practiced. The accused accompanied the organization on this trip and participated in the practice drills. On October 14, 1942, Landing Team No. 3 entrained for a port of embarkation, and on October 15, 1942, embarked for foreign service. The foreign service contemplated for the unit was described as being both important and hazardous service (R. 13-18, 18-25, 27-30).

Prior to the departure of Landing Team No. 3, the accused, on October 5, absented himself without leave from the unit and remained absent without leave until October 21, 1942. The accused was not, therefore, present with Landing Team No. 3 on October 14 and 15, and did not embark with it for foreign service. On October 21 the accused returned to Fort Bragg and sought Staff Sergeant Anthony J. Skiba, his former supply sergeant, and requested certain of his property. At that time accused stated that he had been absent without leave (R. 18-25, Ex. 2).

The prosecution showed that following the act of the accused in absenting himself without leave, his company commander, Captain James R. Geraty, delivered the service record of the accused to the regimental personnel officer, together with a certificate which reads as follows:

"STATEMENT OF CAPTAIN JAMES R. GERATY,
COMMANDING COMPANY 'A', 66TH ARMD REGT.

"I certify that Tech 5th Gr Francis Y. Webster, 14019747, Co. 'A', 66th Armored Regiment, did on October 5, 1942 desert the Army of the United States, after having been informed that his

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organization was being equipped for combat duty and he was also informed that they would leave Fort Bragg, North Carolina on short notice for a port of embarkation.

(sgd.) James R. Geraty
Capt. 66th A R

JAMES R. GERATY,
Captain, Co. 'A', 66th Armored Regt,
Commanding"

The quoted certificate was, over the objection of the defense, received in evidence under the theory that it was an official report required by Army Regulations 615-300 (par. 9c), and that, therefore, under paragraph 117 of the Manual (M.C.M., 1928) it was admissible as an exception to the hearsay rule (R. 8-13; Ex. 2).

4. The accused made an unsworn statement as follows:

"Well, sir, On October 3rd the 1st Sergeant announced that around fifty percent of the company, provided they had their work completed, would receive a week-end pass. At that time I was in the maintenance and had been working pretty hard. I asked my maintenance sergeant if I could put in for a week-end pass and he said I could. I applied for it and received it, and — well, sir, I over-stayed it. But while I was gone I had no idea when the landing team would leave, otherwise I wouldn't have over-stayed it. I returned of my own accord. I was not apprehended. I would like to stress that while I was away I had no intention of avoiding hazardous duty or shirking important service. That is all." (R. 36)

5. The Specification alleges that the accused deserted the service "* * * with intent to avoid hazardous duty and to shirk important service, to-wit: entrainment for a port of embarkation, * * *". In order to sustain the finding of guilty under this Specification the evidence must show that the accused knew that Landing Team No. 3 would depart for a port of embarkation on short notice, and that he absented himself with the specific intent to avoid the hazardous and important duty involved in such service. There is clear proof that Landing Team No. 3 had been equipped with new and specialized equipment appropriate to landing operations, and that the unit had been trained in actual landing operations. There is also proof that the accused was equipped, as were the other members of the unit, and that he actually participated in the technical training which the unit received.

The only evidence, however, tending to show that the accused knew that Landing Team No. 3 would leave for a port of embarkation on

short notice was contained in the certificate of Captain Geraty (Ex. 2). The defense objected to the introduction of the certificate upon several grounds, including the ground that it was hearsay evidence and did not fulfill the requirements of Army Regulations 615-300. The law member ruled, without objection by any member, that the certificate was an official statement in writing required by the regulation cited, and admissible under the exceptions noted in paragraph 117, Manual for Courts-Martial, 1928. Paragraph 9c, Army Regulations 615-300, provides for a report by the commanding officer of a company following the desertion of a soldier, and the last sentence of the pargraph states that

> "* * * The facts developed, with names of competent witnesses, will be carefully recorded to be utilized in the effort to apprehend the deserter and in the investigation of charges and trial".

From this statement it is apparent that the purpose of the regulation is not to create an exception to the hearsay rule or to make the report called for in the regulation admissible in evidence, but rather to provide information and means by which competent evidence might be secured. The admission of the extrajudicial statement of Captain Geraty for the purpose of proving the truth of the statements therein contained offends every principle of proof which the hearsay rule was designed to protect. Captain Geraty was not present before the court or the accused, his statement was not made under oath, and it was not subject to the inquisitive test of cross-examination. As hearsay evidence it was clearly incompetent.

The statement is made in paragraph 113, Manual for Courts-Martial, 1928, that

> "Hearsay is not evidence. * * * The fundamental reasons for the rule are that the author of the statement was not under oath, and was not subject to cross-examination, and that the court had no opportunity of observing his demeanor."

In addition the admission of the statement of Captain Geraty was an error because it violated the opinion evidence rule by presenting, not simple facts from which the court might draw its own conclusions, but the broad legal conclusion that the accused "* * * did * * * desert the Army of the United States, * * *" (par. 112, M.C.M., 1928). Furthermore, since desertion in time of war is a capital offense, the statements contained in the certificate of Captain Geraty would have been inadmissible even if it had been presented in the form of a deposition (A.W. 25; par. 14, M.C.M., 1928).

Except for the certificate of Captain Geraty, there is no evidence in the record which could have warranted the inference that the accused absented himself from his organization with the specific intent to avoid hazardous service and the logical effect of the certificate, therefore, was to impel the court to its finding of guilty. The error in admitting such an incompetent statement was necessarily, therefore, so prejudicial to the rights of the accused as to require a disapproval of the findings of guilty.

It may be added that although one may surmise from the other evidence and the coincidence of his well timed absence that the accused may have possessed the cowardly purpose of deserting his comrades in order to avoid a service perilous to them all, the Board of Review is under the duty of safeguarding the basic principle of American justice that in order to have a legal conviction "A man must not only be guilty but he must be proven guilty." We must conclude, therefore, that the proof fails to support the findings of guilty.

The evidence does, however, show that the accused absented himself from his organization without leave from October 5 to October 21, 1942, and is sufficient, therefore, to support the lesser included offense of absence without leave, in violation of Article of War 61. The maximum punishment authorized by paragraph 104c, Manual for Courts-Martial, 1928, for the offense of absence without leave for 16 days, is confinement at hard labor for one month and eighteen days and forfeiture of two-thirds of his pay per month for a like period.

6. For the reasons stated, the Board of Review holds that the record of trial is legally sufficient to support only so much of the findings of guilty of the Charge and the Specification thereunder as involves findings that the accused at the time and place alleged, absented himself without leave from his organization and remained absent without leave until he surrendered himself at the time and place 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 one month and eighteen days, and forfeiture of two-thirds of his pay for a like period.

Chas. I. Grosson, Judge Advocate.

Dorrance D. Snapp, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

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1st Ind.

War Department, J.A.G.O., FEB 27 1943 - To the Commanding General, 2nd Armored Division, A.P.O. 252, c/o Postmaster, New York, New York.

1. In the case of Private Francis Y. Webster (14019747), Company A, 66th Armored Regiment, attention is invited to the foregoing holding by the Board of Review, which holding is hereby approved. I concur in the holding by the Board and for the reasons therein stated recommend that only so much of the findings of guilty of the Charge and Specification be approved as involves findings that the accused, at the time and place alleged, absented himself without leave from his organization and remained absent without leave until he surrendered himself at the time and place alleged, in violation of the 61st Article of War, and only so much of the sentence be approved as involves confinement at hard labor for one month and eighteen days, and forfeiture of two-thirds of his pay for a like period. Under the provisions of Article of War 50½, you now have authority to order the execution of that part of the sentence approved by the Board of Review.

2. Action by the President under Article of War 48 is not required in a case involving a sentence of life imprisonment. This case, therefore, has been considered as if forwarded under Article of War 50½.

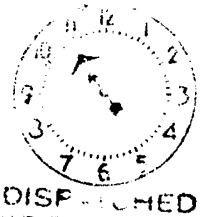
3. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of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

(CM 228401).

E. C. McNeil,
Brigadier General, U. S. Army,
Acting The Judge Advocate General.

1 Incl.-Record of trial.

FEB 27 '43 4M



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

SPJGN
CM 228402

FEB 10 1943

UNITED STATES	)	2ND ARMORED DIVISION
	)	
v.	)	Trial by G.C.M., convened at Fort Bragg, North Carolina, November 20 and 21, 1942. To be shot to death with musketry.
	)	
Private WILLIAM L. COWART (7004836), Company A, 66th Armored Regiment.	)	

HOLDING by the BOARD of REVIEW
CRESSON, SNAPP and LIPSCOMB, Judge Advocates

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that COWART, WILLIAM L., Private, Company "A", 66th Armored Regiment, Fort Bragg, North Carolina, having knowledge of the fact that, as a member of the 3rd Landing Team, which was being equipped for combat duty, he would depart from Fort Bragg for a port of embarkation on short notice, did, at Fort Bragg, North Carolina, on or about October 5, 1942, with intent to avoid hazardous duty and to shirk important service, to-wit: entrainment for a port of embarkation, desert the service of the United States and did remain absent in desertion until he surrendered himself at Fort Bragg, North Carolina, on or about October 21, 1942.

The accused pleaded not guilty to and was found guilty of the Charge and Specification thereunder. Evidence of three previous convictions was introduced. He was sentenced to be shot to death with musketry. The reviewing authority approved the sentence, and forwarded the

record of trial for action under Article of War 48, with the recommendation that since another soldier who had gone absent with and returned to duty with the accused and who had been tried on the same day on an identical charge, was found guilty and sentenced to dishonorable discharge, total forfeitures, and life imprisonment, that the sentence of the accused be commuted to life imprisonment in order to bring the two sentences "into parity".

3. The evidence for the prosecution shows that during September, 1942, the First Battalion, including Company A, of the 66th Armored Regiment, was organized into a unit called "Landing Team No. 3." The accused as a member of Company A became a member of this new unit. The new unit was moved and located in an area apart from its former area at Fort Bragg. New and different equipment appropriate for a landing team was issued to the members of the unit and to the accused. Modifications were made in the construction of the tanks used by the unit so as to provide protection for the tanks when operating in water during landing operations. During the training of the unit in the technique of landing on hostile shores, a training trip was made to Norfolk, Virginia, where actual landing operations were practiced. The accused accompanied the organization on this trip and participated in the practice drills. On October 14, 1942, Landing Team No. 3 entrained for a port of embarkation, and on October 15, 1942, embarked for foreign service. The foreign service contemplated for the unit was described as being both important and hazardous service (R. 5-8, 24).

Prior to the departure of Landing Team No. 3, the accused, on October 5, absented himself without leave from the unit and remained absent without leave until October 21, 1942. The accused was not, therefore, present with Landing Team No. 3 on October 14 and 15, and did not embark with it for foreign service. On October 21 the accused returned to Fort Bragg and sought Staff Sergeant Anthony J. Skiba, his former supply sergeant, and requested his barrack bag. At that time the accused was wearing a khaki uniform, whereas the troops at Fort Bragg had changed from their summer uniforms to woolen clothing (R. 8-9, 22-24).

The prosecution showed that following the act of the accused in absenting himself without leave, his company commander, Captain James R. Geraty, delivered the service record of the accused to the regimental personnel officer, together with a certificate which reads as follows:

"STATEMENT OF CAPTAIN JAMES R. GERATY,
COMMANDING COMPANY 'A', 66TH ARMD REGT.

"I certify that Pvt. William L. Cowart, 7004836, Co. 'A', 66th Armd Regiment, did on October 5, 1942 desert the Army of the United States, after having been informed that his organization was being equipped for combat duty and he

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was also informed that they would leave Fort Bragg, North Carolina on short notice for a port of embarkation.

(sgd.) James R. Geraty
Capt. 66th A R

JAMES R. GERATY,
Captain, Co. 'A', 66th Armored Regt.,
Commanding"

The quoted certificate was, over the objection of the defense, received in evidence under the theory that it was an official report required by Army Regulations 615-300 (par. 9c), and that, therefore, under paragraph 117 of the Manual (M.C.M., 1928) it was admissible as an exception to the hearsay rule (R. 21-26, 28-33; Ex. 2).

4. The accused made an unsworn statement as follows:

"Well, sir, on Saturday, October 3rd, about 4:00 o'clock in the afternoon, the First Sergeant posted on the bulletin board, the company bulletin board, that men desiring passes over the week-end, if their work was completed, would be granted passes up to fifty percent of the company. I was among the first to ask for a pass and got it. Before that I had asked for a leave. I had a letter from my sister saying they wanted my opinion as to my mother's operation for an internal goitre. Although they did not operate I was worried about her. I hadn't had a pass in about fifteen months, and I had asked about four or five times before, before we went on maneuvers in Carolina and after we were camped there at Fort Bragg, and I was always refused a pass. When I got this week-end pass on the 3d of October I went to Atlanta, Georgia, to see my sister and mother. That's all I have to say, sir, except I did return of my own accord" (R. 43).

5. The Specification alleges that the accused deserted the service "* * * with intent to avoid hazardous duty and to shirk important service, to-wit: entrainment for a port of embarkation, * * *". In order to sustain the finding of guilty under this Specification the evidence must show that the accused knew that Landing Team No. 3 would depart for a port of embarkation on short notice, and that he absented himself with the specific intent to avoid the hazardous and important duty involved in such service. There is clear proof that Landing Team No. 3 had been equipped with new and specialized equipment appropriate to landing operations, and that the unit had been trained in actual landing operations. There is also proof that the accused was equipped, as were the other members of the unit, and

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that he actually participated in the technical training which the unit received.

The only evidence, however, tending to show that the accused knew that Landing Team No. 3 would leave for a port of embarkation on short notice was contained in the certificate of Captain Geraty (Ex. 2). The defense objected to the introduction of the certificate upon several grounds, including the ground that it was hearsay evidence and did not fulfill the requirements of Army Regulations 615-300. The law member ruled, without objection by any member, that the certificate was an official statement in writing required by the regulation cited, and admissible under the exceptions noted in paragraph 117, Manual for Courts-Martial, 1928. Paragraph 9c, Army Regulations 615-300, provides for a report by the commanding officer of a company following the desertion of a soldier and the last sentence of the paragraph states that

> "* * * The facts developed, with names of competent witnesses, will be carefully recorded to be utilized in the effort to apprehend the deserter and in the investigation of charges and trial."

From this statement it is apparent that the purpose of the regulation is not to create an exception to the hearsay rule or to make the report called for in the regulation admissible in evidence, but rather to provide information and means by which competent evidence might be secured. The admission of the extrajudicial statement of Captain Geraty for the purpose of proving the truth of the statements therein contained offends every principle of proof which the hearsay rule was designed to protect. Captain Geraty was not present before the court or the accused, his statement was not made under oath, and it was not subject to the inquisitive test of cross-examination. As hearsay evidence it was clearly incompetent.

The statement is made in paragraph 113, Manual for Courts-Martial, 1928, that

> "Hearsay is not evidence. * * * The fundamental reasons for the rule are that the author of the statement was not under oath, and was not subject to cross-examination, and that the court had no opportunity of observing his demeanor."

In addition the admission of the statement of Captain Geraty was an error because it violated the opinion evidence rule by presenting, not simple facts from which the court might draw its own conclusions, but the broad legal conclusion that the accused "* * * did * * * desert the Army of the United States, * * *" (par. 112, M.C.M., 1928). Furthermore, since desertion in time of war is a capital offense, the statements contained in the certificate of Captain Geraty would have been inadmissible even if it had been presented in the form of a deposition (A.W. 25, par. 14, M.C.M., 1928).

Except for the certificate of Captain Geraty, there is no evidence in the record which could have warranted the inference that the accused absented himself from his organization with the specific intent to avoid hazardous service and the logical effect of the certificate, therefore, was to impel the court to its finding of guilty. The error in admitting such an incompetent statement was necessarily, therefore, so prejudicial to the rights of the accused as to require a disapproval of the findings of guilty.

It may be added that although one may surmise from the other evidence and the coincidence of his well timed absence that the accused may have possessed the cowardly purpose of deserting his comrades in order to avoid a service perilous to them all, the Board of Review is under the duty of safeguarding the basic principle of American justice that in order to have a legal conviction "A man must not only be guilty but he must be proven guilty". We must conclude, therefore, that the proof fails to support the findings of guilty.

6. 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 the Charge and the Specification thereunder, and the sentence.

Chas. L. Bresson, Judge Advocate.

Dorsey D. Snapp, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

1st Ind.

War Department, J.A.G.O., FEB 27 1943 - To the Commanding General, 2nd Armored Division, A.P.O. 252, c/o Postmaster, New York, New York.

1. In the case of Private William L. Cowart (7004836), Company A, 66th Armored Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is not legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. I concur in the holding by the Board of Review and for the reasons therein stated recommend that the findings of guilty and the sentence be disapproved.

2. You are advised that the action of the Board of Review and the action of The Judge Advocate General have been taken in accordance with the provisions of Article of War 50½, and that under the further provisions of that Article and in accordance with the fourth note following the Article (M.C.M., 1928, p. 216), the record of trial is returned for your action upon the findings and sentence and for such further action as your may deem proper.

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

(CM 228402).

E. C. McNeil,
Brigadier General, U. S. Army,
Acting 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.

SPJGK
CM 228480

UNITED STATES v. Second Lieutenant CLIFFORD H. SMITH (0-1010248), Headquarters 8th Armored Division.	8TH ARMORED DIVISION Trial by G.C.M., convened at Fort Knox, Kentucky, November 19, 1942. Dismissal.

OPINION of the BOARD OF REVIEW
HOOVER, COPP and SARGENT, Judge Advocates.

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

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

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

Specification: In that 2nd Lt. Clifford H. Smith, Headquarters, 8th Armored Division, did, without proper leave, absent himself from his organization at Fort Knox, Kentucky, from about September 14, 1942 to about September 21, 1942.

CHARGE II: Violation 96th Article of War.

Specification 1: In that 2nd Lt. Clifford H. Smith, Headquarters, 8th Armored Division, did, at San Francisco, California, on or about September 4, 1942, wrongfully fail to maintain in the Security-First National Bank of Los Angeles, Lompoc Branch, Lompoc, California, sufficient bank balance for the payment of a certain check, made and passed by him on September 4, 1942, to the Crocker First National Bank of San Francisco, in the following words and figures:

Lompoc, California, Sept 4 1942 No. 62
Lompoc Branch
SECURITY-FIRST NATIONAL 90-451
BANK OF LOS ANGELES 12
H & Ocean

Pay to the Order of

Cash $30 00

Thirty and no/100 DOLLARS

/s/ Clifford H. Smith

and did continue to wrongfully fail to maintain sufficient bank balance, as aforesaid, until said check was dishonored by said Security-First National Bank of Los Angeles.

Specification 2: In that 2nd Lt. Clifford H. Smith, Headquarters, 8th Armored Division, did, at San Francisco, California, on or about September 8, 1942, wrongfully fail to maintain in the Security-First National Bank of Los Angeles, Lompoc Branch, Lompoc, California, sufficient bank balance for the payment of a certain check, made and passed by him on September 8, 1942, to the American Trust Company of San Francisco, in the following words and figures:

Lompoc, California, Sept 8 1942 No. 66
Lompoc Branch
SECURITY-FIRST NATIONAL 90-451
BANK OF LOS ANGELES 12
H & Ocean

Pay to the Order of

Cash $30 00

Thirty and no/100 DOLLARS

/s/ Clifford H. Smith

and did continue to wrongfully fail to maintain sufficient bank balance, as aforesaid, until said check was dishonored by said Security-First National Bank of Los Angeles.

Specification 3: In that 2nd Lt. Clifford H. Smith, Headquarters, 8th Armored Division, did, at Chicago, Illinois, on or about September 16, 1942, wrongfully fail to maintain in the Security-First National Bank of Los Angeles, Lompoc, California, sufficient bank balance for the payment of a certain check, made and passed by him on September 16, 1942, to the Terminal National Bank of Chicago, in the following words and figures:

Security-First Natl. Bank
Bank Name Here of Los Angeles No.

Lompoc - Calif.
Town Name Here

Chicago, Ill. Sep 16 1942

Pay
To The
Order of Cash $20 00

Twenty and no/100 DOLLARS

/s/ Clifford H. Smith
8th Arm'd Div.
Ft. Knox, Ky.

and did continue to wrongfully fail to maintain sufficient bank balance, as aforesaid, until said check was dishonored by said Security-First National Bank of Los Angeles.

He pleaded 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 for action under Article of War 48.

3. The evidence introduced by the prosecution was documentary in form and consisted mainly of stipulations as to testimony, official orders pertaining to accused, the checks described in the Specifications, Charge II, and telegrams. All such evidence was introduced by the prosecution with the express consent of the accused and defense counsel (R.7-11).

This evidence shows that on August 1, 1942, an order was issued for the transfer of accused from the 5th Armored Division, Camp Cooke, California, to the 8th Armored Division, Fort Knox, Kentucky (Ex. 1-A). On August 10, 1942, he was assigned by order of the Commanding General, 8th Armored Division, to duty in The Adjutant General's

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Section of that organization (Ex. 1-B). However, accused was hospitalized at Camp Cooke, California, on August 7, 1942, and was unable to leave Camp Cooke until August 31, 1942, on which date he left for San Francisco, California, arriving at that city on September 1, 1942 (Exs. 1-C, 1-D, 2).

On September 4, 1942, at the Crocker First National Bank of San Francisco, accused cashed a personal check for $30, the check being drawn on the Security-First National Bank of Los Angeles, Lompoc Branch, Lompoc, California (Exs. 1-I, 6). On September 8, 1942, at the American Trust Company, San Francisco, he cashed another personal check for $30, drawn on the same bank (Exs. 1-J, 7). When presented for payment, the two checks were dishonored by the drawee bank because the balance in accused's account was, on each occasion, insufficient in amount to pay the check (Exs. 5, 6, 7). Accused had opened an account at the drawee bank during July 1942, and had maintained a satisfactory account until about September 1, 1942. On September 3, 1942, the amount of his balance was $4.38. No deposits were made after this date. Between September 3 and September 10 several checks were presented to the drawee bank for payment, including the three checks set forth in the Specifications, Charge II. Payment of such checks was refused because of the insufficient balance. On September 12, 1942, the bank received a letter from accused dated September 10, 1942, in which he stated that his account was overdrawn and in which there was inclosed his promissory note for $150. This note was returned to accused by the drawee bank together with a letter to the effect that any application for a loan should be presented in the usual manner (Ex. 5).

On September 10, 1942, accused sent a telegram from San Francisco to the 8th Armored Division, Fort Knox, Kentucky, stating that he was unavoidably detained "by accident" and that he was leaving that evening for Fort Knox, and requesting 10 days leave of absence "to cover lost time" (Exs. 1-E, 2). Accused was granted a 10 day leave of absence effective on or about September 5, 1942 (Exs. 1-F, 2).

On September 10, 1942, at Fort Mason, California, accused obtained a transportation request from San Francisco to Fort Knox, Kentucky, and left San Francisco on September 12. After stopping over for one night at Salt Lake City, Utah, because of illness, he resumed his journey and arrived at Chicago, Illinois, September 16 (R. 13). On that date, at the Terminal National Bank of Chicago, he cashed a third personal check for $20, also drawn on the Security-First National Bank of Los Angeles, Lompoc Branch. Payment of this check was likewise refused because of insufficiency of funds (Exs. 1-K, 5, 8). On September 21, 1942, accused reported to the Provost Marshal, Headquarters 6th Service Command, Chicago, Illinois. He was attached to the 1600th Service Unit, 6th Service Command, on September 22, 1942 (Exs. 1-G, 2, 3),

and on September 23 left to report to the Commanding General, 8th Armored Division, pursuant to letter order, Headquarters 6th Service Command, of the same date (Exs. 1-H, 2, 3). He reported at Fort Knox on September 23 (R. 21; Exs. 2, 10). Introduced by the prosecution, without objection by the defense, was an original extract copy of the morning report of accused's organization stating, inter alia, that accused was granted 10 days leave of absence as of September 5, 1942, that his status of on leave was changed to absence without leave as of September 15, 1942, and that he joined his organization on September 24, 1942 (R. 7, 8; Ex. 10). It was stipulated that accused was absent without leave from September 14 to September 21, 1942 (Ex. 2).

Restitution of funds realized on the checks was made prior to trial (R. 15, 17; Exs. 6, 7, 8).

Accused testified that he had been hospitalized from June 23 to August 28, 1942, because of yellow jaundice. He left Camp Cooke August 31 and upon arrival at San Francisco on September 1, 1942, did not feel well and decided to remain "for a couple days" in order to rest (R. 13). He drank to some extent, not realizing what effect it would have on him considering his period of hospitalization. He did not become intoxicated but "it rather seemed to have the effect of placing me more or less in a daze—not completely, but partial daze" (R. 13). He continued in this state until September 10, "at which time I perked up some" (R. 13). He then recalled cashing the checks but did not know their amounts or the status of his bank account. Accordingly, he sent his bank a promissory note for $150, not realizing that it might not be accepted. When he received the transportation request from San Francisco to Fort Knox on September 10, it was too late to get the ferry from San Francisco to Oakland where he was to entrain. He was "rather disgusted about this" (R. 13), began drinking again and did not leave San Francisco until September 12. On September 13 he became ill on the train, stopped for the night at Salt Lake City, Utah, and resumed his journey the following day. On September 16, when he arrived in Chicago, Illinois, his physical condition was "rather low and depressing" (R. 13). He had domestic difficulties at his home in that city (R. 13, 16). As a result he began drinking again. He reported to the Provost Marshal, Headquarters 6th Service Command, on September 21, believing that he would thus be under military control. Upon arrival at Fort Knox on September 24 he reported the complete story to the Adjutant General of the 8th Armored Division. He was then restricted to Camp limits and ordered to the duty of training clerks in the personnel section of the Division Adjutant General's Office. Later he became head of the section (R. 13, 14). He redeemed the three checks concerned after he arrived at Fort Knox and received his transportation money (R. 15, 17).

First Lieutenant Joseph H. Jones, 3rd Company, Officers' Candidate School, Fort Knox, Kentucky, commanding officer of the company to which accused belonged while attending the school, testified for the defense that accused's conduct at the school had been excellent, and that he had very satisfactorily performed the duty of company commander for a three-day period. Witness believed him to be an excellent "soldier" (R. 18). Second Lieutenant James A. King, 1550th Service Unit, Fort Knox, Kentucky, classmate of accused at the Officers' Candidate School, testified that his conduct at the school had been beyond reproach and that his character was excellent (R. 20). First Lieutenant D. D. Courtright, Headquarters 8th Armored Division, under whose supervision accused worked when he reported at Fort Knox, stated that accused was at the time of trial personnel officer of the division, that his performance of duty was excellent and that his character was "exceptionally good" (R. 21). Major R. O. Fullerton, 8th Armored Division Adjutant General, testified that accused had then been in charge of the Units Personnel Section under his supervision for two weeks, and that his efficiency was "excellent plus". He had previously been assistant personnel officer of the division. He further stated that accused's conduct and veracity had been above reproach, and that he would be satisfied to have accused remain in charge of the Units Personnel Section (R. 22, 23). Lieutenant Colonel L. L. Boyd, General Staff Corps, 8th Armored Division, testified that accused's efficiency as reported to him had been excellent, that upon reporting he had been very cooperative concerning his previous actions, and that he had no reason to question accused's veracity or conduct since joining the organization (R. 24, 25).

4. It is clearly established by the evidence and by the pleas of guilty that when accused cashed the checks described in the Specifications, Charge II, he knew that the balance in his account was not sufficient to meet the checks when presented for payment. When the checks were drawn, the balance in his account was $4.38. Accused sent a promissory note for $150 to his bank accompanied by a statement that he had overdrawn his account. Although accused may have hoped that this action would result in the payment of the checks upon presentation such a hope was clearly unjustified, as was evidenced by the fact that the checks were subsequently dishonored for lack of sufficient funds. In view of the seriously depleted state of the account with relation to the comparatively large amount of the negotiated checks, and the unwarranted assumption by accused that the checks would be honored because of the receipt by his bank of a promissory note, it must be concluded that accused's actions indicated either reprehensible carelessness, complete indifference, or a deliberate desire to gain time and temporary relief from the result of his actions. The allegation that accused wrongfully failed to maintain a sufficient bank balance for the payment of the checks was clearly proved.

It is noted that none of the Specifications, Charge II, allege that in passing the checks accused intended to defraud. The allegation in each Specification that he "wrongfully failed" to maintain a sufficient bank balance for the payment of the check involved, states an offense, however, in violation of Article of War 96, such acts being of a nature to bring discredit on the military service (CM 202027, McElroy).

5. Four of the ten members of the court recommended that the sentence be "commuted to a reprimand, or admonished, or to a forfeiture of $25.00 of his pay per month for a period not to exceed six months, or any combination of the above". The recommendation was based upon the testimony of witnesses as to the good character and efficiency of accused, and upon the belief that accused "would be an asset to the Military Service in his present rank and should not be dismissed".

6. War Department records show that accused is 26 years of age. He attended high school for two years and "Metropolitan Business College" for three months. He served as an enlisted man in the Regular Army for about eight years and five months. He was appointed a warrant officer, junior grade, on May 15, 1942. Having completed the course of instruction at an officers' candidate school he was appointed a second lieutenant, Army of the United States, on May 23, 1942. He is married and has three children.

7. 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 and sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of violation of Articles of War 61 and 96.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., JAN 5 1943 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Clifford H. Smith (0-1010248), Headquarters 8th Armored Division.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. Accused was absent without leave from his organization, the 8th Armored Division, from about September 14, 1942, to about September 21, 1942. At about this time he uttered a series of three checks in amounts aggregating $80 but wrongfully failed to maintain sufficient bank balances for their payment with the result that the checks were dishonored. Restitution of funds realized on the checks was made prior to the trial. He was sentenced to dismissal. Four of the ten members of the court recommended commutation of the sentence to some lesser punishment in the form of a reprimand, admonition or forfeiture of pay. Accused has an excellent record both as an enlisted man and officer. I believe that he is capable of further valuable service. In view of all the circumstances and the recommendation for clemency, I recommend that the sentence be confirmed but suspended during the pleasure of the President.

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

Myron C. Cramer.

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

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

(Sentence confirmed but execution suspended. G.C.M.O. 35, 15 Mar 1943)

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

(187)

SPJGH
CM 228502

DEC 28 1942

UNITED STATES	)	HEADQUARTERS THIRD ARMORED DIVISION
	)	
v.	)	Trial by G.C.M., convened at APO 253, Camp Pickett, Virginia, November 16, 23, 1942. Dismissal.
	)	
Second Lieutenant WILLIAM G. TALIAFERRO, (O-1010882) 83rd Armored Reconnaissance Battalion.	)	

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

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

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

CHARGE: Violation of the 95th Article of War.

Specification: In that Second Lieutenant William G. Taliaferro, Infantry 83rd Armored Reconnaissance Battalion was, at Jerome, Arizona, on or about October 10, 1942, in a public place, to wit, street in front of Ritz Theatre, drunk and disorderly while in uniform.

The accused pleaded not guilty to and was found guilty of the Charge and its Specification. He was sentenced to be "dishonorably dismissed from the service of the United States". The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The evidence shows that Company B, 83rd Reconnaissance Battalion, and accused, who had formerly been in that company, were in Jerome, Arizona, on the afternoon and evening of October 10, 1942, after Company B had participated in a parade in Clarksdale, Arizona. Accused was drinking beer at 3:00 p.m., again at about 5:00 p.m., and for several hours prior to 11:00 p.m. (R. 17, 18; Exs. C, D).

At about 11:00 p.m. Acting Chief of Police T. W. Cantrell and Officer M. S. Graham of the Jerome Police Department, in response to a call from the Ritz Theatre, found accused and Sergeant Liska in an intoxicated condition. Chief Cantrell, who had served nine years as an Army officer, tried to get accused to quiet down and not make a scene in front of the enlisted men. After

getting accused and Sergeant Liska across the street, accused began using profane language. Some of the soldiers took the two into a saloon. In about five minutes accused came out of the saloon with a glass of beer in his hand, blew his whistle, called some of the men of Company B, gave them $10, and told them to buy some drinks for the soldiers of Company B. Accused also told them to get the boys together and they would clean up the whole town. Chief Cantrell tried to get the accused off the street peaceably but accused was very drunk and would not go. The accused then stopped J. R. Cox, manager of the Penny store, who was wearing tan pants and a tan jacket, and asked him what company he was in. Mr. Cox replied that he was not in the Army. Accused made an insulting remark, grabbed Mr. Cox by the wrist, twisted it, and stated that he was going to take Mr. Cox to camp. Officer Graham then arrested accused and, with the assistance of Chief Cantrell, took him to the city jail and locked him up. While on the street, accused had repeatedly used many profane and obscene words in a very loud voice which could be heard for a city block. The accused was in Army uniform, with a bar of a second Lieutenant on the left side of the collar of his khaki shirt, and the 3rd Armored Division insignia on the right side of the collar and on the left sleeve (R. 19; Exs. C, D, E).

The accused was drunk in the opinion of Chief Cantrell, Officer Graham, Mr. Cox and Private Williard J. Bond of Company B. Their opinions were based on the fact that the accused swayed as he stood still, staggered in walking, his tongue was thick, talked in a loud and arrogant voice, used profane and indecent language, and because he did not recognize that Mr. Cox was not in Army uniform. (R. 20; Exs. C, D, E)

4. The defense offered no testimony. The accused elected to remain silent (R. 21).

5. The evidence shows that accused was drunk in uniform upon a public street of Jerome, Arizona, on October 10, 1942, in the presence of enlisted men and civilians. He staggered in walking, swayed while standing still, and talked in a loud and arrogant voice.

The evidence also shows that he was disorderly. He used profane and indecent language in a voice which could be heard a block away, came out of a saloon with a glass of beer in his hand, gave money to the soldiers to buy drinks and told them to get the boys together and they would clean up the whole town, grabbed a civilian, made insulting remarks to him and told him that he would take him to camp. As a result of the above conduct, the accused was publicly arrested and locked up in the city jail.

The Manual for Courts-Martial, 1928, cites "being grossly drunk and conspicuously disorderly in a public place" as an instance of violation of the 95th Article of War (MCM 1928, par. 151). Winthrop states as an instance of an offense chargeable under that article, "Drunkenness of a gross character committed in the presence of military inferiors, or charactized by some peculiarly shameful conduct or disgraceful exhibition of himself by the accused. (Winthrop Military Law and Precedents, Reprint, p. 717). The evidence shows that the accused was conspicuously disorderly, grossly drunk, and made a

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disgraceful exhibition of himself in a public place in the presence of his military inferiors and civilians. In the opinion of the Board of Review, the evidence establishes a violation of the 95th Article of War.

6. The accused is 24 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from September 30, 1940; appointed second lieutenant, Army of the United States, from Armored Force Officer Candidate School, and extended active duty, June 13, 1942.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons stated, the record of trial in the opinion of the Board of Review, is legally sufficient to support the findings of guilty of the Charge and its Specification, in violation of Article of War 95, legally sufficent to support the sentence and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of a violation of Article of War 95.

[signature], Judge Advocate.

[signature], Judge Advocate.

[signature], Judge Advocate.

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SPJGH
CM 228502 1st Ind.

War Department, J.A.G.O., JAN 2 1943 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant William G. Taliaferro (0-1010882), 83rd Armored Reconnaissance Battalion.

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

3. 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 above recommendation.

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.

(Sentence confirmed. G.C.M.O. 40, 17 Mar 1943)

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

SPJGN
CM 228507

APR 7 1943

UNITED STATES v. Captain WILLIAM C. NOON (0-308672), Quartermaster Corps.	FIRST CAVALRY DIVISION Trial by G.C.M., convened at Fort Bliss, Texas, November 19, 1942. Dismissal and forfeiture of all pay and allowances, and confinement for three (3) years.

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

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

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

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

Specification 1: In that Captain William C. Noon, Company "E", 56th Quartermaster Regiment, did, at El Paso, Texas, on or about March 9, 1942, wrongfully and fraudulently convert to his own use the sum of Five Dollars and Twenty-five cents ($5.25), currency of the United States, of the value of $5.25, the property of Company "L", 3rd Battalion, 55th Quartermaster Regiment and belonging to the Company Fund of said company.

Specification 2: In that Captain William C. Noon, Company "E", 56th Quartermaster Regiment, did, at El Paso, Texas, on or about April 27, 1942, wrongfully and fraudulently convert to his own use the sum of Five Dollars and Twenty-five Cents ($5.25), currency of the United States, of the value of $5.25, the property of Company "L", 3rd Battalion, 55th Quartermaster Regiment and belonging to the Company Fund of said company.

Specification 3: In that Captain William C. Noon, Company "E", 56th Quartermaster Regiment, did, at Fort Bliss, Texas, from about February 1, 1942, to about May 1, 1942, knowingly and wrongfully indulge in the practice of purchasing at various times and at a substantial discount war stamps from enlisted men of his command, which he had previously sold to the men on credit, on the company collection sheet, thereby making a profit for himself from enlisted men of his command.

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

Specification: In that Captain William C. Noon, Company "E", 56th Quartermaster Regiment, did, at Fort Bliss, Texas, on or about July 22, 1942, with intent to deceive Major Thomas O. Mitchell, an investigating officer, officially state to the said Major Thomas O. Mitchell, in substance that no funds coming into his hands as proceeds from the sale of shoulder patches to personnel of Company "L", 55th Quartermaster Regiment, reached his personal bank account and that he made full payment for the patches to Youlin & Company of Los Angeles by one payment in paper money (cash), which statement was known by said Captain William C. Noon to be untrue, in that he did remit by check to said Youlin & Company of Los Angeles, California, on or about May 18, 1942, the sum of $97.30 in payment for such patches.

He pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for three years. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. With reference to Specifications 1 and 2 of Charge I the evidence, in substance, is as follows:

There was admitted in evidence as Prosecution's Exhibit A a written sworn statement made by the accused during the latter part of July, 1942, during an official investigation then being conducted by a duly appointed board of officers (R. 17). When this statement was made the accused identified three checks, each drawn by W. A. Roberts, Jr.,

payable to cash on the El Paso National Bank, and endorsed by the accused on the back. One check was for $5.25, dated February 19, 1942, one for $1.75, dated March 18, 1942, and one for $3.50, dated April 3, 1942. The accused testified that during the time he was in command of Company L all of the company fund money that came into his hands was deposited in the El Paso National Bank to the credit of the company fund account. He alone made such deposits and the three above described checks were so deposited. He further stated that he never drew any cash on any checks that came into his hands as Company L fund money.

The three checks mentioned in the statement of Captain Noon, in the amounts of $5.25, $1.75 and $3.50, respectively, were identified in court and admitted in evidence, without objection, as Exhibits B, C, and D. An employee of the El Paso National Bank testified that the larger of the two rubber stamp marks on the face of the three checks indicates that they were negotiated at the bank for cash; that when checks are accepted for deposit they are not so stamped, only the deposit slip is stamped; and that when a check is made payable to cash the presence of but one endorsement after payment indicates that payment was made to such endorsee (R. 40).

The depositions of Technical Sergeant Kenneth L. Coffee and Staff Sergeant Leonard C. Wagner were admitted in evidence, without objection, as Prosecution's Exhibits E and F, respectively. Each of these witnesses was mess sergeant of Company L, 55th Quartermaster Regiment at Fort Bliss, Texas, while the company was commanded by Captain Noon. One served in that capacity from January 1, 1942, to March 20, 1942, and the other from March 23, 1942 to May 18, 1942. During all of this time the company mess served meals to civilians for 25¢ per meal, and the money was collected by the mess sergeants, during their respective tenures, in the form of cash and checks, and turned over to Captain Noon as received.

Major Hulen D. Wendorf, assistant trial judge advocate, appeared as a witness for the prosecution, was qualified as an expert auditor of company funds, and identified the council book of Company L, 55th Quartermaster Regiment for the period from June, 1941, to May 1, 1942, which was then admitted in eivdence, without objection, as Prosecution's Exhibit G. This witness then stated that he had made a thorough examination of the company fund records of Company L for the period December 18, 1941, to April 30, 1942, during which time the accused was custodian of the fund, and had made a written analysis of the fund, which analysis was identified by the witness and admitted in evidence, without objection, as Prosecution's Exhibit H. With respect to this analysis the witness stated that it did not show that any money had been deposited to the credit of the fund from civilian boarders at the company mess during the period in question, and that the council book did not show that the three check (Exs. B, C and D) had been entered as receipts.

With reference to Specification 3 of the Charge I the evidence, in substance, is as follows:

The accused testified during the official investigation before the board that he sold War Savings Stamps which were purchased out of the company fund, but that he never bought any stamps from Privates Lentz, Humfleet or Kroll (Ex. A).

Private Edward C. Humfleet testified that while stationed at Fort Bliss during April and May as a member of Company L he purchased two bonds from the accused so that he could sell them back and get money to pay his debts. He made these purchases at different times and on each occasion was charged $18.75 on the collection sheet, which was subsequently deducted from his pay. The purchase and resale to the accused were in each instance simultaneous. The first time he received $10 from the accused, and the second time $16 (R. 57).

Private First Class Robert F. Lentz, by deposition, testified that while stationed at Fort Bliss as a member of Company L he purchased War Savings Stamps from the accused on two occasions, the first of February and the first of March, 1942. These purchases were charged on the collection sheet and collected for at the end of the month. He resold them to the accused at the same time they were purchased. The first time he received a check for $8 in return for $10 in stamps, and the second time he received cash in the amount of $7 in return for $10 in stamps (R. 64; Pros. Ex. K).

Private First Class Edmund R. Kroll, by deposition, testified that while stationed at Fort Bliss, Texas, as a member of Company L he purchased War Savings Stamps from the accused on credit to be paid for out of his pay. There were three such transactions, one in February, one in March, and one in April, and each time he bought $18.75 worth of stamps. Later he resold them to the accused. One time he sold $18.75 worth of stamps for $12. Another time he sold $18.75 worth for $9, and another time he sold $18.75 worth for $7.50. On each of these occasions he received payment by check (R. 65, Pros. Ex. L).

With reference to the Specification of Charge II the accused testified, during the official investigation before the board of officers, that he obtained shoulder patches from Youlin & Co. of Los Angeles for the convenience of the men in his company who wished to purchase them. This was not a matter involving the company fund and he obtained the patches on his personal credit. When the patches were sold he remitted the proceeds to Youlin & Co. None of this money was ever deposited in the bank. He kept it in a sack and paid Youlin & Co. in cash (Pros. Ex. A).

E. R. Singerman, an accountant employed by Youlin & Co., testified, by deposition, in substance, that he was familiar with an

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account that his firm had with Company L, 55th Quartermaster Regiment, Fort Bliss, Texas, in connection with which his firm had corresponded with Captain Noon, that on May 20, 1942, his firm received a check on this account for $97.30, and that no payments on this account were ever made in cash (R. 64; Pros. Ex. I).

The gravamen of the offense charged is that the statement made by the accused, that he paid for the patches in cash, was made with an intent to deceive the investigating officer, and, inasmuch as this statement appears in the transcript of the testimony of the accused taken before that officer it is necessary, in order to determine whether such intent existed, to examine in detail all of his testimony that relates in any way to the alleged false statement. The attention of the accused was directed to a letter from Youlin & Co. acknowledging the receipt from the accused of his check for $97.30 in settlement of the account.

> "Q. *** In the letter you will note that Youlin & Co. recites that your remittance of $97.30 was made by check?
> "A. If it was made by check I would like to know where my check is.
> "Q. You state that you made it in cash?
> "A. Yes, sir.
> "Q. Are you still positive that you made that payment of $97.30 to Youlin & Co. in cash?
> "A. Yes. If I had my check books here I could say definitely.
> "Q. *** You still do not know whether you sent them green backs or whether you sent them a check?
> "A. *** If I had my bank stubs I could answer that question definitely.
> "Q. I want to know if you want to change your testimony?
> "A. I will change it to satisfy this case, I paid it by check.
> "Q. In other words you now testify that you paid the $97.30 by check?
> "A. I am saying that because I am not sure.
> "Q. *** I would like to know at this time how the $97.30 was actually remitted, if you are willing to tell me?
> "A. My answer to that is this way. I am going to say that it was paid by check and if I can't find my check book, my first answer will stand" (Pros. Ex. A).

4. Lieutenant Colonel James D. Mooney, Adjutant General's Department, Post Headquarters, Fort Bliss, Texas, testified that at Headquarters the accused had the reputation of being a good officer (R. 73).

Major James I Stewart, Transportation Corps, Fort Bliss, Texas, testified that he had known the accused for a little more than a year and that his general reputation as to honesty and integrity and fair dealing was good (R. 74).

The defense introduced in evidence, as Defense Exhibit No. 1, duplicates of the ledger sheets of the account of the accused in the El Paso National Bank for the months of February, March and April, 1942, for the purpose of showing that during those months no checks were drawn by the accused in the amounts testified to by Kroll (R. 76).

The rights of the accused were fully explained to him and he elected to remain silent.

5. With respect to Specifications 1 and 2 of Charge I the evidence is uncontradicted that the three checks represented payments by a civilian for board at the company mess, that they should have been deposited to the credit of the company fund at the El Paso National Bank, that the accused had possession of them for that purpose, and that they had been presented at the bank, with the blank endorsement of the accused affixed, and had been cancelled by the bank.

The accused stated that the checks were deposited by him to the credit of the company fund, but an employee of the bank, after examining the check, testified that the rubber stamp mark showed that they had not been deposited, but, on the contrary, had been cashed. In addition to this a qualified expert testified that an examination of the books and records of the company fund failed to disclose that any deposits had been made at any time for any money received from civilian boarders.

In the opinion of the Board of Review the inference is justifiable that the accused did not deposit the check, but instead received cash thereon which he wrongfully and fraudulently converted to his own use.

With respect to Specification 3 of Charge I, three enlisted men testified that they had bought stamps, or, in one case bonds, from the accused, and had immediately resold them to the accused at a substantial profit to him. However, a careful examination of the testimony of these witnesses, particularly Private Humfleet indicates that these so called "sales" were not bona fide, but merely constituted a deceitful procedure whereby the enlisted men, for their own convenience borrowed money from the accused, at a handsome profit to him, and with a guaranty of repayment furnished by the Company Collection Sheet (R. 57).

The accused, in his statement to the investigating officer, denied that he had ever bought any stamps or bonds from these men. However, the finding of guilty indicates that the court, who saw and heard the witnesses testify, chose to accept as true the testimony of the witnesses for the prosecution and no reason is apparent to the Board of Review why such finding should be distrubed.

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With reference to the Specification, Charge II, the facts are that the accused, for the convenience of the members of his company, arranged with Youlin & Co. of Los Angeles to be supplied with shoulder patches which he sold to members of his company and applied the money collected to the settlement of his account. It was not a company matter and had nothing to do with the company fund. Insofar as this phase of the investigation was concerned the sole purpose of the investigating officer was to determine whether the accused had made a profit on the patches sold.

It was charged that the accused made a sworn statement to the investigating officer knowing such statement to be untrue and with intent to deceive that officer. The false statement, alleged to have been made, was that none of the money collected from the sale of shoulder patches reached his personal bank account and that he had paid for the patches in cash. As to the first element of the statement the evidence is uncontradicted (Pros. Ex. A) that none of this money went into his personal bank account. As to the second element of the statement the evidence is equally strong that he paid for the patches by check, not cash.

The accused did testify, in answer to one series of questions, that he had made the payment in cash (Pros. Ex. A, p. 15). However, an examination of the entire statement of the accused, insofar as it relates to the manner of this payment, clearly indicates that he was not certain just how he made the remittance, and that the investigating officer must have been fully aware of this doubt (Pros. Ex. A, p. 20, 21). It is the opinion of the Board of Review that the prosecution has failed to establish beyond a reasonable doubt that the accused made the alleged statement, or any part thereof, corruptly and with a wilful intent to deceive the investigating officer.

6. After the arraingment of the accused the defense presented a motion for a continuance urging various reasons in support thereof. The court, exercised its discretionary power, denied the motion, subject, however, to the right of the defense to renew the motion upon the completion of the prosecution's case (R. 7-16). Upon the completion of the prosecution's case the defense renewed its motion for a continuance but the motion was again denied (R. 66-71). Near the end of the trial the defense again renewed its motion for a continuance with the particular request that the trial be postponed in order to give the defendant an opportunity to produce certain evidence from the bank records of the El Paso National Bank. The prosecution at this point withdrew the objection which it had previously made to the admission of certain bank statements in the possession of the defense covering the account of the accused in the El Paso National Bank for the months of February, March and April, 1942. The defense thereupon withdrew its motion for a continuance. The court,

through its law member, asked the defense counsel the following question:

> "In view of the withdrawal of the objection, does defense still desire to have its renewed plea for continuance stand?"

In reply to this question the defense counsel made the following answer:

> "No, if it please the Court, that reaches what we had feared might be an objection to the evidence" (R. 75-76)

Thus the original motion for a continuance which was presented in the beginning of the trial was narrowed twice during the process of the trial, and finally completely withdrawn.

Although the complete withdrawal by the defense of its motion for a continuance eleminated any possible question of error in connection with the court's ruling thereon, an analysis of the principal reasons offered in support of the motions gives further proof of the justice in the court's action. This analysis may be summerized in five points as follows:

(1) The defense contended that the accused had only succeeded in obtaining the services of a civilian defense counsel on the night before the trial, and that the defense counsel had not, therefore, had an opportunity to confer with certain witnesses or to prepare to defend the accused. The contention is subject to the criticism that the accused had been on notice that his trial was impending for approximately six weeks, and had, therefore, ample time within which to secure the services of a civilian counsel. The reference of the defense to certain witnesses was not made definite, and particular witnesses were not named. Furthermore, it is pertinent to the motion of the defense that the record shows that the accused was represented prior to his trial by the regular appointed defense counsel.

(2) The defense contended that no subpoenas had been issued for witnesses for the defense. The defense failed, however, to indicate what witnesses might have been desired, what their expected testimony would have been, or that any subpoenas were ever asked for.

(3) The defense complained that certain depositions were taken by the prosecution, and that the defense had no means of knowing what the answers to the several interrogatories would be until the night before the trial. It appears, however, that the interrogatories to

each deposition were based upon information developed at the preliminary hearings in June, and that the answers to the interrogatories were substantially the same as the answers which had been given at that time. The accused was present at these hearings and had been furnished complete records of all the testimony adduced, prior to the time the charges were filed. The defense was in a position, therefore, to have anticipated the answers to the deposition and could have suffered no surprise.

(4) The defense contended that it needed time in which to secure character witnesses. On this point the record shows that a substantial number of character witnesses were presented and the further production of such evidence would have been cumulative only.

(5) The defense contended that it needed time in which to check the bank records at the El Paso National Bank in order to be able to introduce certain testimony in defense as well as to impeach the testimony of witnesses Krolle and Lentz. This contention was insisted upon until the prosecution withdrew its objection to the use of the statements from the El Paso National Bank covering the account of the accused for the months of February, March, and April, 1942. The introduction of these bank statements into the evidence appears to have given to the defense all the information and all the benefit which it could have obtained from any inspection of the records in the El Paso National Bank.

Aside, therefore, from the action of the defense in withdrawing its motion for a continuance, we must conclude that the motion was properly disposed of upon each presentation and that no substantial right of the accused was violated by the court's action in relation thereto.

7. The accused is 42 years of age. The records of the Office of The Adjutant General show that he was commissioned second lieutenant, Quartermaster Corps, Reserve, April 19, 1933, was promoted to first lieutenant, Quartermaster Corps, Reserve, May 4, 1936, and was promoted to captain, Quartermaster Corps, Reserve, May 14, 1940. He was ordered on extended active duty on January 14, 1941.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is not legally sufficient to support the findings of guilty of Charge II and the Specification thereunder, but is legally sufficient to support the findings of guilty of Charge I and the Specifications thereunder, and the sentence, and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 96.

Silas B. Bresson, Judge Advocate.
Abner E. Lipscomb, Judge Advocate.
B R Sleeper, Judge Advocate.

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1st Ind.

War Department, J.A.G.O., APR 23 1943 - 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 William C. Noon (0-308672), Quartermaster Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty of Charge I and its Specifications, and legally insufficient to support the findings of guilty of Charge II and its Specification, and legally sufficient to support the sentence and to warrant confirmation thereof.

The accused on two occasions fraudulently converted to his own use sums of money aggregating in each case $5.25, belonging to the company fund of his company and engaged in the practice of purchasing from enlisted men of his company, at a discount, War Savings Stamps which he had sold to these enlisted men on credit. Discounts to accused of $41.85 were shown. Accused was sentenced to dismissal, total forfeitures and confinement at hard labor for three years. I recommend that Charge II and its Specification be disapproved and, in view of all of the circumstances and the fact that accused has already been confined for several months, I recommend that the sentence be confirmed, but that the confinement and forfeitures be remitted.

3. The Board of Review has given careful consideration to an attached brief of the defense counsel, and to attached letters and inclosures from the Honorable Tom Connally, H. M. Kilgore, W. Lee O'Daniel, Frederick Van Nuys, United States Senate, and from the Honorable R. E. Thomason, Andrew Edmiston, and Gerald W. Landis, House of Representatives. Consideration has also been given to the attached letters from Mrs. C. W. Noon, wife of the accused, addressed to the President of the United States, the Secretary of War, The Adjutant General and The Judge Advocate General.

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

Myron C. Cramer

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

21 Incls

(Findings of guilty of Charge II and its Specification disapproved. Sentence confirmed but confinement and forfeitures remitted. G.C.M.O. 119, 17 Jun 1943)

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

(201)

SPJGH
CM 228509

JAN 15 1943

UNITED STATES)	ARMY AIR FORCES GULF COAST TRAINING CENTER
v.)	Trial by G.C.M., convened at Army Air Forces Bombardier School, Midland, Texas, November 13, 1942. Dismissal and Total Forfeitures.
Second Lieutenant FORREST W. BIGELOW (O-442416), Air Corps.)	

OPINION of the BOARD OF REVIEW
HILL, LYON and SARGENT, 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 1: In that Second Lieutenant Forrest W. Bigelow, Air Corps, did, without proper leave, absent himself from his station at Lamesa Army Air Forces Glider Training Detachment, Lamesa, Texas, from about July 7, 1942, to about August 8, 1942.

Specification 2: In that Second Lieutenant Forrest W. Bigelow, Air Corps, did, without proper leave, absent himself from his proper station at William Beaumont General Hospital, El Paso, Texas, from about August 29, 1942 to about August 31, 1942.

Specification 3: In that Second Lieutenant Forrest W. Bigelow, Air Corps, did, without proper leave, absent himself from his station at Lamesa Army Air

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Forces Glider Training Detachment, Lamesa, Texas, from about September 4, 1942, to about September 24, 1942.

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

Specification 1: In that Second Lieutenant Forrest W. Bigelow, Air Corps, Lamesa Army Air Forces Glider Training Detachment, Lamesa, Texas, did, at Odessa, Texas, on or about July 16, 1942, with intent to defraud, wrongfully and unlawfully make and utter to The Model Shop, Odessa, Texas, a certain check in words and figures as follows, to-wit:

Midland, Texas, July 16, 1942 No. 24

THE FIRST NATIONAL BANK
88-2161
11-E

PAY TO ------Cash ------ OR BEARER $10.00

Ten ---------- 00/100 DOLLARS

For Cash Lt. F. W. Bigelow

and by means thereof, did fraudulently obtain from The Model Shop, Odessa, Texas, the sum of $10.00, he, the said Second Lieutenant Forrest W. Bigelow, then well knowing that he did not have and not intending that he should have sufficient funds in The First National Bank, Midland, Texas, for the payment of said check.

Specification 2: In that Second Lieutenant Forrest W. Bigelow, Air Corps, Lamesa Army Air Forces Glider Training Detachment, Lamesa, Texas, did, at Big Spring, Texas, on or about July 23, 1942, with intent to defraud, wrongfully and unlawfully make and utter to the Crawford Hotel, Big Spring, Texas, a certain check in words and figures as follows, to-wit:

Midland, Texas, July 23, 1942 No. 29

THE FIRST NATIONAL BANK of MIDLAND, TEXAS

PAY TO ------Cash ---------- $5.00

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Five ---------- 00/100 DOLLARS
Lt. F. W. Bigelow

and by means thereof, did fraudulent obtained from the Crawford Hotel, Big Spring, Texas, the sum of $5.00, he, the said Second Lieutenant Forrest W. Bigelow, then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank, Midland, Texas, for the payment of said check.

Specification 3: In that Second Lieutenant Forrest W. Bigelow, Air Corps, Lamesa Army Air Forces Glider Training Detachment, Lamesa, Texas, did, at Big Spring, Texas, on or about July 24, 1942, with intent to defraud, wrongfully and unlawfully make and utter to the Crawford Hotel, Big Spring, Texas, a certain check in words and figures as follows, to-wit:

THE FIRST NATIONAL BANK of MIDLAND, TEXAS

Midland, Texas, July 24, 1942 No. 30

PAY TO THE
ORDER OF ------Cash ---------- $10.00

--Ten ----------00/100 DOLLARS

FOR Cash Lt. F. W. Bigelow

and by means thereof, did fraudulent obtained from the Crawford Hotel, Big Spring, Texas, the sum of $10.00, he, the said Second Lieutenant Forrest W. Bigelow, then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank, Midland, Texas, for the payment of said check.

Specification 4: In that Second Lieutenant Forrest W. Bigelow, Air Corps, Lamesa Army Air Forces Glider Training Detachment, Lamesa, Texas, did, at Big Spring, Texas, on or about July 24, 1942, with intent to defraud, wrongfully and unlawfully make

and utter to the Crawford Hotel, Big Spring, Texas, a certain check in words and figures as follows, to-wit:

THE FIRST NATIONAL BANK of MIDLAND, TEXAS

Midland, Texas, July 24, 1942 No. 31

PAY TO THE
ORDER OF ------Cash ---------- $5.00

--Five----------00/100 DOLLARS

For Food Lt. F. W. Bigelow

and by means thereof, did fraudulently obtained from the Crawford Hotel, Big Spring, Texas, the sum of $5.00, he, the said Second Lieutenant Forrest W. Bigelow, then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank, Midland, Texas, for the payment of said check.

Specification 5: In that Second Lieutenant Forrest W. Bigelow, Air Corps, Lamesa Army Air Forces Glider Training Detachment, Lamesa, Texas, did, at Big Spring, Texas, on or about July 26, 1942, with intent to defraud, wrongfully and unlawfully make and utter to the Crawford Hotel, Big Spring, Texas, a certain check in words and figures as follows, to-wit:

THE FIRST NATIONAL BANK of MIDLAND, TEXAS

Midland, Texas, July 26, 1942 No. 33

PAY TO THE
ORDER OF ------Cash ---------- $10.00

--Ten ----------00/100 DOLLARS

For Food & Mcl. Lt. F. W. Bigelow

and by means thereof, did fraudulently obtained from

the Crawford Hotel, Big Spring, Texas, the sum of $10.00, he, the said Second Lieutenant Forrest W. Bigelow, then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank, Midland, Texas, for the payment of said check.

Specification 6: In that Second Lieutenant Forrest W. Bigelow, Air Corps, Lamesa Army Air Forces Glider Training Detachment, Lamesa, Texas, did, at Big Spring, Texas, on or about July 27, 1942, with intent to defraud, wrongfully and unlawfully make and utter to the Crawford Hotel, Big Spring, Texas, a certain check in words and figures as follows, to-wit:

THE FIRST NATIONAL BANK OF MIDLAND, TEXAS

Midland, Texas, July 27 1942 No. 34

PAY TO THE
ORDER OF ------ Cash----------$5.00

--Five ----------00/100 DOLLARS

FOR Food Lt. F. W. Bigelow

and by means thereof, did fraudulently obtained from the Crawford Hotel, Big Spring, Texas, the sum of $5.00, he, the said Second Lieutenant Forrest W. Bigelow, then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank, Midland, Texas, for the payment of said check.

Specification 7: In that Second Lieutenant Forrest W. Bigelow, Air Corps, Lamesa Army Air Forces Glider Training Detachment, Lamesa, Texas, did, at Big Spring, Texas, on or about July 27, 1942, with intent to defraud, wrongfully and unlawfully make and utter to the Settles Hotel, Big Spring, Texas, a certain check in words and figures as follows, to-wit:

THE FIRST NATIONAL BANK of MIDLAND, TEXAS

Midland, Texas, July 27 1942 No. 35

PAY TO THE
ORDER OF ------Cash ---------- $10.00

--Ten ---------- 00/100 DOLLARS

Lt. F. W. Bigelow

and by means thereof, did fraudulently obtained from the Settles Hotel, Big Spring, Texas, the sum of $10.00, he, the said Second Lieutenant Forrest W. Bigelow, then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank, Midland, Texas, for the payment of said check.

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

Specification 1: In that Second Lieutenant Forrest W. Bigelow, Air Corps, Lamesa Army Air Forces Glider Training Detachment, Lamesa, Texas, being indebted to Elliott Hotel, Odessa, Texas, in the sum of $57.30 for lodging, telephone, cash, drugs, damage to mattress, and incidentals, which amount became due and payable on July 21, 1942, did, from July 21, 1942 to October 3, 1942 dishonorably fail and neglect to pay said debt.

Specification 2: In that Second Lieutenant Forrest W. Bigelow, Air Corps, Lamesa Army Air Forces Glider Training Detachment, Lamesa, Texas, did, at Big Spring, Texas, on or about July 28, 1942, with intent to defraud, wrongfully and unlawfully make and utter to The Crawford Hotel, Big Spring, Texas, a certain check in words and figures as follows, to-wit:

Midland, Texas, July 28 1942 No. 36

THE FIRST NATIONAL BANK
88-388
11

PAY TO ------Cash-----OR BEARER $10.00

Ten ---------- 00/100 DOLLARS

For Food & Mdse. Lt. F. W. Bigelow

and by means thereof, did fraudulently obtain from The Crawford Hotel, Big Spring, Texas, the sum of $10.00, he, the said Second Lieutenant Forrest W. Bigelow, then well knowing that he did not have and not intending that he should have sufficient funds in The First National Bank, Midland, Texas, for the payment of said check.

Specification 3: In that Second Lieutenant Forrest W. Bigelow, Air Corps, Lamesa Army Air Forces Glider Training Detachment, Lamesa, Texas, did, at Big Spring, Texas, on or about July 29, 1942, with intent to defraud, wrongfully and unlawfully make and utter to Lee Hanson, Big Spring, Texas, a certain check in words and figures as follows, to-wit:

THE FIRST NATIONAL BANK OF MIDLAND, TEXAS

88-388
11

Midland, Texas, July 29, 1942 No. 37

Pay to the order of --Lee Hanson-----$10.00

Ten----------00/100 DOLLARS

For Supplies Lt. F. W. Bigelow

and by means thereof, did fraudulently obtain from Lee Hanson, Big Spring, Texas, about $3.00 in cash and about $7.00 in merchandise, he, the said Second Lieutenant Forrest W. Bigelow, then well knowing that he did not have and not intending that he should have sufficient funds in The First National Bank, Midland, Texas, for the payment of said check.

Specification 4: In that Second Lieutenant Forrest W. Bigelow, Air Corps, Lamesa Army Air Forces Glider Training Detachment, Lamesa, Texas, did, at Big

Spring, Texas, on or about August 1, 1942, with intent to defraud, wrongfully and unlawfully make and utter to Lee Hanson, Big Spring, Texas, a certain check in words and figures as follows, to-wit:

THE FIRST NATIONAL BANK OF MIDLAND, TEXAS
88-388
11

Midland, Texas, August 1, 1942 No. 44

Pay to the order of--Lee Hanson ---- $10.00

Ten ---------- 00/100 DOLLARS

For Clothes Lt. F. W. Bigelow

and by means thereof, did fraudulently obtain from Lee Hanson, Big Spring, Texas, about 5¢ in cash and about $9.95 in merchandise, he, the said Second Lieutenant Forrest W. Bigelow, then well knowing that he did not have and not intending that he should have sufficient funds in The First National Bank, Midland, Texas, for the payment of said check.

Specification 5: In that Second Lieutenant Forrest W. Bigelow, Air Corps, Lamesa Army Air Forces Glider Training Detachment, Lamesa, Texas, did, at Big Spring, Texas, on or about August 1, 1942, with intent to defraud, wrongfully and unlawfully make and utter to Lee Hanson, Big Spring, Texas, a certain check in words and figures as follows, to-wit:

THE FIRST NATIONAL BANK OF MIDLAND, TEXAS
88-388
11

Midland, Texas, August 1, 1942 No. 45

Pay to the order of Lee Hanson -------$10.00

Ten ----------00/100 DOLLARS

For Clothes Lt. F. W. Bigelow

and by means thereof, did fraudulently obtain from

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Lee Hanson, Big Spring, Texas, cash and merchandise totalling $10.00, he, the said Second Lieutenant Forrest W. Bigelow, then well knowing that he did not have and not intending that he should have sufficient funds in The First National Bank, Midland, Texas, for the payment of said check.

Specification 6: In that Second Lieutenant Forrest W. Bigelow, Air Corps, Lamesa Army Air Forces Glider Training Detachment, Lamesa, Texas, did, at Big Spring, Texas, on or about August 2, 1942, with intent to defraud, wrongfully and unlawfully make and utter to Collins Brothers, Walgreen Agency, Big Spring, Texas, a certain check in words and figures as follows, to-wit:

THE FIRST NATIONAL BANK OF MIDLAND, TEXAS
88-388
11

Midland, Texas, August 2, 1942 No. 46

Pay to the order of--Cash --------- $10.00

Ten ---------- 00/100 DOLLARS

For Lt. F. W. Bigelow

and by means thereof, did fraudulently obtain from Collins Brothers, Walgreen Agency, Big Spring, Texas, the sum of $10.00, he, the said Second Lieutenant Forrest W. Bigelow, then well knowing that he did not have and not intending that he should have sufficient funds in The First National Bank, Midland, Texas, for the payment of said check.

Specification 7: In that Second Lieutenant Forrest W. Bigelow, Air Corps, Lamesa Army Air Forces Glider Training Detachment, Lamesa, Texas, did, at Big Spring, Texas, on or about August 3, 1942, with intent to defraud, wrongfully and unlawfully make and utter to The Ben Hogue Store No. 3, Big Spring, Texas, a certain check in words and figures as follows, to-wit:

THE FIRST NATIONAL BANK OF MIDLAND, TEXAS
88-388
11

Midland, Texas, August 3, 1942 No. 46

Pay to the order of --Cash --------- $5.00

Five ---------- 00/100 DOLLARS

For Cash Lt. F. W. Bigelow

and by means thereof, did fraudulently obtain from The Ben Hogue Store No. 3, Big Spring, Texas, the sum of $5.00, he, the said Second Lieutenant Forrest W. Bigelow, then well knowing that he did not have and not intending that he should have sufficient funds in The First National Bank, Midland, Texas, for the payment of said check.

Specification 8: In that Second Lieutenant Forrest W. Bigelow, Air Corps, Lamesa Army Air Forces Glider Training Detachment, Lamesa, Texas, did, at Big Spring, Texas, on or about August 5, 1942, with intent to defraud, wrongfully and unlawfully make and utter to Lee Hanson, Big Spring, Texas, a certain check in words and figures as follows, to-wit:

Midland, Texas 8-5 1942

THE FIRST NATIONAL BANK 88-235
IN MIDLAND

PAY TO ----Lee Hanson -----OR ORDER $20.55

Twenty and 55/100 ----------DOLLARS

Lt. F. W. Bigelow

and by means thereof, did fraudulently obtain from Lee Hanson, Big Spring, Texas, about $10.00 in cash and about $10.55 in merchandise, he, the said Second Lieutenant Forrest W. Bigelow, then well

knowing that he did not have and not intending that he should have sufficient funds in The First National Bank, Midland, Texas, for the payment of said check.

Specification 9: In that Second Lieutenant Forrest W. Bigelow, Air Corps, Lamesa Army Air Forces Glider Training Detachment, Lamesa, Texas, did, at Big Spring, Texas, on or about August 6, 1942, with intent to defraud, wrongfully and unlawfully make and utter to Lee Hanson, Big Spring, Texas, a certain check in words and figures as follows, to-wit:

Midland, Texas 8 - 6 1942

THE FIRST NATIONAL BANK 88-235
IN MIDLAND

PAY TO Lee Hanson OR ORDER $10.00

Ten and no/100 ---------- DOLLARS

Cash Lt. F. W. Bigelow

and by means thereof, did fraudulently obtain from Lee Hanson, Big Spring, Texas, the sum of $10.00, he, the said Second Lieutenant Forrest W. Bigelow, then well knowing that he did not have and not intending that he should have sufficient funds in The First National Bank, Midland, Texas, for the payment of said check.

He pleaded not guilty to and was found guilty of all Charges and Specifications. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record for action under Article of War 48.

3. The evidence for the prosecution shows that accused reported for duty at Lamesa Field, Texas, on June 3, 1942, and on June 5, 1942, was transferred to the hospital, Army Air Forces Bombardier School, Midland, Texas, for hospitalization. Accused was discharged from the

hospital to a duty status, July 6, 1942. He was absent without leave from his station at Lamesa Field from July 7, 1942, to August 8, 1942 (R. 17, 21; Exs. 1, 2, 3). (Specification 1, Charge I).

On August 10, 1942, accused was transferred from confinement in quarters to the hospital, Army Air Forces Bombardier School at Midland, and was, on August 11, 1942, transferred to William Beaumont Hospital, El Paso, Texas. He was absent without leave from his station at the William Beaumont Hospital from August 29, to August 31, 1942 (Exs. 1, 3, 4). (Specification 2, Charge I).

Accused was discharged from the William Beaumont Hospital to a duty status on September 1, 1942, and ordered to proceed to his original station at Lamesa Field, Texas. He did not return to Lamesa Field, but was "picked up" at Sweetwater, Texas, after being absent without leave from September 4, to September 24, 1942 (R. 21; Exs. 1, 5, 6, 7). (Specificiation 3, Charge I).

It was further established in evidence that during the initial absence without leave of accused from July 7, to August 8, 1942, he registered at the Elliott Hotel, Odessa, Texas, on July 6, 1942. On July 21, 1942, his luggage was placed in storage by the hotel authorities as he had not occupied his room for two days. During his occupancy, accused incurred bills in the amount of $57.30, which sum had not been paid prior to trial (R. 23-26; Exs. 1, 8). (Specification 1, Charge III).

During the same period of his initial absence without leave, accused was also a guest at the Crawford Hotel, Big Spring, Texas, from July 23, to July 29, 1942 (R. 26-28; Pros. Ex. 9). During the time that he was at Odessa and Big Spring, accused signed and negotiated the checks alleged in all Specifications (1 to 7, incl.) of Charge II, and in Specifications 2, 3, 4, 5, 6, 7, 8, and 9, of Charge III. These checks were drawn on The First National Bank of Midland, Texas. It was stipulated that on the dates alleged, accused signed and negotiated the checks described in these Specifications, and that he received, on the same dates, either in the form of cash or merchandise, the amounts alleged. The checks were received in evidence, with consent of the defense, by virtue of the stipulation (R. 34, 35; Pros. Exs. 1, 10-24). With the exception of the check described in Specification 1, Charge II (Ex. 10), a witness having personal knowledge of such fact identified each check admitted in evidence as having been negotiated by accused. These witnesses further testified that the checks were not honored by the drawee bank when presented for payment, because of either an insufficiency of funds or because the account of accused was overdrawn, and that restitution had not been made prior to trial (R. 36-45).

Properly identified and introduced in evidence was a statement of accused's checking account at the drawee bank. Accused deposited $165 on June 13, 1942. A series of withdrawals resulted in there being no funds in the account on July 14, 1942. On July 24, 1942, two checks totaling $15 were received by the drawee bank, which resulted in an overdraft in that amount of accused's account, to which was added a service charge in the sum of $1.10. When accused negotiated all the checks alleged in the Specifications of Charges II and III, he had no funds whatsoever in his account. No deposits to the account were made by accused other than that made on June 13, 1942 (R. 45-47; Ex. 25).

After accused had been advised that any statement he made might be used against him, he told the officer investigating the charges under consideration that "any checks he had written were no good but that he needed the funds and intended to pick them up and pay his obligations later on when he got some money. He said he understood he had some money coming from the government" (R. 29, 35).

4. For the defense, accused testified that he had been an enlisted man until he was commissioned on March 16, 1942. He had a total flying time of 3200 hours, and nine months' experience flying with the Royal Canadian Air Force in Canada and abroad. He had also flown for ten years in the United States, Alaska, and South America. Shortly after he reported for duty at Lamesa Field, he was sent to the station hospital at Midland for treatment of a venereal disease. He was last paid at his previous station, Sheppard Field (Texas), for the month of May 1942, and had received no pay since that time. While in the hospital at Midland, he opened an account at The First National Bank of Midland. The amount of the deposit was $165. During the latter part of June 1942, accused forwarded from Midland to Lamesa Field, a pay voucher for the period June 1 to June 30, 1942 (R. 49, 52, 53, 55, 56; Ex. 26). (Although accused stated that he requested therein that the check be sent to The First National Bank of Midland (R. 49, 53), an examination of the voucher shows that accused requested that his check be mailed to him at Lamesa (Ex. 26)).

Accused drew the checks in question after his discharge from the hospital at Midland (July 6, 1942), and during the period of his absence without leave from July 7, to August 8. He cashed several checks while at Big Spring, some of which were returned unpaid to the payees in July and during the first part of August. About August 3, 1942, accused consulted a Mr. Baker, an official of the drawee bank, and was told that his account "was getting low". His pay check for the month of June had

not arrived. Accused informed Mr. Baker that there was no finance officer at Lamesa Field, and that payments were handled either at Fort Worth or Lubbock. He stated that his check would be forthcoming in a week or two. Mr. Baker "agreed to carry me awhile until my check came through". Accused requested the payees of the checks which had been returned, to send them to the bank again, as he was satisfied that his June pay check "would be in by then". On one of the checks was a note from Mr. Baker saying, "to hold it for a few days, as it would be good". Prior to his release from the hospital, accused had been told by a Colonel Allott that he "would never be able to fly again during my army career or after". Because of this fact he became depressed, downhearted, and after his release he "got drunk". After his conference with Mr. Baker, accused started for Lamesa Field, reached Big Spring, remained there for several days, and was then "picked up" by the provost marshal (R. 49, 51, 52).

Accused "had no further chance to check up on my accounts", as he was then returned to Lamesa Field, kept in a hotel room for three days, returned to the hospital at Midland, and was then transferred to William Beaumont General Hospital for observation. While at this hospital he requested the finance office there to inquire about his pay status, and sent several letters to Lamesa Field asking from what station he would be paid. He received no replies. Accused was entirely without funds, and his uniforms were "in hock" for hotel bills. He wired his insurance company, and used dividends from his insurance to pay his hospital bills and train fare to Lamesa Field. He informed his wife of the nature of his illness, and was later advised that she had started divorce proceedings. He was also informed at the hospital that he was under observation of a psychiatrist for any mental abnormality. Upon his release from William Beaumont Hospital (September 1, 1942), accused felt "downhearted", as he had previously been told he could not fly again, and because he could not get his pay and thereby dispose of his bills. Accordingly, he "proceeded to get 'plastered'". He was waiting for a train to Lamesa when apprehended at Sweetwater (September 24, 1942). At the time he had a train ticket from Sweetwater to Lamesa (R. 49-54; Ex. E).

Accused further testified that he depended on his Army pay for support, that he did not intend to defraud anyone, and that he intended to pay his debts by borrowing on his life insurance, regardless of the outcome of the trial. Accused admitted that he had been absent without leave for the periods alleged in Specifications 1, 2, and 3, Charge I (R. 50, 54).

An official of the drawee bank testified that accused interviewed him on about July 22, 1942, and requested a loan "to take care of a few checks". Accused stated that his pay check was delayed, but that he "would take care of these checks on pay day, which would be around the first". A letter written by accused from William Beaumont Hospital, dated August 16, 1942, was received by his commanding officer at Lamesa Field, in which accused requested that an arrangement be made "with Ft. Worth to pay me while I am here in the hospital" (R. 58, 60; Ex. 27).

5. The uncontradicted evidence shows that accused absented himself without leave at the times and places alleged (Specifications 1, 2, and 3, Charge I).

It was established by the evidence that accused signed and negotiated the check described in Specification 1, Charge II, and that he received the $10 as alleged. Although the payee of the check did not testify, an examination of Exhibit 10 discloses that the check was returned for insufficient funds and the defense did not dispute this fact.

It was also clearly established by the evidence that accused signed and negotiated the checks described in the Specifications 2, 3, 4, 5, 6, and 7 of Charge II, and in Specifications 2, 3, 4, 5, 6, 7, 8, and 9 of Charge III, that he received the amounts alleged, either in cash or in merchandise, and that such checks were dishonored by the drawee bank because of an insufficiency of funds, or because his account had been overdrawn. The only point in issue was whether accused signed and negotiated the checks with the intent to defraud. Accused contended that he had not intended to defraud anyone, that he had forwarded to Lamesa Field a pay voucher for the month of June, and that he fully expected that the pay check would be deposited to his credit at the drawee bank, as requested, in sufficient time to insure payment of the checks when presented for payment. He further testified that on August 3, 1942, he was assured by an official of the drawee bank that he would "carry me awhile" until the pay check arrived. It is noted that although accused testified that he directed his pay check to be deposited to his account at the drawee bank, an examination of his pay voucher submitted for the month of June discloses a request that the check be mailed to him personally at Lamesa (Ex. 26). Although accused testified that he was assured on August 3, 1942, by a bank official that he would be "carried" until the pay check arrived, the official himself testified that the conference occurred earlier, about July 22, 1942, and that accused had asked him for a small loan "to take care of a few checks"

until he was paid on the first of the month. Accused negotiated all of the checks while he was absent without leave, and after he had drawn a $10-check which resulted in leaving no balance whatsoever in his account. After certain checks were returned unpaid to the payees thereof, accused continued to negotiate additional checks, despite the fact that he still had no funds in his account and knew that certain checks had already been dishonored. After his release from William Beaumont Hospital on September 1, 1942, he did not return to his organization at Lamesa as ordered, where he could have made inquiries as to his June pay check. Instead, he became intoxicated and absented himself without leave a third time for a period of 20 days. He admitted to the officer investigating the charges that "any checks he had written were no good but that he needed the funds and intended to pick them up and pay his obligations later on when he got some money". It is evident that the accused knew that there were no funds whatsoever in his account to meet payment of 15 negotiated checks, totaling $140.55. In view of all the circumstances, the assertion of accused that when negotiating the checks he did not intend to defraud anyone is unworthy of belief.

Similarly, it was clearly established by the evidence that accused dishonorably failed and neglected to pay a debt of $57.30 incurred at the Elliott Hotel at Odessa, Texas. That this amount was due on July 21, 1942, and unpaid prior to date of trial (November 13, 1942), was undisputed. Accused registered at the hotel on July 6, 1942, remained until July 19, 1942, departed without paying the bill, and left his baggage behind. On July 21, 1942, the hotel authorities discovered his absence and placed his effects in storage.

Giving a check on a bank where one knows, or reasonably should know, that there are no funds to meet it, and without intending that there should be, is an example of a violation of Article of War 95 (par. 151, M.C.M., 1928, p. 186).

6. The accused is 28 years of age. The records of the Office of The Adjutant General show his service as follows:

Appointed second lieutenant, Army of the United States, March 11, 1942; discharged as enlisted man effective March 15, 1942; extended active active duty, March 16, 1942.

The accused testified that he had 9 months' experience in flying with the Royal Canadian Air Force, and 10 years' experience in commercial flying.

7. The court was legally constituted. No errors injuriously af-

fecting 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 thereof. Dismissal is mandatory upon conviction of violation of Article of War 95, and is authorized upon conviction of violation of Article of War 61 or 96.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

SPJGH
CM 228509

1st Ind.

War Department, J.A.G.O., JAN 19 1943 - 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 Forrest W. Bigelow (0-442416), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence. The accused was absent without leave from his station at Lamesa Army Air Forces Glider Training Detachment, Lamesa, Texas, from about July 7, 1942, to about August 8, 1942, and from about September 4, 1942, to about September 24, 1942. He was also absent without leave from his station at William Beaumont General Hospital, El Paso, Texas, from about August 29, 1942, to about August 31, 1942. While absent without leave from July 7, 1942, to August 8, 1942, accused uttered a series of 15 checks in amounts aggregating $140.55, but wrongfully failed to maintain sufficient bank balances for their payment, with the result that the checks were dishonored. He also dishonorably failed and neglected, for a period of nearly 4 months, to pay a hotel bill in the amount of $57.30. He was sentenced to dismissal and to forfeiture of all pay and allowances due or to become due. No restitution of funds realized on the checks was made prior to trial, and the hotel bill has not been paid. In view of the fact that accused had no funds whatsoever in his bank account when he negotiated the checks, and considering his repeated absences without leave, I recommend that the sentenced be confirmed and carried into execution.

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

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.

(Sentence confirmed. G.C.M.O. 15, 2 Mar 1943)

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

SPJGN
CM 228524

U N I T E D S T A T E S v. Private ELDEN W. MOSER (13000699), Company D, 4th Training Battalion.	)	FOURTH SERVICE COMMAND SERVICES OF SUPPLY Trial by G.C.M., convened at Camp Wheeler, Georgia, October 16, 1942. Dishonorable discharge and confinement for fifteen (15) years. Federal Reformatory, Chillicothe, Ohio.

REVIEW by the BOARD OF REVIEW
CRESSON, SNAPP 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. Accused was tried upon the following Charges and Specifications:

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

Specification: In that Private Elden W. Moser, Company "D", Fourth Training Battalion, Camp Wheeler, Georgia, did, at Camp Wheeler, Georgia on or about June 2, 1942, desert the service of the United States and did remain absent in desertion until he was apprehended at Frederick, Maryland on or about August 6, 1942.

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

Specification: (Finding of not guilty.)

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

Specification 1: (Finding of not guilty.)

Specification 2: In that Private Elden W. Moser, Company D, Fourth Training Battalion, Camp Wheeler, Georgia, did, at Frederick, Maryland, on or about June 11, 1942, to June 20, 1942, commit the crime of sodomy, by feloniously and against the order

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of nature, having carnal connection with William Thomas Ward, a child under eighteen years of age.

He pleaded not guilty of Charges II and III and the Specifications thereof, and not guilty of Charge I and the Specification thereof, but guilty of violation of the 61st Article of War. At the close of the case for the prosecution on motion of defense the court entered a finding of not guilty as to Charge II and the Specification thereof. He was found guilty of Charge I and the Specification thereof and not guilty of Specification 1 of Charge III, but guilty of Charge III and Specification 2 thereof. Evidence of one previous conviction was introduced. Three-fourths of the members of the court present concurring, he was sentenced 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, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, and forwarded the record for action under Article of War 50½.

3. With reference to the Specification of Charge I, there was received in evidence, without objection, the morning report of Company D, Fourth Training Battalion, Camp Wheeler, Georgia, for the month of June, 1942, from which it appears that accused absented himself without leave from his organization and station on or about June 2, 1942 (R. 9, Ex. P-1). At the conclusion of the prosecution's case it was stipulated between the trial judge advocate, defense counsel and accused that the accused was apprehended near New London, Maryland, on or about August 6, 1942, and thereafter returned to military control at Camp Wheeler, Georgia, on or about August 20, 1942 (R. 36).

With reference to Specification 2, Charge III, the evidence shows that accused left Macon, Georgia, about June 3, 1942, accompanied by William Thomas Ward, a boy about fourteen years old who lived in Macon, and with whom accused had been on very friendly terms for some time past. They hitchhiked to Maryland, arriving at the home of accused's parents about June 10. After staying there about 24 hours they went a considerable distance to the home of some friends named Schroyer who lived near Frederick. The only evidence to support the findings of guilty under Charge III is the testimony of the pathic, William Thomas Ward, who described the offense, in all the essential details, as having taken place at the home of the Schroyer's (R. 32, 35) near Frederick, Maryland, on one occasion not identified as to date. On examination in chief and also on examination by the court Billy Ward, the pathic admitted that he had been struck by the accused but he denied that he had ever said he would get even with accused (R. 34, 54).

4. Accused, testifying in his own behalf, admitted that he was apprehended by civil authorities (R. 44) and was then wearing civilian clothes (R. 45). He was working for farmers around there (R. 44) and was planning to get enough money to go back (R. 45). He left Macon because he wanted to visit his folks. He was gone about 65 days and

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stayed at his parents home about one night and one day. He was arrested by the sheriff of Frederick County, Maryland, on August 6, 1942, at which time he was not in uniform and was brought down to Camp Wheeler about August 20, 1942 (R. 52).

Accused testified further that he had never had any unnatural intercourse with Billy Ward at the Schroyer home. Accused further testified that while at the Schroyer's he struck Billy one morning for hitting Schroyer's son on the head, and that Billy had said he would get even with accused (R. 38-53).

5. As to Charge I the court was fully justified, by reason of the prolonged absence, the fact that he was apprehended at a great distance from his station, and the fact that he had adopted civilian attire and was employed in a civilian pursuit for his own profit, in presuming an intent on the part of accused to desert the service of the United States (M.C.M., 1928, par. 130).

The findings of guilty under Charge III are based entirely on the testimony of the 14 year old pathic, who obviously was an accomplice to the offense charged. Although the testimony of an accomplice should be received with circumspection, both the English rule and the prevailing rule in the United States permits the conviction of an accused upon the uncorroborated testimony of an accomplice (Wharton's Criminal Evidence, Vol. 3, sec. 1399). Since the testimony of the pathic was clear and since the facts show ample opportunity for the commission of the offense, the court was justified in its findings of guilty.

6. The charge sheet shows that accused is 28 years of age. He enlisted July 31, 1940, to serve three years and his present period of service is governed by Service Extension Act of 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 of guilty and the sentence. Confinement of the accused in a penitentiary is authorized.

Chas. L. Bresson, Judge Advocate.

Dorrance D. Snapp, Judge Advocate.

Abner E. Finney, Judge Advocate.

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

Board of Review
CM 228526

JAN 23 1943

UNITED STATES	)	4th MOTORIZED DIVISION
v.	)	Trial by G.C.M. convened at Camp Gordon, Georgia, November 11, 1942. Each: Dishonorable discharge and confinement for thirty (30) years. Penitentiary.
Private LUTHER V. MARTIN (6398744), and JAMES E. SIMS, (14031937), both of Battery A, 20th Field Artillery Battalion.	)	

REVIEW of the BOARD OF REVIEW
HOOVER, COPP and ANDREWS, Judge Advocates

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

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private (then sergeant) Luther V. Martin and Private (then corporal) James E. Sims, both of Battery "A", 20th Field Artillery Battalion, acting jointly and in pursuance of a common intent, did, at Langley, South Carolina, on or about September 15, 1942, unlawfully enter the store house of Langley Drug Company, with intent to commit a criminal offense, to wit, larceny, therein.

Specification 2: In that Private (then sergeant) Luther V. Martin and Private (then corporal) James E. Sims, both of Battery "A", 20th Field Artillery Battalion, acting jointly and in pursuance of a common intent, did, at Langley, South Carolina, on or about September 15, 1942,

feloniously take, steal and carry away Five dollars ($5.00) lawful currency of the United States, the property of Langley Drug Company.

Specification 3: In that Private (then sergeant) Luther V. Martin and Private (then corporal) James E. Sims, both of Battery "A", 20th Field Artillery Battalion, acting jointly and in pursuance of a common intent, did, at Langley, South Carolina, on or about September 15, 1942, with intent to do him bodily harm, commit an assault upon L. S. Redd, by striking him on the head and body with a dangerous thing, to wit, a shotgun.

Specification 4: In that Private (then sergeant) Luther V. Martin and Private (then corporal) James E. Sims, both of Battery "A", 20th Field Artillery Battalion, did at Langley, South Carolina, on or about September 15, 1942, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of L. S. Redd one (1) revolver, Smith and Wesson, caliber .38, value about Thirty dollars ($30.00), the property of said L. S. Redd.

Specification 5: In that Private (then sergeant)Luther V. Martin and Private (then corporal) James E. Sims, both of Battery "A", 20th Field Artillery Battalion, acting jointly and in pursuance of a common intent, did, at or near Louisville, Georgia, on or about September 12, 1942, feloniously take, steal and drive away one (1) black Plymouth sedan automobile model 1939, value about three hundred dollars ($300.00), the property of E. J. Smith, Jr.

Charges pertaining to accused Martin.

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

Specification: In that Private (then sergeant) Luther V. Martin, Battery "A", 20th Field Artillery Battalion, did, at Camp Gordon, Georgia, on or about September 18, 1942, desert the service of the United States and did remain absent in desertion until he was apprehended at or near Erwin, Tennessee, on or about October 12, 1942.

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

Specification: In that Private (then sergeant) Luther V. Martin, Battery "A", 20th Field Artillery Battalion, having been duly placed in confinement in the guardhouse, 20th Field Artillery Battalion, Camp Gordon, Georgia, at or about 1800 September 17, 1942, did, at Camp Gordon, Georgia, at or about 0005 September 18, 1942, escape from said confinement before he was set at liberty by proper authority.

Charges pertaining to accused Sims.

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

Specification: In that Private (then corporal) James E. Sims, Battery "A", 20th Field Artillery Battalion, did, at Camp Gordon, Georgia, on or about September 18, 1942, desert the service of the United States and did remain absent in desertion until he was apprehended at or near Erwin, Tennessee, on or about October 12, 1942.

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

Specification: In that Private (then corporal) James E. Sims, Battery "A", 20th Field Artillery Battalion, having been duly placed in confinement in the guardhouse, 20th Field Artillery Battalion, Camp Gordon, Georgia, at or about 1800 September 17, 1942, did, at Camp Gordon, Georgia, at or about 0005 September 18, 1942, escape from said confinement before he was set at liberty by proper authority.

Each pleaded not guilty to and was found guilty of the Charges and Specifications against him. Evidence of one previous conviction by special court-martial for breach of arrest in violation of Article of War 69 and for absence without leave for four months and eight days in violation of Article of War 61 in the case of accused Martin, and one previous conviction by general court-martial for an assault upon another soldier with a "blackjack" in violation of Article of War 93 in the case of Private Sims was introduced. The court sentenced each of the accused 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 thirty (30) years. The reviewing authority approved the sentences, designated the United States Penitentiary, Atlanta, Georgia, as the place of confinement and forwarded the record pursuant to Article of War 50½.

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3. The evidence shows that on the evening of September 14, 1942, the two accused were in possession of a 1939 Plymouth coach automobile (R. 8) bearing Georgia registration tag D8-52 (R. 8, 14, 20, 26) of the value of $500.00 (R. 8, 9). This automobile belonged to and was registered in the name of Mr. E. J. Smith, Jr., an employee of the Atlantic Oil Corporation of Louisville, Georgia (R. 8) and had been stolen, with the keys in the ignition switch (R. 9), sometime between 9:30 p.m., September 13, 1942, and 10:00 a.m. on the morning of September 14th (R. 9, 44), from the curb in front of Mr. Smith's home in Louisville where it had been parked (R. 9).

With this car the accused drove three high school girls of Bath, South Carolina, (R. 10, 12, 14, 17, 20) to a Cafe where they had refreshments (R. 11, 12), and to a Mrs. Thomas' Place at about 10 or 11 o'clock p.m. (R. 13) where they danced, bought and drank two beers and three Royal Crown colas (R. 11, 13, 16, 17) and bought four gallons of gasoline (R. 11, 15, 16). As the accused had no ration coupons for the gasoline they gave Mrs. Thomas a written order for the gasoline signed fictitiously "S. H. Ewing" (R. 12, Ex. B). An employee at this place identified the car by the make and registration number (R. 14). Then at 11:05 p.m. they took the three girls for a motor drive (R. 11, 12, 18) and when one-half to three fourths of a mile from the main highway on a side dirt road (R. 19) at about 11 or 12 p.m., drove and stalled the car in the ditch (R. 11, 12, 13, 19) from which the car was extricated at about 1 a.m. with the help of Herbert Roberts, a garage man who lived in the vicinity (R. 11, 12, 19), and his wrecker (R. 11, 19) at a cost to the accused of three dollars (R. 12, 13, 19). Roberts identified the car by make and registration number. In making this payment the accused "stalled around quite a bit" and paid the amount with two one-dollar bills and the rest in small change (R. 19, 20). The accused drove the girls to their home in Bath at about 2 a.m., September 15, 1942 (R. 11, 13), and departed about half an hour later (R. 17).

Thirty minutes after leaving the girls at Bath, two soldiers were seen with the Plymouth car at Langley, South Carolina (R. 21), distant one mile from Bath (R. 10), behind the Langley Drugstore, with the motor running and the lights off (R. 21). Mr. Lewis S. Redd, deputy sheriff, who resided next door to the drugstore, being awakened by his wife and seeing the car and two soldiers, arose, took his shotgun (R. 21), his .38 Smith and Wesson revolver (R. 21) worth thirty-five dollars (R. 21), and went out of his house to investigate (R. 21). He testified that he saw the two men come around the corner of the drugstore (R. 21). He then heard the breakage of glass (R. 21). One of them, the smaller one, identified in the record as Sims, went inside of the store (R. 23) where he was plainly seen as the store lights

were on (R. 23). He gained entrance by breaking the store plate glass window in front (R. 24, 25, 26, 27) and stole five dollars in cash from the cash registers (R. 25). Both soldiers returned to, and entered the car and started to drive away (R. 21), but were stopped by command of deputy sheriff Redd at the point of his gun (R. 21). One of the men, the larger one, identified in the record as Martin, got out of the automobile with his hands up (R. 22), approached, and with the aid of Simms grabbed (R. 22), disarmed (R. 22), and struck the deputy sheriff over the head with such force that a dent was made in the barrel of the gun (R. 22, 26). Injuries were inflicted on Mr. Redd, consisting of mild concussion and "multiple lacerations of scalp, extending down to bone with profuse hemorrhage and small lacerated wound of right arm" (R. 25). Mr. Redd was treated for these injuries at the University Hospital in Augusta, Georgia (R. 27). The treatment was for "control of hemorrhage, debridement of scalp and suturing of laceration" (R. 25). The shotgun, broken and dented, was found in front of the drug store shortly after 3:00 a.m. September 15, (R. 26, 43). The Plymouth automobile was later found abandoned six or seven miles from the city of Augusta, Georgia (R. 26), and on September 16 or 17, 1942, was returned to the owner by the sheriff (R. 9, 10, 27). Redd testified that he was certain that the car in which his assailants arrived at the scene, was the car identified by other witnesses as that taken from Smith (R. 8, 23).

At about six p.m., September 17, 1942, the accused were apprehended at Camp Gordon, Georgia (R. 28) and placed in confinement in the 20th Field Artillery Battalion Guard House (R. 28, 30, 34). About six hours later, at 12:05 a.m., September 18 (R. 34), while still so confined, the accused at their request and under armed guard (R. 32) were taken to the latrine for relief (R. 31, 32) and to a Battery mess hall to get a drink of water (R. 33). While the sentinel was kneeling down to get a drink (R. 33), accused shoved him over (R. 33), caused him to drop his rifle (R. 33), then ran around the corner of the mess hall (R. 33) and made good their escape (R. 33). Their escape was unauthorized (R. 33).

On October 12, 1942 (R. 36), the accused, dressed in khaki uniforms (R. 35), while headed north (R. 35, 36) and thumbing a ride (R. 35) were apprehended about a mile from the North Carolina State line on a mountain in Tennessee (R. 35) by the sheriff of Unicoi County, Erwin, Tennessee. They were kept in jail a week or ten days (R. 36), then brought to Fort Oglethorpe, Georgia (R. 36) and confined in the Post Guardhouse (R. 36).

Accused, Martin testified:

"Me and Private Sims were together and two privates came by in a car. They asked us if we would like to ride with them. They said they would take us to town for two beers. We decided we would use our tickets on the way back. We gave them two-bits to go to town with them. We stopped at Mac's Place and had some drinks and they wanted us to go with them. We told them we had dates in Carolina. One of them made the remark would we like to use the automobile. We told them we would consider it and asked them to make a price on it. They asked us for nine dollars. We told them that was too much and argued them down to seven and a half, to use the car until 12:00 o'clock. We went to see the girls, and rode around, taken in some places, Jones' and Thomas', and taken the girls back home about 2:00 o'clock, I suppose it was about that time. We came back to town. We were supposed to have the car back at 12:00 o'clock. We got back to Mac's place and the boys weren't there. We parked the car in front of Mac's place and went up and down the street looking for them, but didn't find them. We took the car back to South Carolina, almost up to the Airport, to the left of the road pulled over thirty or forty yards somewhat and parked it. We caught a taxi from there and got into town, then caught a bus out to camp." (R. 37, 39, 40).

He also testified that both accused spent the rest of the night in their barracks (R. 37) and went about their regular duties after that (R. 37). The second day after, they were confined in the guardhouse by order of Captain Long (R. 38), without explanation as to why they were so confined (R. 38). They broke confinement in order to return the car to the boys from whom they had received it and to prevent a report being made "that we stole the automobile" (R. 38). They left in uniform and were apprehended in uniform by Sheriff McInturff (R. 38). They were on their way to Erwin where witness had relatives whom he planned to visit (R. 38).

Accused, Sims testified:

"Martin and myself left the_ came here, I believe it was about 5:30 or after, right after we got off duty, and went to the bus station. We were in line waiting to get on the bus going to Augusta when these two guys came along in this car, a Plymouth, and asked if we wanted a ride. We were on the tail end of the line so

we got in with them, and went to the corner and picked up another guy in front of the hospital and rode from there to Augusta. We went to Mac's Cafe, I believe, and drank beer and, I believe, some cigarettes. The boys made a proposition to rent us the car. They said they were going to a show that night. We weren't much interested, but we went to a liquor store below there and bought a pint of whisky and took a drink and when the boys asked the second time they asked us we said we had dates in South Carolina and told them we would rent it if it was reasonable. They told us nine dollars from then until midnight. We said that was too much and finally agreed on seven dollars and a half as the price. We got the car from them and went to Bath, South Carolina, and got the girls and went to two or three honky-tonks, I don't know which ones. We were drinking quite a few beers, and rode around some and took the girls home about two o'clock, I imagine. We left there and got back to Augusta and looked for the two guys. They weren't at Mac's where we had planned to meet them, so we left the car for a few minutes and went up and down the streets, looking in all the places but we couldn't find them on the street anywhere. We came back, got in the car and went across the bridge to South Carolina, left the car on a side road, came back to the highway and got a cab and came to Augusta, and got a bus out to the camp that morning. I believe that's all" (R. 41).

He also testified that the two were placed in confinement in the battalion Guardhouse without any explanation (R. 41) and broke confinement (R. 42) without permission (R. 42). On the 14th accused then had left camp about 5:30 or 6:00 o'clock and had rented the car at about 7:30 or 8 o'clock (R. 43). Martin bought gasoline for the automobile without coupons (R. 42) and drove the automobile into a ditch and they returned to camp at about 2 or 3 o'clock in the morning (R. 42, 43).

4. The evidence sufficiently establishes that the accused were in possession of the stolen automobile at the time and in the vicinity of the scene of the house breaking; that the Langley Drugstore was unlawfully broken into and entered at about 3 a.m., September 15, 1942, with intent to commit a criminal offense, to-wit larceny, therein, and that five dollars was stolen from the cash registers. Deputy Sheriff Redd, an eye witness positively identified the car used by the offenders, so as to leave no doubt but that it was the same car that had been stolen from its owner and used by the accused earlier in the night. The court was

warranted in a finding that the accused at the time and place alleged committed the crime of house breaking with the intent as alleged in Specification 1 of the Charge; that they stole five dollars from the cash registers on the occasion of the house breaking, at the time and place and manner as alleged in Specification 2 of the Charge; that they committed an assault upon Redd, at the time and place and with the intent as alleged in Specification 3 of the Charge and that they robbed Redd of one revolver, Smith and Wesson caliber.38 of the value of about thirty dollars at the time and place in the manner and by the means as alleged in Specification 4 of the Charge. Accused's possession of the recently stolen automobile gave rise to the presumption that they had stolen it. In their attempt to explain such possession and rebut the presumption, accused related an alleged rental transaction with two strangers, whose names, residences or other means of identification were unknown to them and whom they did not produce as witnesses at the trial. The court was clearly justified in rejecting such testimony of the accused and in finding that at the time and place alleged in Specification 5, Charge I, the accused committed the offense of larceny and feloniously stole, took, and carried away the automobile.

By their own testimony both accused admitted that they escaped from confinement before they were set at liberty by proper authority, at the time and place as alleged in the Specifications under the additional Charges (Charge II in each case). The court's findings of guilty thereof are supported by unconflicting evidence. After having made good their escape from confinement the accused traveled in several states until apprehended in the mountains of Tennessee headed north away from Camp Gordon, Georgia. The court was amply warranted in finding that when the accused escaped from confinement they left Camp Gordon and remained absent in desertion with the intention of deserting the service of the United States, as alleged in the Specifications under the additional charges (Charge I in each case).

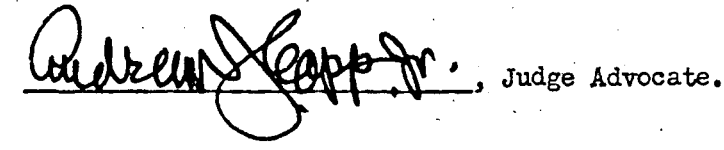
5. The charge sheet shows that Martin is about 25 years of age and that he enlisted December 3, 1936, was discharged May 14, 1940, and enlisted June 6, 1940 to serve three (3) years.

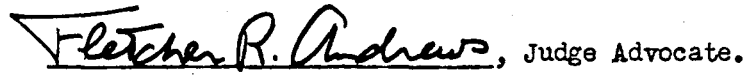
The charge sheet shows that Sims, is about 21 years of age and enlisted January 8, 1941, for three (3) years with a record of no prior service.

6. 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 and sentence. Confinement in a penitentiary is authorized in each case by Article

of War 42; for desertion in time of war (Additional Charge I and Specification) and for the offense of housebreaking, (Specification 1 of Charge), assault with intent to do bodily harm with a dangerous weapon (Specification 3 of Charge), robbery (Specification 4 of Charge) and larceny (Specification 5 of Charge) recognized as offenses of a civil nature and so punishable by penitentiary confinement for more than one year, respectively, by section 1801, Title 22, District of Columbia Code, by sections 455 and 463, Title 18, United States Code, and by Section 2201, Title 22 of the District of Columbia Code.

, Judge Advocate.

 , Judge Advocate.

 , Judge Advocate.

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

SPJGK
CM 228527

JAN 23 1943

UNITED STATES	NEW YORK PORT OF EMBARKATION
v.	Trial by G. C. M., convened at Fort Hamilton, New York, November 19, 1942. Dismissal.
First Lieutenant WILLIAM G. WALL (0-359819), Transportation Corps.	

OPINION of the BOARD OF REVIEW
HOOVER, COPP and ANDREWS, Judge Advocates.

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: (Finding of not guilty).

Specification 2: In that First Lieutenant William G. Wall, 396th Port Battalion, Transportation Corps, was, at Fort Hamilton, New York, so drunk and disorderly while in uniform, in the presence and hearing of many persons, as to disgrace the military service.

He pleaded not guilty to the Charge and Specifications. He was found guilty of the Charge and Specification 2 thereunder and not guilty of Specification 1. 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 for action under Article of War 48.

3. The evidence shows that at about 8:30 a.m., November 5, 1942 (R. 8), accused drove an automobile in which he and a woman (R. 11, 22, 29, 30, 32) were riding (R. 9, 11, 14) in such a manner that it collided with another automobile parked on the side of a road in front of a Quartermaster building at Fort Hamilton, New York (R. 8, 9, 11, 14).

The bumper of accused's car and the rear fender of the other car (R. 11) were locked together (R. 9, 11, 22). Accused attempted to but did not succeed in separating the cars by backing (R. 9, 11; 15, 22).

Mr. Clarence Lane, a civilian employee who had witnessed the accident, went to accused's car and found him (R. 9, 11, 12) "slumped over in his seat" in what Lane testified he believed was "a drunken stupor" (R. 9, 11, 15, 22). Lieutenant Colonel James J. Pintel, Quartermaster Corps, Post Quartermaster, and First Lieutenant John M. Hulsey, Quartermaster Corps, who were nearby, went to the car (R. 22, 32). Lieutenant Colonel Pintel asked accused what his trouble was and accused "mumbled, 'Nothing'". Believing accused was drunk, he asked the woman why she did not drive and the woman said, "he wouldn't let me" (R. 22). Lieutenant Colonel Pintel then asked accused as to his organization. Accused replied, "Who the Hell are you?", and added, "I am not going to tell you what organization I am from; I am from a Task Force and I don't have to tell you what organization I'm from" (R. 23). He also said, "I don't give a damn who you are; the Hell with this fuckin' Army" (R. 24). Accused got out of or was taken from his car (R. 9, 24) but "just couldn't stand on his feet" (R. 9). Lieutenant Hulsey and Mr. Nicholas Santella, another civilian employee, owner of the car struck by accused, assisted and "practically dragged" accused into Lieutenant Colonel Pintel's office which was in the immediate vicinity (R. 9, 16, 24, 32). Accused was in uniform (R. 9, 17, 26). A number of civilians and enlisted men were on duty in a room adjoining Lieutenant Colonel Pintel's office but a connecting door was closed (R. 26, 29).

Lieutenant Colonel Pintel testified that inside his office accused

> "kept referring to the Army, using the same expression: 'fuckin' Army, and fuckin' this' ***. And while I was on the telephone, Lieutenant Wall got up on his feet and proceeded to stagger all around the office. I had to call Lieutenant Hulsey to refrain him. He made an attempt to get out of the office and threatened to tear the place down" (R. 24, 25).

Accused said, "I want that woman to come in here" and referred to the woman as his wife (R. 30). Witness testified that while witness was telephoning accused said,

> "I don't know who you are, Major or Lieutenant Colonel; but the Colonels that he had seen can't even execute

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> left face; and judging by the way I executed left face when I was approaching my telephone, he thought I was a hell of a Colonel" (R. 25, 26).

Accused made his remarks in a "very loud and in a drunken manner". He "kept ranting about his friends at Fort Dix *** and he didn't give a damn about anybody or anything". The woman tried to placate him but without success (R. 27). At one time accused said to Lieutenant Hulsey, during Lieutenant Colonel Pintel's temporary absence from the room, "What does that little son-of-a-bitch intend to do" (R. 34). Two military police came to take accused to the hospital (R. 25, 63). When they arrived accused refused to leave (R. 25, 63) and it was only when the woman interceded that he agreed to do so. It required the assistance of the two military police to get accused to his feet and into a car (R. 25, 63). On reaching the car he "fell on the floor seat" (R. 63).

En route to the station hospital accused pointed to one of the military police and said, "I don't like that son-of-a-bitch" (R. 63, 64). At the hospital the military police assisted accused up a stairway and into a receiving room (R. 37, 63). He was unsteady on his feet and "swayed from side to side" (R. 40). He "tried to release himself" from the military police and threatened them (R. 37, 61). He told one of the military police that he would "knock the shit out of him" and called him a "son-of-a-bitch" (R. 38, 61, 63). A medical officer ordered accused to be quiet but without effect (R. 37, 38). Accused said he "didn't give a good God damn" (R. 38). He "raised his hands toward" one of the military police (R. 38, 61, 63) but was restrained. He threatened to "tear the place apart" (R. 48). When asked for his name he said it was "Waddel" or something similar, and finally said he could not remember his name (R. 40).

Accused was taken to a ward of the hospital. Captain Frederick W. Brewer, Medical Corps, an officer on duty in the hospital, testified,

> "I heard a disturbance down the hallway. I went down to see what that disturbance was, and it seems that Lieutenant Wall was refusing to take any orders whatsoever from Lieutenant Strub, who is the officer in charge of this ward. In an attempt to assist Lieutenant Strub, I then asked Lieutenant Wall to undress and go to bed, which he refused to do. He was very

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> loud and very upset. He went so far as to threaten physical violence not only to myself but to anyone with whom he came in contact" (R. 51).

He cursed "very loud" (R. 51) and

> "called every one who came in contact with him a son-of-a-bitch, or a horse's ass; or would say bullshit to anything that you suggested to him. He made quite a few remarks about the Army and the Government being run by nothing but half-wits and stuffed shirts; and he wasn't going to take orders from anybody ***, he was very uncooperative, abusive, and threatened to 'take the hospital apart'" (R. 53, 54).

A nurse and enlisted men were present (R. 52, 57). He was given a hypodermic of apomorphine to remove the contents of his stomach (R. 51, 52). After about forty-five minutes he went to bed (R. 51) and to sleep and slept until late afternoon (R. 52).

The next morning accused showed signs of a mild chest cold (R. 53) and asserted that he had ear trouble (R. 53, 58). A physical examination disclosed that he had an exostosis, or overgrowth of tissue, secondary to infections of the ear (R. 44). There was no acute infection at the time (R. 44) and no furuncle or boil (R. 54), but there was a "chronic" (R. 45) or "recurrent" (R. 53) infection of the external ear canal (R. 45). There was no physical evidence of recent acute infection (R. 46) or of any condition which would have caused any great pain on November 5 (R. 45, 59) or would have affected the brain (R. 46, 53, 55). He had been treated for an ear condition on November 25, 1941 (R. 44). Accused had a slight swelling of the left side of his head caused, as he stated, by an injury recently suffered while he was riding in a "jeep" (R. 53). While in the hospital accused stated to a medical officer that on the night of November 4-5 he drank until approximately 2 a.m., after which he remembered nothing for a time, and that when he got up the next morning he made a "futile attempt to sober up" (R. 54).

Santella, as well as Lieutenant Colonel Pintel and Lane as noted above, testified that in his opinion accused was drunk when observed in the vicinity of Lieutenant Colonel Pintel's office following the automobile collision (R. 9, 16, 22). Lieutenant Colonel Pintel testified that when he saw accused in the car his eyes appeared to be "half

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closed, practically glazed", that he was breathing heavily (R. 22), that his face appeared to be flushed and that he spoke with a "thick tongue" (R. 28). Lieutenant Hulsey testified that he believed accused was "drunk or very sick" (R. 32, 33). One of the military policemen who escorted accused to the hospital testified that he believed accused had been drinking (R. 62). A Medical Corps enlisted man who observed accused when he was brought into the hospital testified that he believed accused was drunk (R. 38). Major Wayne S. Hagen, Medical Corps, testified that he examined accused following his admission to the hospital and found him to be "suffering from acute alcoholism" (R. 43, 48). Captain Brewer testified that he examined accused and found him to be "acutely intoxicated" (R. 51), showing "no signs of anything else, such as narcotics" (R. 53). First Lieutenant Giles J. Strub, Medical Corps, ward officer of the hospital ward in which accused was placed, testified that,

> "the officer was flushed, was perspiring very freely, his gait was unsteady, and there was a distinct odor of alcohol on the officer's breath" (R. 57).

Witness believed he was "under the influence of alcohol" (R. 58).

The defense counsel requested a stipulation to which the trial judge advocate objected and did not agree (R. 65, 66), but which the court received in evidence (R. 66), that certain medical officers would, if present, testify that accused had been treated for "furuncle, left auditory, meatus" on September 1 and 3, 1942, and for external otitis, left side, "mild, not a severe disease", on October 4, 5, 14 and 16, 1942 (R. 65).

First Lieutenant Harry Feinberg, Medical Corps, testified for the defense that he examined accused on November 6, 1942, while witness was on duty with the ear, nose and throat clinic at the Station Hospital, Fort Hamilton (R. 67) and found that accused "had a chronic furunculosis, which simply means boils in the ear; and I recommended either vaccine therapy or x-ray treatment to cure the condition" (R. 68). There was swelling and pain (R. 68), but the condition was not acute (R. 69). The pain complained of was not, in witness' opinion, insufferable, intolerable or unbearable (R. 69, 70). It was possible that there had been an acute condition within twenty-four hours prior to the examination (R. 70). Witness believed that pain from acute

furunculosis could be so excruciating that a normally intelligent person "might be driven" to drink intoxicating liquor (R. 71).

Accused made an unsworn statement, through his individual counsel, that for some time past accused had been suffering from the ear condition and had received treatment as described (R. 73). On November 4 he had an attack of furunculosis that was extremely painful and as a result took medication consisting of six to eight aspirins and two sodium amytols over a period of a few hours. He had something to drink but

> "he does want this court to know that he did not have any more to drink that night than he has had on a number of occasions during the past thirteen or fourteen years. He takes three or four drinks in an evening, and without any effect. Further, that on this particular night, these drinks had an effect upon him to the extent that he does not remember anything that happened subsequent to shortly after midnight on November 4, 1942. He does not remember the occurrences that happened here on November 5, 1942. And further, that he does not recollect anything until some time during the afternoon of November 5, 1942, when he awakened in the Station Hospital, Fort Hamilton" (R. 74).

On October 28, 1942, a jeep in the back seat of which he was riding struck an obstruction and accused was thrown violently against the top of some cross bars. He suffered "two bumps on the head" and some injury to his spine and back (R. 78). He was "rendered sufficiently woosy so that he felt he had to go to the dispensary". The examination there received was superficial and no x-rays were taken (R. 79).

5. The evidence establishes without conflict that on November 5, 1942, at the place alleged, accused was drunk in uniform. His drunkenness was exhibited by his appearance, by his almost complete lack of physical control, by his abnormal and highly insubordinate behavior and by his obscene and insubordinate utterances. These things occurred on the public streets of the post, in the post quartermaster's office, en route to the hospital and at the hospital. He indulged in loud talking and general threats of physical violence, made

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offensively provoking and obscene remarks, addressed disrespectful remarks to officers and threatened and made threatening gestures toward enlisted men. All of his indecorum was witnessed by military personnel and much of it by civilians. In the opinion of the Board of Review his drunkenness must be characterized as gross and his disorders as conspicuous. Both were of such aggravated degree as to be manifestly disgraceful. They amounted to conduct unbecoming an officer and a gentleman and were violative of Article of War 95.

6. The Specification is defective in that it does not allege the date of the offense. Paragraph 87b of the Manual for Courts-Martial, in reference to the purview of Article of War 37, provides that:

> "No finding or sentence need be disapproved solely because a specification is defective if the facts alleged therein and reasonably implied therefrom constitute an offense, unless it appears from the record that the accused was in fact misled by such defect, or that his substantial rights were in fact otherwise injuriously affected thereby".

No objection based on the defect was made by the defense, and the undisputed proof established precisely the date of the offense. The defect could not have misled accused and could not otherwise have injuriously affected his substantial rights. See CM 228271, Clark.

7. Five of the seven members of the court submitted recommendations that the sentence to dismissal be suspended and that accused be "assigned immediately to a unit for overseas duty", basing their recommendations on the "length of this officer's service, and the value of his experience". The defense counsel submitted a recommendation of similar tenor.

8. War Department records show that accused is 38 years of age. He graduated from Fordham University in 1927 with the degree of A.B., and from the law school of that university in 1928 with the degree of LL.B. He was appointed a second lieutenant, Military Intelligence Reserve, on September 18, 1937. He was ordered to extended active duty for one year about August 20, 1940. He was promoted to first lieutenant October 4, 1940. A board of officers convened in December, 1940, to investigate allegations of adulterous relations by accused prior to his

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entry upon active duty, his paternity of an illegitimate child and his nonsupport of his wife and their child, recommended that accused be relieved from active duty. The recommendation was not approved by the War Department. Accused was again ordered to extended active duty on September 27, 1941. On November 29, 1941, a board of officers appointed to investigate personal injuries suffered by him on November 25, 1941, found that accused was under the influence of alcohol at the time of his injuries and that the injuries were proximately caused by his intoxication and were not incurred in line of duty. His 201 file contains correspondence relating to his failure to pay a bill for subsistence furnished him while hospitalized in February, March and April, 1942. It also contains correspondence relating to a letter from his wife dated October 6, 1942, stating that she was legally separated from accused and complaining of his nonsupport of herself and child.

9. 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 thereof. Dismissal is mandatory upon conviction of violation of Article of War 95.

Robert W. Harvey, Judge Advocate.
Andrew Copp, Jr., Judge Advocate.
Fletcher R. Andrews, Judge Advocate.

1st Ind.

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

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant William G. Wall (0-359819), Transportation Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. Accused appeared at Fort Hamilton, New York, in a staggering drunk condition and when taken into custody and hospitalized became conspicuously disorderly in that he loudly made obscene, provoking, insubordinate, threatening and disrespectful remarks in the presence of officers, enlisted men and civilians, and made threatening gestures to enlisted members of the military police. He was sentenced to dismissal. Five of the seven members of the court recommended suspension of the sentence. Accused's record during somewhat more than two years of active duty has not been wholly creditable and includes evidence of previous difficulties due to drunkenness. In response to an inquiry addressed to the Chief of Transportation as to whether he believed retention of accused in the service would be desirable, that officer replied in the negative and recommended that the dismissal be executed. I believe the usefulness of accused as an officer is at an end and recommend that the sentence be confirmed and carried into execution.

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

(Sentence confirmed but execution suspended. G.C.M.O. 91, 23 Apr 1943)

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

SPJGN
CM 228566

MAR 2 1943

U N I T E D S T A T E S	)	2ND ARMORED DIVISION
v.	)	Trial by G.C.M., convened at Fort Bragg, North Carolina, November 27 and 28, 1942. To be shot to death with musketry.
Private ANTHONY APOSTOLOS (32332142), Company D, 66th Armored Regiment.	)	

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

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

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

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

Specification: In that Private Anthony Apostolos, Company "D", 66th Armored Regiment, did, at Fort Bragg, North Carolina, on or about September 30, 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 October 16, 1942.

CHARGE II: Violation of the 59th Article of War.

Specification: In that Private Anthony Apostolos, Company "D", 66th Armored Regiment, did, at Fort Bragg, North Carolina, on or about Sept. 30, 1942, advise Private David R. Hurley, Company "D", 66th Armored Regiment, a soldier who was then in arrest and under charges, to desert the service of the United States, by pretending to the said Private Hurley that he, the said Private Apostolos, had a brother in Washington, D.C., who would supply the said Private Hurley

with fraudulent registration cards and other government papers to enble him to obtain employment in civilian life, and did, in pursuance of such advice, accompany the said Private Hurley from Fort Bragg, North Carolina to Washington, D. C.

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

Specification 1: In that Private Anthony Apostolos, Company "D", 66th Armored Regiment, having been duly placed in arrest at Fort Bragg, North Carolina, on or about September 3, 1942, did, at Fort Bragg, North Carolina, on or about September 7, 1942, break his said arrest before he was set at liberty by proper authority.

Specification 2: In that Private Anthony Apostolos, Company "D", 66th Armored Regiment, having been duly placed in arrest at Fort Bragg, North Carolina, on or about September 29, 1942, did at Fort Bragg, North Carolina, on or about September 30, 1942, break his said arrest before he was set at liberty by proper authority.

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

Specification 1: In that Private Anthony Apostolos, Company "D", 66th Armored Regiment, did, without proper leave, absent himself from his organization at Fort Bragg, North Carolina from about August 26, 1942 to About September 3, 1942.

Specification 2: In that Private Anthony Apostolos, Company "D", 66th Armored Regiment, did, without proper leave absent himself from his organization at Fort Bragg, North Carolina, from about September 7, 1942 to about September 29, 1942.

CHARGE V: Violation of the 96th Article of War.
(Nolle prosequi)

Specification 1: (Nolle prosequi)

Specification 2: (Nolle prosequi)

Specification 3: (Nolle prosequi)

The accused pleaded not guilty to all Charges and Specifications. He was found not guilty of Charge I but guilty of a violation of the 61st Article of War, guilty of the Specification, Charge I, except the words "desert" and "in desertion" substituting therefor, respectively, the words "absent himself without leave from" and "without leave," of the excepted words, not guilty, of the substituted words, guilty, and guilty of Charges II, III and IV and the Specifications thereunder. A nolle

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prosequi was entered to Charge V and its Specifications. He was sentenced to be shot to death with musketry. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War "with the recommendation that the sentence be commuted by the confirming authority to life imprisonment for the reason that the case, although considered aggravated, is not believed to be so flagrant as to require the imposition of the extreme penalty".

3. The evidence for the prosecution shows that the accused absented himself without leave on August 26, 1942, from Fort Bragg, North Carolina, and remained absent until September 3, 1942, when he returned and was placed under arrest in quarters. On September 7, 1942, he broke his arrest and again absented himself without leave until September 29, 1942, when he returned and was again placed under arrest in quarters. Upon both occasions of being placed in arrest his company commander personally explained to him the limits of the area to which he was confined, informing him that he should not leave the company area and that he was permitted to go only to the latrine, kitchen, or to points half-way between the tents where the two company areas joined. The accused was not released at any time, nor was he detailed to any duty which would be inconsistent with his status of arrest (R. 1-14; Exs. C, D).

On September 30, 1942, the accused was detailed to kitchen police duty. While on this duty he suggested to and advised Private David Hurley, who was also under arrest and detailed to kitchen police duty, to desert and "go over the hill" with him. The accused told Private Hurley that his, the accused's brother, an employee of the Bureau of Engraving and Printing, would obtain false registration and 4-F classification cards for them. The accused told Private Hurley that a friend would supply them with civilian clothes. Private Hurley had no intention to desert the service prior to being advised to do so by the accused. The following day, on or about October 1, 1942, both the accused and Private Hurley broke their arrest by absenting themselves without leave, and proceeded to Washington, D. C., where they remained for two days at the home of the accused's brother who obtained the promised fraudulent registration cards for them. They then went to New York and stayed at the home of a friend of the accused for a day. Private Hurley then left and "hitch-hiked" to Chicago and two days later surrendered himself to the military police at Camp Grant. He was thereafter tried and found guilty of having been absent without leave in violation of Article of War 61.

The record shows that the accused left New York and that he was present with his organization on November 4, 1942, at which time he was under arrest in quarters (R. 14-16, 30,35, 40-41; Exs. D, F, G).

4. The accused elected to remain silent and no evidence was offered for the defense, except the testimony of the accused's company commander who identified a letter received by him about October 1, 1942, written by the accused during his absence, saying that he would return in a few days (Ex. 1).

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5. Charge I and the Specification thereunder alleges that the accused deserted the service in violation of the 58th Article of War. The evidence shows that the accused carefully prearranged all details for the desertion of himself and Private Hurley including the obtaining of fraudulent classification cards, civilian clothes and refuge in his brother's home. He then carried out his plan and left his organization without proper authority. The court found the accused guilty only of the lesser included offense of absence without leave in violation of the 61st Article of War and the evidence is clearly legally sufficient to support the findings.

6. Charge II and the Specification thereunder alleges that the accused advised another to desert the service of the United States in violation of the 59th Article of War. The evidence shows that the accused deliberately suggested, invited and advised Private Hurley to "go over the hill" and desert with him. The accused made all plans for their desertion, including the obtaining of false classification cards, arrangements to obtain civilian clothes, and refuge in his brother's and a friend's home. Acting upon the advice of the accused, Private Hurley who had had no prior intent, broke his arrest, and, in company with the accused, departed from Fort Bragg without authority. They remained at the home of the accused's brother in Washington for two days and at the home of the accused's friend in New York for another day all of which had been prearranged by the accused.

The Manual for Courts-Martial, 1928, Paragraph 131, states that the offense of advising one to desert is complete when the advice is given, whether the person advised deserts or not. The evidence is, therefore, legally sufficient to support the findings of guilty of the Specification and the Charge.

7. Charge III and the Specifications thereunder allege that the accused broke his arrest in violation of the 69th Article of War. The evidence shows that the accused absented himself without leave from August 26, 1942, until September 3, 1942. He returned and was placed under arrest in quarters by his company commander who clearly explained to him the meaning and limits of his arrest, and that he was permitted to go only to certain places. He was not released at any time. September 7, 1942, he again absented himself without having been set at liberty by proper authority. The accused remained absent until September 29, 1942, when he returned to his organization and was once more placed under arrest in quarters. The meaning and limits of his arrest were again clearly explained to him. On September 30, 1942, he broke that arrest and departed for Washington, D. C. The arrest was legal and proper on both occasions, and before he was set at liberty by proper authority he transgressed the limits fixed by order of the proper authority. The evidence is, therefore, legally sufficient to support the findings of guilty of a violation of the Specifications and the Charge (M.C.M., 1928, par. 139, p.154).

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8. Specifications 1 and 2, Charge IV allege absence without leave in violation of Article of War 61. The evidence shows that the accused did absent himself without leave from August 26, 1942, to September 3, 1942, and from September 7, 1942, to about September 29, 1942. The evidence, therefore, clearly supports the findings of guilty.

9. The charge sheet shows the accused to be 23 years of age, and that he was inducted into the service at Fort Jay, New York, on May 6, 1942.

10. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and the sentence, and to warrant confirmation thereof. In time of war a sentence of death is authorized upon conviction of a violation of Article of War 59.

Thomas H. Jessson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Willard B. Cowles, Judge Advocate.

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1st Ind.

War Department, J.A.G.O., MAR 8 - 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 Anthony Apostolos (32332142), Company D, 66th Armored Regiment.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. The accused was found guilty of absenting himself without leave on three occasions, in violation of Article of War 61, of breaking arrest on two occasions, in violation of Article of War 69, and of advising a soldier to desert the service in violation of Article of War 59. He was sentenced to be shot to death with musketry. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48 with the recommendation that the sentence be commuted to life imprisonment for the reason that the case, although considered aggravated, was not believed to be so flagrant as to require the imposition of the extreme penalty.

Although the offenses committed by the accused are serious offenses, I am of the opinion that military necessity at the present time does not require either the imposition of the death penalty which was assessed by the court, or the imposition of life imprisonment as recommended by the reviewing authority. I recommend, therefore, that the sentence be confirmed but commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for twenty years. I also recommend that the dishonorable discharge be suspended and that a detention and rehabilitation center be designated as the place of confinement.

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

E. C. McNeil,
Brigadier General, U. S. Army,
Acting The Judge Advocate General.

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

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(Sentence confirmed but commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for five years. Execution of that portion thereof adjudging dishonorable discharge suspended until soldier's release from confinement. G.C.M.O. 75, 2 Apr 1943)

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

SPJGK
CM 228571

JAN 8 1943

THIRD SERVICE COMMAND
SERVICES OF SUPPLY

UNITED STATES v. Private WILBERT J. DOCKERY (33221913), Company A, 8th Engineer Training Battalion, Engineer Replacement Training Center.	Trial by G. C. M., convened at Fort Belvoir, Virginia, October 30, 1942. To be hanged by the neck until dead.

OPINION of the BOARD OF REVIEW
HOOVER, COPP and ANDREWS, Judge Advocates.

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1. The record of trial in the case of the soldier named above has been examined by the Board of Review and the Board submits this, its 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 Pvt. Wilbert J. Dockery, Company A, 8th Engr Tng Bn, ERTC, Fort Belvoir, Virginia, did, at Fort Belvoir, Virginia, on or about October 19, 1942, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Grandford Burrell, Co. A, 8th Engr Tng Bn, ERTC, Fort Belvoir, Virginia, a human being, by shooting him with a rifle.

He pleaded not guilty to the Charge but guilty of violation of the 93rd Article of War, and guilty to the Specification, except the words, "with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation", substituting therefor the words, "willfully, feloniously and unlawfully", and except the words, "a human being", of the excepted words not guilty, of the substituted words guilty. He 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. The reviewing authority approved the sentence and forwarded the record of trial, including in his action the following:

> "Pursuant to Article of War 50½ the order directing 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 evidence shows that on the night of October 18, 1942, at Fort Belvoir, Virginia, a "crap" game was in progress in the latrine on the ground floor of the barracks of the second platoon of Company A, 8th Engineer Training Battalion. Accused and Privates Grandford Burrell and Solomon Beatty, all members of the platoon, were participants (R. 24, 61, 113, 127). An argument arose between accused on the one hand and Burrell and Beatty on the other, accused asserting that the others were not giving him a "square deal" (R. 83) in connection with "fading" or betting upon certain rolls of the dice (R. 61, 62, 83, 114). Accused called Burrell, as well as Beatty, a name, variously described as "a black mother-fucker" (R. 84), "a mother-fucking son of a bitch" and a "cheap-ass mother fucker" (R. 24, 62, 114). Burrell responded by addressing identical remarks to accused (R. 24, 62, 84). Accused then told Burrell that if Burrell did not like what he said Burrell could "get some of his ass at any time he wanted to" (R. 62). One of the enlisted witnesses who heard this remark testified that he interpreted it as meaning that "he wasn't scared of him" (R. 62). Burrell jumped to his feet and told accused the same thing (R. 62, 114).

Accused left the latrine (R. 24, 62, 85) and went toward the platoon commander's office (R. 62, 63) where about 40 rifles were kept and where, in a drawer of the platoon commander's desk, there was some .30 caliber rifle ammunition (R. 45). As he left he said that he "was going to make trouble" (R. 114). After accused had gone Burrell picked up a stick, described as "something like a broom stick" (R. 62, 84, 114) but not as large in diameter (R. 84). According to one witness it measured approximately 1½ inches in diameter (R. 115). The estimate of its length varied from 1½ to 3 feet (R. 84, 114). Accused soon reappeared with a rifle in his hands (R. 63, 85). Burrell, who had been standing in the latrine door, ran upstairs (R. 63, 84, 115) where his bunk was located (R. 85). At about this

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time Burrell told accused he would "beat the shit out of him if he went upstairs" (R. 84, 85). Accused stood "for a little while" at the bottom of the steps, pointing the rifle toward the top of the stairway (R. 63). Then he put the barrel of the rifle against Beatty's back and forced him to walk upstairs and turn on the lights, accused following closely (R. 63-65, 85, 86, 88, 115, 116).

The second floor consisted principally of a long, narrow room used as a barracks. The room ran north and south and the bunks were arranged along the east and west walls, each extending lengthwise from the wall. There were fifteen bunks on the west side and fourteen on the east side. The stairway referred to was located near the north end. At the south end was a fire escape (Ex. 4). Near the south end, midway between the two rows of cots, four cots were piled in pyramidal form, the highest point of the pile approximately three feet from the floor (R. 41; Ex. 4). A few feet farther to the south, midway between the two rows, stood another bunk (Ex. 4). Burrell's bunk was on the west side, next but one from the south end (R. 40, 43, 85; Ex. 4). Accused bunked downstairs (R. 40, 85, 93, 112). On the morning of October 18 accused had been observed sitting at the desk in the platoon commander's office on that floor (R. 96).

When accused appeared upstairs Burrell ran to the south end of the room and down the fire escape (R.63, 85, 88, 116). Accused, having ordered Beatty to turn out the lights (R. 116, 117), thereupon went downstairs (R. 63) and, after some persuasion from his fellow soldiers, returned the rifle to the platoon office (R. 63, 85, 88). A few minutes later Burrell again appeared downstairs (R. 63, 85) "grumbling" (R. 63) and "the argument continued" (R. 88). One witness, after testifying that Burrell "had a rock in each hand" (R. 64, 69), stated that he did not see the stones but "saw his hands clinched" (R. 69). Accused walked up to Burrell and said, "Burrell, you don't believe I will kill you; you are a mother-fucker" (R. 64). Burrell ran upstairs (R. 64, 85, 117). Having again obtained a rifle accused followed him (R. 65, 85, 118). It was estimated by one eyewitness that about five minutes elapsed between the two appearances by accused with the rifle (R. 87).

Upon his arrival on the second floor accused turned the lights on (R. 118). The light switch was near the head of the stairs at the north end of the room (R. 98; Ex. 4). Burrell ran to the south end of the room and crouched between the last two bunks on the east wall (R. 103, 104, 105, 119; Ex. 4). Accused loaded the rifle, a

Springfield, 1903 model, caliber .30 (R. 80), and with the rifle in his hands (R. 130) advanced toward Burrell (R. 94, 103, 119). Twice accused said, "Burrell, you don't believe I'll kill you" (R. 128). Some of the men tried to persuade accused to desist, but their efforts proved of no avail (R. 93, 103, 119). Arriving near the spot where Burrell was crouched, accused leaned down, ordered him to come out (R. 103, 105, 119, 128, 130), and "pointed the rifle at him" (R. 119). Burrell "came out from under the bed" (R. 103, 128) and ran (R. 103, 120, 128) toward the west side of the room, thence north along the length of the room (R. 103, 105, 108, 120, 122, 130, 131, 133; Ex. 4). Burrell did not at any time run toward accused - he "was retreating". Had he continued to run in the direction he finally took he would not have approached or run into accused but would have passed him (R. 109; Ex. 4). Accused "backed up" a few paces (R. 106, 120). As Burrell started to run he threw a stone at accused (R. 103, 105, 120, 123, 133; Ex. 4), striking him "on the arm" (R. 120, 123). One witness, describing the stone which he subsequently saw, said, "It wasn't as big as my fist" (R. 120), and another described it as about two-thirds of the size of his fist (R. 111). As Burrell, running along the west side of the room, reached a point near the piled up cots approximately opposite accused's position near the east side, accused fired the rifle (R. 103, 104, 106, 121). It was estimated that at the time of the shot the distance between accused and Burrell was "about the width of the cot" (R. 107). When the shot was fired accused was pointing the gun "westward" (R. 108, 109). As one witness described it, he "sort-a shifted around and sort-a aimed the rifle at Private Burrell" (R. 120, 121). He did not raise the rifle but "shot from the hip" (R. 107). Burrell fell to the floor, shot through the arm and body (R. 94, 104, 121, 132; Ex. 1). There was evidence that accused was "a very good rifle shot" (R. 107) and that on the range "he qualified as some kind of marksman"(R. 108). The witness so testifying never had seen accused fire "from the hip" (R. 109). An eyewitness testified that at the time of the incident on the second floor he did not observe anything like a stick or other weapon about Burrell's person (R. 87).

Burrell, lying on the floor, asked accused "not to shoot him any more" (R. 104, 121, 123) or not to kill him (R. 66) and asserted he had done nothing to accused (R. 66, 67, 104, 123) and "didn't intend to start an argument" (R. 88, 89). Accused was about two feet distant at the time (R. 67), and said to Burrell, "die, you motherfucker" (R. 67, 68, 94, 124). Thereupon accused went downstairs (R. 94, 104), and reported the shooting to the corporal of the guard (R. 71).

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Burrell was taken to the infirmary and from there to the station hospital (R. 68, 71, 94, 104), reaching the latter place about 12:45 a.m., October 19 (R. 21, 22, 29). He was treated and operated upon promptly but died about 7:25 the same morning (R. 18, 21, 29).

Upon his admission to the hospital Burrell was in a "critical" and "very serious condition" (R. 23). A medical officer testified that,

> "He was anxious, apprehensive and in very considerable pain. He was also in a mild state of shock; and he was in a very, very uncomfortable condition generally".

He was not informed that he was about to die but was told that he had "a very serious abdominal wound". (R. 21) The medical officer testified that he believed a normal individual "would have had cause to appreciate and realize impending death under such circumstances". Within about five minutes after his admission, at about 12:47 or 12:50 a.m., he was questioned by the medical officer and made statements as to what had occurred. The medical officer, over objection by the defense, was permitted to testify to these statements, including a statement that following the obscene remarks exchanged in the latrine, accused,

> "ran from the room, saying he was going to get a rifle and return to the barracks and chase Private Burrell and shoot him" (R. 24).

Medical testimony showed that the bullet entered the

> "outer surface right elbow, leaving inner surface of right elbow, entering right upper quadrant of abdomen, and some fragments leaving thru the right lumbar region" (R. 17-37; Ex. 1).

There was a consequent destruction of the lower end of the right humerus and upper ends of the right radius and ulna (Ex. 1) and laceration or perforation of various abdominal organs (R. 34; Ex. 1). Substantially all of the bullet remained in the body (R. 26). Death occurred by reason of "hemorrhage following massive laceration of the liver and perforation of the inferior vena cava", both due to the gunshot wound (R. 26; Exs. 1, 2). The medical witness concluded that at

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the time of the shot Burrell must have "had his right elbow definitely flexed" (R. 33), "more or less guarding himself and trying, as it were, to fend a blow" (R. 26). The attending surgeon, upon being asked whether he believed "that a bullet striking the arm in that position would normally deflect into the body itself", answered, "The bullet from a rifle so powerful as the one used and at such close range certainly would" (R. 26). An autopsy performed on Burrell's body indicated that he weighed approximately 200 pounds and was a little over six feet tall (Ex. 2).

In the course of investigation of the charges, after he had been warned that he was not required to make a statement and that whatever he said might be used against him, accused told the investigating officer that he did not desire to say anything but that he wished the officer "to use" a written statement accused had previously made to his company commander (R. 49, 54, 55). In this statement, which was received in evidence without objection by the defense, accused said that after the argument over the crap game Burrell threatened to "beat hell" out of him and advanced on him, whereupon accused "went back downstairs" (R. 57; Ex. 6). Burrell followed accused to the foot of the stairs. Accused asked the men upstairs to turn out the lights but they refused to do so. Burrell went upstairs again and called back that if accused wanted the lightsoff he should come and turn them off himself. He started up the steps and saw Burrell at the top He went to the platoon office, got the rifle and several cartridges and loaded the rifle. As he went upstairs to turn off the lights Burrell hit him across the forearm and advanced on him. He "begged" Burrell not to come closer. Burrell was coming down the west aisle. When he was four or five paces away accused told him to stop - "I shot him in the arm when he wouldn't stop". Burrell said nothing to accused and accused said nothing to Burrell after the shooting. Accused had not been drinking and in so far as he knew Burrell had not been drinking. (Ex. 6).

Accused did not testify or make an unsworn statement. In his argument the defense counsel stated that accused was a "much smaller man" than Burrell (R. 142).

4. The evidence, together with the pleas of guilty, shows that at the place and time alleged accused intentionally killed Private Grandford Burrell, Company A, 8th Engineer Battalion, by shooting him with a lethal weapon, a service rifle. The shooting followed an altercation arising out of a petty dispute over the refusal or failure

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of Burrell and another soldier to make wagers in a dice game. The altercation was precipitated by accused with an obscene epithet addressed to Burrell. Burrell replied in kind. Some threats of violence were exchanged. Accused left the scene of the dice game and Burrell armed himself with a broomstick or similar piece of wood. Accused appeared with a rifle and Burrell ran to his quarters and later fled from the building when accused followed him. Accused was persuaded to relinquish the rifle but when Burrell again appeared in barracks some minutes later, probably with stones in his hands, accused, in turn, threatened to kill him, again secured the rifle and followed when Burrell ran to his squadroom. When accused reached the room Burrell had taken cover. Accused loaded the rifle, advanced and ordered Burrell out from between the bunks and twice told Burrell, in effect, that he intended to kill him. Burrell again started to flee, throwing a stone and striking accused. Accused fired upon Burrell as he fled and brought him down. While lying on the floor Burrell asked accused to refrain from further shooting and accused, with a repetition of his original obscenity, told him to "die".

In his statement prior to the trial accused asserted, among other things, that when just prior to the shooting he went to the room in which Burrell was quartered Burrell advanced upon him threateningly, that accused begged him to stop and that he fired only when Burrell continued his advance. These assertions are contrary to the testimony of all the disinterested witnesses and, upon the entire record, are unworthy of belief.

The pleas of guilty of voluntary manslaughter are inconsistent with any theory of excusable killing in self-defense, and there is nothing in the evidence which supports such a theory. Accused precipitated the altercation and assumed the role of aggressor throughout. Burrell at one time had a stick of wood in his hands but no physical offer of violence with it was made. He threw a stone at accused just before he was shot but this act was, under the circumstances, nothing more than a feeble attempt by Burrell to defend himself against the impending and aggressive attack by accused with the loaded rifle. Whether the rock throwing would have amounted to provocation had it been the first occurrence in the series of events need not be determined, for accused's prior threats to kill, plus his actions in procuring the rifle, mounting the stairs, and advancing on Burrell, clearly show that his intent to take Burrell's life had been formed before the victim's effort at resistance.

There was no legal justification for the homicide. There was no assault upon accused preceding the throwing of the stone nor was there any other act or event legally adequate to excite in him an uncontrollable passion. No opprobrious language was addressed to accused which he had not already used toward the others. Threats were exchanged but under the circumstances these threats were trivialities wholly inadequate to arouse uncontrollable anger in a reasonable man. There was a substantial cooling period preceding the final act by accused in hunting down his victim.

Upon all the evidence the Board of Review is convinced beyond reasonable doubt that accused, giving way to what he considered affronts by Burrell, intentionally, deliberately, maliciously and without legal justification or excuse set upon and killed Burrell in cold blood. The finding by the court that the homicide was committed with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation, as alleged, was fully justified. The offense was murder in violation of Article of War 92.

5. As noted above, without objection by the defense, the prosecution introduced a statement made by accused to his commanding officer. The record does not indicate that at the time the statement was originally made accused's rights in the premises were explained to him, but subsequently, after full explanation by the investigating officer, he adopted his previous statement. This procedure, although perhaps unusual, was not erroneous and the statement was properly received. The statement contained admissions only in contradistinction to a confession.

The court admitted as a dying declaration the statement made by Burrell to the attending medical officer. In it, as noted, Burrell stated that accused had said that "he was going to get a rifle and return to the barracks and chase Private Burrell and shoot him". To authorize the admission of a dying declaration the victim must have been,

> "in extremis and under a sense of impending death, i.e., in the belief that he was to die soon; though it is not necessary that he should himself state that he speaks under this impression, provided the fact is otherwise shown" (par. 148a, M.C.M.).

Whether a deceased person feared impending death ordinarily must be proved by circumstantial evidence. In the present case Burrell was

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in extremis and the circumstances under which the statement was made, as related above, clearly warranted the inference that he did in fact fear impending death. The declaration was properly admitted.

6. The charge sheet shows that accused is 36 years of age. He was inducted into the military service on August 10, 1942.

7. Attached to the record of trial is a statement by the Federal Bureau of Investigation indicating that in 1931 accused was convicted by a civil court of Virginia of voluntary manslaughter and sentenced to confinement for five years; that in 1938 he was convicted in a Federal civil court in North Carolina of violation of the Dyer Motor Act and sentenced to confinement for five years in a penitentiary; and that later in 1938 he was convicted in a Federal civil court of Georgia of violation of the National Motor Vehicle Act and sentenced to confinement for five years. He was released from confinement on October 10, 1941.

8. In his action upon the record of trial the reviewing authority stated:

> "The evidence in this case demonstrates beyond all reasonable doubt that the accused, Private Wilbert J. Dockery, unlawfully killed Private Grandford Burrell with malice aforethought. The proof shows that the act of shooting was voluntary, willful and premeditated. The length of time elapsing from the moment when the argument over the dice game took place up to the time of the actual killing, and the careful planning and deliberate preparations made by the accused during that period, entirely negative any claim that the victim was killed in the heat of sudden passion caused by provocation.
>
> "The record of the Federal Bureau of Investigation discloses that the accused has hitherto been convicted and punished for crimes of violence. In my opinion, he fully comprehended the significance of his act of shooting and intended all the consequences".

9. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support

the findings of guilty and the sentence and to warrant confirmation thereof. The death penalty is authorized upon conviction of murder in violation of Article of War 92.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., JAN 13 1943 - 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 Wilbert J. Dockery (33221913), Company A, 8th Engineer Training Battalion, Engineer Replacement Training Center.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. Accused pursued and with a service rifle shot to death a fellow colored soldier as a sequel to an altercation arising out of a dice game. The two had exchanged some threats and deceased had thrown a stone at accused in an effort to escape the shooting. There was no substantial provocation and there was no legal justification or excuse. The killing was wanton and deliberate. Prior to his induction in the Army accused served prison terms following convictions by civil courts, one for manslaughter and two for violation of the Dyer National Motor Vehicle Act. I find no extenuating or mitigating circumstances and recommend that the sentence to death be confirmed and carried into execution.

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

Myron C. Cramer

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

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

(Sentence confirmed but in view of the short time elapsing between the quarrel and the shooting, is commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of the natural life of accused. G.C.M.O. 32, 12 Mar 1943)

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

SPJGN
CM 228573

JAN 18 1943

UNITED STATES v. Second Lieutenant ORLA C. SHURTLIFF (0-291191), Quartermaster Corps.	NORTHERN CALIFORNIA SECTOR WESTERN DEFENSE COMMAND Trial by G.C.M., convened at Fort Winfield Scott, California, November 21, 1942. Dismissal.

OPINION of the BOARD OF REVIEW
CRESSON, SNAPP 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 Charge and Specification:

CHARGE: Violation of the 96th Article of War.

Specification: In that 2nd Lieutenant Orla C. Surtliff, Quartermaster Corps, being in charge of certain property, not his own, by virtue of the verbal orders of the commanding officer, Presidio of San Francisco, California, stored in Warehouse #26, Presidio of San Francisco, California, did, on about July 7, 1942, wrongfully, and without authority, remove from said warehouse and apply to his own use and benefit the following articles of personal property of value about One hundred and thirty-nine dollars and twenty-five cents, ($139.25) to wit: One (1) Victor adding machine, Serial No. 0137208.
one (1) Royal typewriter Model KMM-14, Serial No. obliterated.
one (1) Sonora portable radio, Model KBU168.

He pleaded not guilty to and was found guilty of the Charge and Specification. He was sentenced to be dismissed from the service and to forfeit

all pay and allowances due and to become due. The reviewing authority approved only so much of the sentence as provided for dismissal from the service and forwarded the record of trial for action under the 48th Article of War.

3. On April 25, 1942, the accused was assigned to the position of assistant post quartermaster at Presidio of San Francisco, California. Part of the duties of the accused consisted in segregating, marking, listing, and shipping certain property belonging to members of the military personnel who had departed for foreign service. The accused was instructed by the post commander that company property was to be put aside and later sold, but that individual officers' property and the property of enlisted men was to be boxed for shipment to Kansas City. All property, the ownership of which could not be determined, was to be packed in boxes marked "unidentified property". The accused was fully informed as to his duties and instructed that all individually owned property was to be preserved even if it were only "an empty tin can". Furthermore, the accused was never given permission by the post commander to remove any of the property from the warehouse except for the purpose of shipping it as directed. This fact was admitted by the accused (R. 8-9, 30-36).

On June 25, 1942, an investigation was made of the property under the care of the accused. Thereafter, on July 30, 1942, a Royal typewriter and a brown portable radio were found in the room occupied by the accused. The accused was interrogated concerning these two articles and in addition an inquiry was made concerning an adding machine. After having been warned of his right to remain silent, the accused stated that he did not have the adding machine in his possession but that it was at his home at Ogden, Utah, where he had sent it in order that his son might learn something of its use. The accused explained, however, that he intended that it should be returned within a short time. The accused was then directed to send a telegram to his home requesting the return of the adding machine. This was done and on August 4 the adding machine was received from the post office. The package was addressed to the accused, and on it as a return address was the name of Mrs. Shurtliff and an address in Ogden, Utah. The carrying case for the adding machine was not with it but was found at the place in warehouse 26 indicated by the accused (R. 24-30).

Concerning the typewriter, the accused explained that he had removed it from warehouse 26 where he had been taking an inventory, and carried it to his room so that he might learn to typewrite. He also said that he had taken this particular typewriter because the serial number had been obliterated (R. 27).

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Concerning the radio, the accused stated that he had removed it from warehouse 26 to his room and he had expected to return it (R. 46).

The adding machine, the typewriter, and the radio were shown to have a value, respectively, of $50, $70, and $20, a total value of $140 (R. 39, 40, 41).

4. The testimony of the accused concerning his use of the three articles of property described in the Specification reaffirmed the statement which he had previously made concerning this property. The accused testified that before removing the typewriter to his room he had asked the noncommissioned officer in charge of the salvage warehouse if the typewriter was needed there. He further explained that since he expected to be appointed salvage officer he wished to learn to use a typewriter. There was no secrecy about his use of the typewriter and other officers saw it in his room (R. 42-47).

Concerning the adding machine, the accused explained that he had asked the noncommissioned salvage officer if he needed an adding machine and that when he had said that he did not need one, the accused had sent it to his son. The accused explained this action as follows:

> "I had been discussing with my son the possibility of his taking a commercial course in high school. And I just thought I would send this machine home to him as a surprise so that he could look at it and as a subtle suggestion of what I wanted him to do. I had in mind that he would have it two or three weeks and that as soon as I asked for it, he would return it or when school started. School didn't start quite as quickly as I anticipated it would" (R. 51).

Concerning the radio, the accused testified that he had taken it to his room from warehouse 921 but that he had expected to return it to the warehouse at the time the unidentified property was to be packed (R. 46-47).

The accused admitted that he had never been authorized to use the property in his charge for his own use (R. 48). The accused also stated,

> "Well, the thing of that is this. This property would be sold and disposed of by the Government. I figured that since I was on the ground floor and that the property was to be disposed of anyway, that I might just as well get the use out of it as anyone else. That is the way I reasoned"(R. 50).

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Sergeant Rockwell Fisher, testified for the defense that he has been the noncommissioned salvage officer in charge of the salvage warehouse at Presidio of San Francisco since May, 1941. During the latter part of June, 1942, the accused told Sergeant Fisher that he was expecting to be appointed salvage officer and he also asked Sergeant Fisher if he had need for an extra typewriter. Later the accused asked Sergeant Fisher if anyone had made an inquiry about certain property.

5. The Specification alleges that the accused, after having been placed in charge of certain property by the commanding officer, Presidio of San Francisco, California, did, on or about July 7, 1942, wrongfully remove from such property and apply to his own use one Victor adding machine, one Royal typewriter, and one Sonora portable radio, of the total value of $139.25. The offense thus alleged is not theft or embezzlement under the 93rd Article of War, or misappropriation of Government property in violation of the 94th Article of War, but the gravamen of the offense consists in the wrongful removal of property entrusted to his care and its application to his own use in disregard of the rights of the unidentified owner. Such an act is clearly a violation of the 96th Article of War.

The facts of the case are uncontroverted. Both the testimony of the accused as well as the testimony for the prosecution shows that the property in question was entrusted to the care of the accused by his commanding officer, and that thereafter on or about July 7, 1942, the accused wrongfully removed the property named in the Specification and applied it to his own use. Although there is confusion in the testimony as to the particular warehouse from which the property was taken, this factor is deemed immaterial to the findings of guilty. The total value of the property is shown to be $140. Every essential of the offense is clearly established.

6. The accused is 46 years of age. The records of the Office of The Adjutant General show that he was appointed a second lieutenant, Quartermaster Reserve, December 23, 1931; reappointed December 23, 1936, and ordered to active duty, February 1, 1942.

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

Chas L. Bresson, Judge Advocate.
Lorrain D. Snapp, Judge Advocate.
Abner E. Lipscomb, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 3 - 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 Orla C. Shurtliff (0-291191), Quartermaster Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence as approved by the reviewing authority and to warrant confirmation thereof. The action of the accused in removing an adding machine, a typewriter and a radio from a quantity of unidentified property which had been entrusted to his care, and of applying those articles to his own use shows him to be unworthy of confidence. I recommend, therefore, that the sentence of dismissal be confirmed and ordered executed.

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

Myron C. Cramer

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

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

(Sentence confirmed but execution suspended. G.C.M.O. 81, 7 Apr 1943)

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

SPJGK
CM 228585

JAN 2 8 1943

UNITED STATES v. First Lieutenant ROSS H. HOWARD (0-1010410), 40th Armored Regiment, 7th Armored Division.	7TH ARMORED DIVISION Trial by G. C. M., convened at North Camp Polk, Louisiana, November 16, 1942. Dismissal.

OPINION of the BOARD OF REVIEW
HOOVER, COPP and ANDREWS, 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 Ross H. Howard, 1st Lt., Hq. Co., 1st Bn., 40th Armored Regiment, 7th Armored Division, on or about October 7, 1942, at Flatwoods, Louisiana, conducted himself in a manner unbecoming to an officer and a gentleman, in that said Lt. Ross H. Howard, did direct certain abusive and profane language to wit: "You son-of-a-bitches can be a lot of trouble", or words to that effect, towards two members of the military police of the 28th Division, Sgt. Frank J. McKendrick and Private Louis J. Landrum, who were at the time properly engaged in the execution of their official duties.

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

Specification: In that Ross H. Howard, 1st Lt., Hq. Co., 1st Bn., 40th Armored Regiment, 7th Armored Division, was drunk at Flatwoods, Louisiana, on or about October 7, 1942.

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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. He recommended clemency as hereinafter appears.

3. The evidence shows that on the evening of October 7, 1942, Private Louis J. Landrum, Jr., 28th Military Police Platoon, 28th Division, approached some Government vehicles which were in front of a store in Flatwoods, Louisiana, to ascertain why they were parked in that area. Accused was standing at the rear of a Government car "arguing" with Second Lieutenant Floyd C. Smith, 40th Armored Regiment. (R. 11) Landrum, who did not recognize accused to be an officer, said, "What's the trouble fellow?". Landrum testified that when accused turned around he was "very unsteady on his feet", he was unable to stand erect, "his voice was very loud" and his breath smelled of alcohol. (R. 11) In Landrum's opinion accused was drunk and because of this fact Landrum called Sergeant Frank J. McKendrick, 28th Military Police Platoon, who was in charge of the military police detail (R. 12). After McKendrick had made notes for a report on the parking of the vehicle accused entered the car to drive away. McKendrick twice asked accused to allow the assigned driver, a noncommissioned officer, to drive the vehicle, and accused replied that he would drive. Thereupon McKendrick left the scene to notify his superior. (R. 12, 13) When McKendrick had reached a point 25 to 40 yards away accused said, "You sons-of-bitches can be a lot of trouble" (R. 14, 23-24). Landrum testified that he did not know whether accused was talking to McKendrick or to witness but "presumed he was talking to the M.Ps" (R. 25). When the words were spoken accused was on the right side and Landrum was on the left side of the vehicle (R. 15).

McKendrick testified that when he talked to accused the latter spoke "very unclearly" and did not seem to be in control of his faculties (R. 16). He was "in fairly bad condition" (R. 18), and, in witness' opinion, drunk (R. 17).

Having been informed of the difficulty, Lieutenant Colonel George C. Ackley, Infantry, Provost Marshal of the IV Corps, went to Flatwoods and saw accused sitting behind the wheel of the car. Accused was dozing, had his arms on the wheel and his head on his arms. Witness addressed accused and asked him what was the matter. Receiving no reply, he asked accused to "dismount" and stand at attention. Accused "dismounted" with difficulty and attempted to stand at attention but in

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order to stand was forced to brace himself by putting his hands on the rear fender of the car. Upon Lieutenant Colonel Ackley's request, accused furnished his name, organization and serial number. When asked where he obtained liquor, accused stated that he had "just been drinking beer". Lieutenant Colonel Ackley asked him why he did not allow the noncommissioned officer accompanying him to drive the car when the military police had requested him to do so, and accused replied that he wanted to drive himself. Witness ordered accused to get into the car, and informed him that he was in arrest. He turned him over to the custody of his companion, Lieutenant Smith. (R. 20) Lieutenant Colonel Ackley testified that in his opinion accused was drunk (R. 21, 23), that his speech was slow but coherent, that in responding to questions he "had to take time to think", and that he was not in apparent full possession of all his mental and physical faculties (R. 21). Accused used no abusive language and answered all questions in a courteous and willing manner (R. 23).

Major Walter G. Gleye, 40th Armored Regiment, testified for the defense that he met accused on the evening in question at a road junction and that the two then visited a new cantonment, returned to the junction, made up a convoy of four vehicles and proceeded toward the 40th Armored Regiment bivouac (R. 26). Witness did not see accused again that evening for before reaching Flatwoods witness noticed that accused's car had dropped out of the convoy (R. 26, 27). In witness' opinion accused was "all right, there was nothing wrong with him" (R. 26).

Lieutenant Smith testified that on the evening in question he and accused each drank one bottle of beer at the officers' club, and later met at the road junction. Witness noticed nothing unusual about accused's appearance or condition (R. 28). Later, while witness was on the road with accused some friends drove up in a car and accused went back to the vehicle, took a drink from a bottle which was passed around, and returned immediately to his own vehicle (R. 33, 34, 36). The two drove to a town called Simpson where they drank "cokes" but no alcoholic beverages and then proceeded to Flatwoods in order to ascertain the location of the regimental bivouac (R. 29, 34). There one of the military police, after some conversation, told accused that he could not drive the car, that he did not have "good control of himself" and was not in condition to drive (R. 30, 35). To witness, the attitude of the military policeman "was belligerent in telling an officer what to do in a way I didn't think he had a right to do" (R. 30, 35). When Lieutenant Colonel Ackley arrived, accused who had been "on the wheel",

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got out of the vehicle and willingly answered all questions in a courteous, respectful manner (R. 31). At no time did witness hear accused use any abusive language toward the military police (R. 30, 32, 33). The testimony of Lieutenant Smith was corroborated, in substance, by that of Staff Sergeant Anteo Nardini, Headquarters Company, 1st Battalion, 40th Armored Regiment, assigned driver of accused's vehicle. Nardini testified for the defense that accused appeared to be in control of his faculties at all times (R. 38) and was not drunk, although his breath smelled "a little of liquor" (R. 46). Witness believed the attitude of McKendrick in talking to accused was "disrespectful and overbearing" (R. 41). Witness did not hear accused use any abusive language toward the military police (R. 41, 44). When Lieutenant Colonel Ackley arrived accused had no apparent difficulty in standing at attention, and witness did not see him holding the car for support (R. 45, 46).

The regimental commander of accused, Colonel Richard B. Wheeler, 40th Armored Regiment, testified that during the two months accused had been under his command, his habits, ability and character as an officer had been "good", and that "up until this affair I considered him beyond the average of the company commanders of his grade at the present time" (R. 10). Major Gleye, accused's battalion commander, testified that accused was a "very excellent officer" and that he had assumed command of a company which was in "terrible shape" and had made it "one of the best" (R. 26).

Accused testified that he had one bottle of beer with Lieutenant Smith at the officers' club, had two bottles after Lieutenant Smith's departure, and took one drink from a fourth bottle (R. 48, 50). When he met some friends in a civilian car he took "a very small drink, infinitesimal" (R. 49) of whiskey from a bottle (R. 48, 51). He had nothing to drink before going to the officers' club and drank nothing after leaving the club until he met his friends (R. 50). He drank no alcoholic beverage that evening after leaving the road junction (R. 49). When accused was informed by a military policeman at Flatwoods that he had to move as they were "clearing the area" (R. 50), the military policeman failed to salute and was "far from courteous" (R. 49). When accused entered the car the military policeman said, in effect, "'You can't drive that peep'". His manner was "the kind that would get the back of your hair up, if he had asked me courteously I would have been willing to let Sergeant Nardini drive" (R. 50). Accused wished at that time to drive because he was more familiar with the surrounding

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country (R. 52). When McKendrick went in search of Lieutenant Colonel Ackley accused muttered under his breath, "You sons-of-bitches can be a lot of trouble" (R. 52). He did not direct the words to Landrum or to anyone else. Although irritated by what had occurred, he did not intend that anyone should hear what he said and referred to no one in particular (R. 52, 53). When Lieutenant Colonel Ackley arrived accused was in the car "drowsing" but not asleep. He got out of the car upon the other officer's request, had no difficulty in standing and did not lean on the vehicle. (R. 51)

4. There is testimony by an officer and two enlisted men that at the place and time alleged in the Specification, Charge II, the appearance and demeanor of accused were such as to suggest drunkenness and that each of the witnesses was convinced that he was drunk. He had difficulty in standing, his speech was not clear, his breath bore the odor of alcohol and he fell asleep while sitting in his car waiting for the provost marshal. Prior drinking to some extent was proved. There was testimony by defense witnesses to the effect that the appearance and acts of accused did not, to them, evidence drunkenness. Upon all the testimony the Board of Review is convinced beyond reasonable doubt that accused was drunk in the sense that his mental and physical faculties were sensibly impaired. His drunkenness was not of extreme degree. Violation of Article of War 96 is established.

It is undisputed that at the time and place alleged in the Specification, Charge I, following the discovery by the military police of his condition, accused uttered the remark set forth in this Specification. The remark was abusive and profane in nature, as alleged. Accused testified that although he used the language described he did not direct the remark to any person in particular and did not intend that anyone should hear it. It was proved, however, that he uttered the remark audibly and its context, together with the circumstances under which it was uttered, leaves no reasonable doubt that it was intended for the military policemen as Landrum took it to be. The circumstance that McKendrick was leaving the scene and did not hear the remark does not alter the fact that the remark was addressed to him as well as to Landrum. The use of the offensive language was unseemly and prejudicial to good order and military discipline within the meaning of Article of War 96. It can hardly be said, however, that the utterance so far transgressed military canons of fairness and decency as to demonstrate that accused is morally unfit to continue as an officer. This being so, the evidence is legally sufficient to support only so much of the finding

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of guilty of Charge I as involves violation of Article of War 96.

5. Following arraignment accused made a motion in the nature of an objection to trial upon the Specification, Charge I, on the ground the allegation of the remark set forth in the Specification "is indefinite and not clear enough to put the defendant aware of the exact words he is charged to have uttered" (R. 8). The court rightly overruled the motion. The Specification adequately and specifically apprised accused of the words alleged to have been uttered.

6. Attached to the record of trial is a recommendation signed by all members of the court that the "sentence be suspended", this upon the grounds that the regimental and battalion commanders testified that accused "is of great value to the service", that the members of the court believed that the "service will benefit by the retention" of accused, that accused in a "frank and truthful manner *** acknowledges his error in taking a drink and using language unbecoming an officer", and that the members of the court believed that "accused will be a better officer for the lesson he has learned". The reviewing authority concurred in this recommendation and also recommended that "clemency be extended by commutation to a sentence of less serious import".

7. War Department records show that accused is 24 years of age. He graduated from Texas Agricultural and Mechanical College. He was inducted April 15, 1941, and served as an enlisted man until May 23, 1942, when, after completion of a course at the Armored Force Officer Candidate School, he was commissioned a second lieutenant, Army of the United States. He was promoted to first lieutenant August 17, 1942.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support 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 thereof. Dismissal is authorized upon conviction of violation of Article of War 96.

_____, Judge Advocate.

_____, Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

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1st Ind.

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

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant Ross H. Howard (0-1010410), 40th Armored Regiment, 7th Armored Division.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty of Charge I and its Specification 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 thereof. Accused was found drunk while sitting in a Government car parked on a highway at Flatwoods, Louisiana (Spec., Chg. II). Having been forbidden to drive the car he directed abusive and profane language toward members of the military police (Spec., Chg. I). He was sentenced to dismissal. All members of the court recommended that the sentence be suspended. The reviewing authority concurred in this recommendation and also recommended "that clemency be extended by commutation to a sentence of less serious import". I recommend that only so much of the findings of guilty of Charge I and its Specification be approved as involves findings of guilty of the Specification in violation of Article of War 96 and, in view of all the circumstances and the recommendations for clemency, recommend that the sentence be confirmed but commuted to a reprimand to be administered by the reviewing authority and that the sentence as thus modified be carried into execution.

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

Myron C. Cramer

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

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

(Only so much of findings of guilty of Charge I and its Specification is approved as involves findings of guilty of the Specification in violation of Article of War 96. Sentence confirmed but commuted to reprimand. G.C.M.O. 55, 25 Mar 1943)

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

SPJGN
CM 228619

U N I T E D S T A T E S	)	2ND ARMORED DIVISION
v.	)	Trial by G.C.M., convened at Fort Bragg, North Carolina, December 4, 1942. Dishonorable discharge, forfeiture of all pay and allowances due and to become due, and to be shot to death with musketry.
Private CLARENCE L. HAMMOCK (14045313), Company B, 67th Armored Regiment.	)	

OPINION by the BOARD OF REVIEW
CRESSON, SNAPP and LIPSCOMB, Judge Advocates

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Clarence L. Hammock, (then Technician Fifth Grade) Company "B", 67th Armored Regiment, having knowledge of the fact that as a member of the 2nd Landing Team which was then embarking for combat duty on foreign soil, he was due to depart for foreign service, on short notice, did at Norfolk, Virginia, on or about October 23, 1942, with intent to avoid hazardous duty, to wit, combat duty, desert the service of the United States, and did remain absent in desertion until he surrendered himself at Fort Benning, Georgia, on or about November 11, 1942.

The accused pleaded not guilty to and was found guilty of the Charge and the Specification thereunder. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due and to become due and to be shot to death with musketry. The reviewing authority approved the sentence, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that on October 23, 1942, the accused, as a member of Landing Team No. 2 of the 67th Armored Regiment was aboard a ship at Norfolk, Virginia, awaiting an expected departure. Although the mission of Landing Team No. 2 was a secret, a part of the organization including the accused, had been engaged for several days prior to October 23 in water-proofing military equipment and loading it on shipboard. During this loading process the accused had been eating and sleeping aboard the ship to which he was assigned, and was present on shipboard at about 12 noon on October 23, 1942 (R. 9-17).

At about 1 p.m. on October 23, all of the soldiers on board the ship to which the accused was assigned were ordered off the ship for a final roll call preceding a re-embarkation in accordance with the passenger list. When the roll was called the accused was absent. A search was made of the ship and the surrounding area, but the accused was not found, and he was not aboard the ship when it sailed on the following morning. The facts were stipulated that the accused had never been relieved from his duties or from the passenger list of his organization (R. 9-17, 17-23). Evidence was also presented that Landing Team No. 2 was designed to engage in combat duty (R. 7).

The officer who investigated this case testified that the accused, after having been warned of his rights under the 24th Article of War, had admitted that he had absented himself without leave from his organization at the Port of Embarkation. The accused had asserted, however, that he had not intended to desert. The accused explained that he had gotten drunk with some civilians, and that when he had returned to the place where the ship had been he found that the ship had gone. The accused also explained that he had unsuccessfully tried to locate the ship so that he might be carried out to it in a tug. After the accused realized that the ship was gone he traveled to Fort Benning, Georgia, and "* * * turned in there on the date alleged in the Specification of the Charge". The accused also stated that he had not gone to Fort Bragg where his regiment had been in training because he was not certain that his regiment was there, and that he had thought that, if he went to Fort Benning he would be sent to his regiment (R. 24-25).

4. The accused elected to remain silent and no evidence for the defense was presented.

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5. The Specification alleges in substance that the accused knew that he was due to depart on short notice for hazardous duty and that he absented himself without leave from his organization with the specific intent of avoiding such duty. In order, therefore, to sustain the findings of guilty the evidence must establish the facts alleged. The evidence clearly shows that for several days prior to October 23, a part of Landing Team No. 2 had been engaged in water-proofing military equipment and loading it on shipboard. The accused had taken part in this loading process, and together with other members of Landing Team No. 2 had been sleeping and eating upon the ship to which they had been assigned. In fact, the accused was on the ship one hour before the final roll call of the passenger list. Although the destination of the organization and the hour fixed for the ship's departure had not been revealed to the accused, he must necessarily have known that the organization was preparing to depart within a short time for some type of hazardous duty. The act of the accused, therefore, in absenting himself without leave under such circumstances clearly justified the inference that his purpose was to avoid such hazardous service. The subsequent facts show that the ship actually sailed within about 18 hours after the departure of the accused and that the mission of Landing Team No. 2 was hazardous. The findings of guilty are, therefore, clearly supported by the evidence.

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

Chas. L. Busson, Judge Advocate.

Lorrane D. Snapp, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

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1st Ind.

War Department, J.A.G.O., FEB 23 1943 - 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 Clarence L. Hammock (14045313), Company B, 67th Armored Regiment.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. The accused was properly found guilty of desertion by leaving his organization when it was preparing to embark for overseas service. He was sentenced to be shot to death with musketry. Although such a desertion is a serious offense, I am of the opinion that military necessity at the present time does not require the execution of the death penalty. I recommend, therefore, that the sentence be confirmed but commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for twenty years. I also recommend that the dishonorable discharge be suspended and that a detention and rehabilitation center be designated as the place of confinement.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the foregoing recommendations.

E. C. McNeil,
Brigadier General, U. S. Army,
Acting The Judge Advocate General.

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

(Sentence confirmed but commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for five years. Execution of that portion thereof adjudging dishonorable discharge suspended until soldier's release from confinement. G.C.M.O. 72, 2 Apr 1943)

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

SPJGN
CM 228657

FEB 12 1943

UNITED STATES	)	90TH MOTORIZED DIVISION
v.	)	Trial by G.C.M., convened at Camp Barkeley, Texas, November 20, 1942. Dishonorable discharge and confinement for twenty (20) years. Disciplinary Barracks.
Private CLAY R. HELTON (6831159), Company D, 359th Infantry.	)	

REVIEW by the BOARD OF REVIEW
CRESSON, SNAPP 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. The accused was tried upon the following Charges and Specifications:

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

Specification 1: In that Private Clay R. Helton, Company "D", 359th Infantry, did, at Camp Barkeley, Texas, on or about 0730, July 5, 1942 desert the services of the United States and did remain in desertion until he surrendered himself at U.S. Army Recreation Area, Forest Park, St. Louis, Missouri, on or about July 25, 1942.

Specification 2: In that Private Clay R. Helton, Company "D" 359th Infantry, did at Jefferson Barracks, Missouri, on or about August 12, 1942 desert the services of the United States and did remain absent in desertion until he was apprehended at Chicago, Illinois, on or about August 14, 1942.

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

Specification: In that Private Clay R. Helton, Company "D", 359th Infantry, having been restricted to the limits

of Jefferson Barracks, Missouri, did, at Jefferson Barracks, Missouri, on or about August 12, 1942, break said restriction by going absent without leave.

CHARGE I: (Additional) Violation of the 58th Article of War.

Specification 1: In that Pvt. Clay R. Helton did, at Camp Barkeley, Texas, on or about September 26, 1942, desert the service of the United States and did remain absent in desertion until he was apprehended at the home of Dave Helton, 2½ miles southwest of Drazito, Missouri, on or about October 16, 1942.

CHARGE II: (Additional) Violation of the 69th Article of War.

Specification 1: In that Pvt. Clay R. Helton, having been duly placed in confinement in stockade at Camp Barkeley, Texas, on or about August 24, 1942, did, at Camp Barkeley, Texas, on or about September 26, 1942, escape from said confinement before he was set at liberty by proper authority.

He pleaded guilty to Additional Charge II and its Specification thereunder, and not guilty to Charges I and II and Additional Charge I and all Specifications thereunder. He was found not guilty of Charge I and Specifications 1 and 2 thereof, but, as to each of said Specifications and of said Charge, guilty of absence without leave in violation of the 61st Article of War, and guilty of all other Charges and Specifications. All of the members of the court concurring he was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for twenty 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 for action under Article of War 50½.

3. With reference to Specifications 1 and 2 of Charge I there was received in evidence a duly authenticated extract copy of the morning report of Company D, 359th Infantry, Camp Barkeley, Texas, for the month of July 1942, from which it appears that there accused absented himself without leave from his organization and station on or about July 5, 1942 (R. 7; Ex. A- p. 1). The company commander of the accused testified that accused was missing on July 5, 1942, that a search failed to disclose his whereabouts and that he did not return until late in August (R. 12). Over objection there was

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received in evidence a written statement to the effect that accused surrendered on July 25, 1942, at the U. S. Army Recreational Area, Forest Park, St. Louis, Missouri, to Military Police, dressed in uniform, and was returned to Military control at Jefferson Barracks, Missouri. This statement, purporting to be made and signed by Martin Swire, Staff Sergeant Military Police, was received in the mail by Captain Albert G. Carrick, commanding officer of Company D, 359th Infantry (R. 21; Ex. E).

There was further received in evidence, a duly authenticated extract copy of the morning reports of Detachment of Casual Prisoners, Jefferson Barracks, Missouri, for the months of July and August, 1942, from which it appears that the accused was confined on July 26, 1942, was released from confinement on August 4, 1942, and placed in arrest, and was absent without leave on August 12, 1942 (R 17; Ex. B).

There was further received in evidence, a duly authenticated extract copy of the morning report of Detachment of Prisoners, Fort Sheridan, Illinois, for the month of August, 1942, from which it appears that the accused was confined on August 15, 1942, and was transferred on August 22, 1942, under armed guard to proper station.

There was also received in evidence, a duly authenticated extract copy of the morning report of Company D, 359th Infantry, Camp Barkeley, Texas, for the month of August, 1942, from which it appears that the accused was confined in the Camp Barkeley Stockade on August 24, 1942 (Ex. A-p. 1).

Major David P. Faulkner, investigating officer, testified that, after being duly warned and informed as to his rights, the accused made a statement to the effect that he left Camp Barkeley with the purpose of seeing his two small children in Chicago. He went directly there and after some difficulty was permitted to look at the children through a window. He then went to St. Louis and turned in at the Army Recreation Center and was placed in the guardhouse at Jefferson Barracks. Later he was placed in an "arrest in post" status, which he breached and returned to St. Louis, where he obtained civilian clothes and returned to Chicago in another attempt to see his children. This resulted in his arrest there by military police (R. 28-30).

With reference to the Specification, Charge II, the proof of the commission of the offense charged is contained in the evidence hereinbefore set forth.

With reference to Additional Charges I and II and the Specifications

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thereunder there was received in evidence, a duly authenticated extract copy of the morning report of Company D, 359th Infantry, Camp Barkeley, Texas, for the month of October, 1942, from which it appears that the accused escaped from confinement to absence without leave on September 26, 1942 (R. 10; Ex. A-p. 2). Over the objection of defense there was received in evidence a report, identified by First Sergeant Wayne M. Klipping, Company D, 359th Infantry, Camp Barkeley, Texas, as having been received at the orderly room (R. 23; Ex. F). This report purports to be a military police report sent from Headquarters Post Military Police, Fort Leonard Wood, Missouri, on October 17, 1942, and addressed, through channels, to the commanding officer, Company D, 359th Infantry, 9th Division, Camp Barkeley, Texas. It bears the official receipt stamp of Post Headquarters, Fort Leonard Wood, indicating that it was received in that office on October 17, 1942.

It states in substance, that accused was arrested by State Police, 2½ miles southwest of Brazito, Missouri, on October 16, 1942, at the home of Dave Helton, a relative, and was turned over by the sherriff to military police at Fort Leonard Wood. At the time of his arrest he was in civilian clothes and was employed by the Western Construction Company.

There was further received in evidence, a duly authenticated extract copy of the morning report of Company D, 359th Infantry, for the month of October, 1942, from which it appears that the accused was confined in the Camp Barkeley Stockade on October 30, 1942 (R. 11; Ex. A-p. 2).

Major David P. Faulkner, investigating officer, testified, with reference to his investigation of the two Additional Charges, that after accused had been duly warned and informed as to his rights, he stated that at the time he escaped from the Stockade at Camp Barkeley on September 26 he had no intention of deserting. His purpose was to go to Chicago and see his family. He went to his great uncle's house near Brazito, Missouri, and worked for a construction company (R. 30-33).

4. After having his rights explained to him the accused elected to remain silent.

5. As to Specifications 1 and 2 of Charge I, the competent evidence is legally sufficient to sustain the findings of guilty of absence without leave from July 5, 1942, to July 25, 1942, and from August 12, 1942, to August 14, 1942, and such evidence is sufficient, also, to sustain the findings of guilty of Charge II and the Specification thereunder. As to Additional Charge I and the Specification thereunder the evidence of the escape from confinement, apprehension at a great distance from his station, and his employment in a civilian occupation for his own profit, fully justified the inference that the accused intended to desert the service of the United States, and is legally sufficient to

to sustain the findings of guilty as to such Charge and Specification. It is unnecessary to consider the question as to the competency of the two military police reports (Ex. E and F) for the reason that the competent evidence, other than such reports, is compelling, and their admission could not, therefore, have injuriously affected the substantial rights of the accused.

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 of guilty and the sentence.

Bhasil Bressoni, Judge Advocate.

Dorrance D. Snapp, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

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

SPJGH
CM 228717

FEB 5 1943

U N I T E D S T A T E S	)	81st INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Camp Rucker, Alabama, November 30, and December 1, 1942. Dismissal.
	)	
First Lieutenant JOHN J. O'MALLEY (0-303373), Medical Corps.	)	

OPINION of the BOARD OF REVIEW
HILL, LYON and SARGENT, Judge Advocates

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

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

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

Specification 1: In that 1st Lt John J. O'Malley, M.C., 306th Med Bn, did, without proper leave, absent himself from his organization and station at Camp Rucker, Ala from about 1915 November 2, 1942 to about 0200 November 3, 1942.

Specification 2: In that 1st Lt John J. O'Malley, M.C., 306th Med Bn, did, without proper leave, absent himself from his properly appointed place of duty at Camp Rucker, Alabama, from about 0900 November 3, 1942 to about 1530 November 3, 1942.

Specification 3: In that 1st Lt John J. O'Malley, M.C., 306th Medical Bn, did, without proper authority, absent himself from his organization and duties

at Camp Rucker, Alabama, from about 1500 November 4, 1942 to about 1735 November 4, 1942.

Specification 4: In that 1st Lt John J. O'Malley, M.C. 306th Med Bn, did, without proper authority, absent himself from his organization and duties at Camp Rucker, Alabama, from about 0830 November 5, 1942 to about 1000 November 5, 1942.

Specification 5: In that 1st Lt John J. O'Malley, M.C., 306th Med Bn, did, without proper authority, absent himself from his organization and duties at Camp Rucker, Alabama, from about 1245 November 5, 1942 to about 1700 November 5, 1942.

Specification 6: In that 1st Lt John J. O'Malley, M.C., 306th Med Bn, being on duty as Company Officer of the Day, did, at Camp Rucker, Alabama, on or about November 6, 1942 fail to repair at the fixed time to the properly appointed place of assembly for reveille.

Specification 7: In that 1st Lt John J. O'Malley, M.C., 306th Med Bn, did, without proper authority, absent himself from his organization and duties at Camp Rucker, Alabama, from about 0900 November 6, 1942 to about 1030 November 6, 1942.

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

Specification: In that 1st Lt John J. O'Malley, M.C., 306th Medical Bn, was, at Camp Rucker, Alabama, on or about October 24, 1942, in a public place, to-wit: 81st Infantry Division Central Officers Mess, drunk and disorderly while in uniform.

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

Specification 1: In that 1st Lt John J. O'Malley, M.C., 306th Med Bn, did, at Dothan, Alabama, on or about November 2, 1942, unlawfully and without proper authority use a government vehicle, to-wit: Command and Reconnaissance Car, USA No. 66565, for his private use and benefit from about 1600 to 1900.

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Specification 2: In that 1st Lt John J. O'Malley, M.C., 306th Med Bn, did, at Ozark, Alabama, on or about November 2, 1942, unlawfully and without proper authority, fail to return a government motor vehicle and driver thereof to proper station at Camp Rucker, Alabama, upon completion of his proper and lawful use thereof, but did, instead, use the same for his own private and unauthorized purpose from about 2030 November 2, 1942 to about 0100 November 3, 1942.

Specification 3: In that 1st Lt John J. O'Malley, M.C., 306th Med Bn, did, on or about November 2, 1942, offer, furnish and supply to Pvt Edward L. Hall, Headquarters Detachment, 306th Med Bn, intoxicating liquor while the said Pvt Hall was on duty as driver of a government motor vehicle, to-wit: Command and Reconnaissance Car, USA No. 66565, and was required as the driver thereof to operate the same on the public roads and highways.

Specification 4: (Finding of Not Guilty).

Specification 5: (Finding of Not Guilty).

He pleaded not guilty to all Charges and Specifications. He was found of Specifications 1 to 7, inclusive, Charge I, and of Charge I, guilty; "Of the Specification of Charge II, Guilty of all except that part reading 'drunk and disorderly', which will be changed to read 'drunk', and of Charge II, Guilty of the 96th Article of War instead of the 95th Article of War"; of Specifications 1 to 3, inclusive, Charge III, and of Charge III, guilty; and of Specifications 4 and 5, Charge III, not guilty. 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, upon the Specifications of which the accused was found guilty, is substantially as follows:

The accused, on November 2, 1942, a junior officer of Company A, 306th Medical Battalion, and in addition to his other duties, a member of a line of duty board, was authorized in connection with his duties on that board, to take an Army vehicle and go to Dothan, Alabama, to interview witnesses. The accused and his driver, Private Edward L. Hall, left the Battalion Headquarters at about 9:30 a.m.,

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November 2, 1942, went to the hospital for about an hour, stopped at the officers' quarters, and went to Dothan, making a detour by way of Ozark. They had dinner at the B-Line Cafe in Dothan at 12:30 p.m. When the accused came out of the toilet of the cafe he told Private Hall that he saw a bottle in there and that Hall could help himself if he cared for a drink. Private Hall took a drink, and then brought the nearly full 4/5th bottle of Scotch out with him and put it in the car. The bottle remained in the car all day. Private Hall had two small drinks during the entire day. The accused left the B-Line Cafe about 1:30 p.m. He went to the City Cafe in Dothan, and then to the City Hall to interview witnesses. The accused left the City Hall about 4 p.m., went to Headland, nine miles east of Dothan, where he made a call upon a woman for about an hour, and left about 5 p.m. The accused then went to the Cat-O-Log tourist camp three miles north of Dothan for food, went back to Dothan, and reached Ozark at about 8:30 p.m., where he and his driver had some food in a cafe, left the cafe with a waitress about 9 p.m., went to a show, and returned to the car about 12:45 a.m. The accused and his driver returned to Camp Rucker about 1:30 a.m., Tuesday morning. The trip ticket on the vehicle showed a mileage of 125 miles since 9:45 a.m., Monday (R. 4-5, 7, 14-18; Ex. B).

Captain Guy G. Shaw, Jr., in command of Company A, saw the accused at about 9 a.m., November 2, when accused stated he was making the trip to Dothan. Captain Shaw could not find accused that afternoon. The accused was not present to conduct his regular scheduled class in the officers' school at 7:30 p.m., November 2nd. After the class hour, at about 9 p.m., when Captain Robert D. Burley, in command of the battalion, ascertained that neither the accused nor the car had returned, he directed Captain Shaw and the adjutant, Lieutenant Goode Price, to go in a car to Dothan to search for accused, and he himself went in his own car for the same purpose. They searched with the aid of a patrol of military police but were unable to find accused or the car and returned to the post at about 1 a.m. The accused had not returned to his quarters, nor had his car returned to the motor pool at about 1:35 a.m. The car trip ticket showed its "time in" as 1:30 a.m. (R. 5, 8, 10, 12, 16).

When Captain Burley called accused to his office on Tuesday morning, November 3, and inquired why he had not come back at a reasonable time, the accused stated that he had been unable to contact one witness until late Monday afternoon and that after he had seen the witness he drove to Ozark and went to the last show, returning to his quarters at 2 a.m. The battalion commander, Captain Burley, "reprimanded" the accused and told him that he wanted accused to complete this investigation as soon as possible. When the accused reported to Captain Shaw at

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8:30 a.m., Tuesday, he was not dressed for the field and stated that he had some work to do on the board. Captain Shaw told accused that he was coming back to the post from the field that afternoon and would pick the accused up then. When Captain Shaw came back to the post at about 1:30 p.m., the accused was not around the company orderly room. Captain Shaw found accused sleeping in barracks at about 2:30 p.m., woke him, found him in a hazy and cloudy condition, and directed him to be ready to leave in an ambulance at about 3 p.m. for duty with the company in the field. The ambulance driver was unable to find him. The accused did not go to his company which remained in the field over night (R. 5, 10-11).

Captain Shaw returned with the company from the field at about 7:30 a.m., Wednesday, November 4th, and at about 9 a.m. saw accused working on the board report. At about 9:30 a.m. accused went in a car to the hospital to see the man whose line of duty status was being investigated. The accused did not return that morning. At 1 p.m. Captain Shaw was unable to find accused. At 3 p.m. a member of the board stated to Captain Shaw that the members of the board had returned from the hospital a short time before. At 4:45 p.m. Captain Shaw looked in the room of accused, found him sleeping, woke him, and told him to hurry and get dressed for retreat. The accused was not present at retreat and was not seen again that day by Captain Shaw. Because of the absence of accused from retreat, Captain Burley went to the room of accused at about 5:40 p.m., found him working on the report of the board, and under the influence of alcohol. Captain Burley determined that accused probably would not be able to finish the board investigation, told him that he was relieved from the board, and that he was to be on duty with his company the following morning "full time", except for his scheduled teaching with the training company of about one or two hours a day (R. 6, 8, 10, 13).

Lieutenant Price testified that the accused handed the report of the board to him on Tuesday or Wednesday; that he handed the report back to the accused, told accused to work on the report; probably told him to drop everything else that he had to do and get the report in, meaning that accused was to drop his company duties for that day and complete the findings of the board, but not to miss formations (R. 13-14).

On Thursday, November 5, Captain Shaw was unable to find accused at 8:30 a.m. at the company or with the training company. When Captain Shaw reported at about 9:30 a.m. to Captain Burley that accused had not been present for duty with the company that morning, Captain Burley, at

about 10 a.m., sent Lieutenant Price for the accused. Lieutenant Price found accused in his quarters on his bunk with his clothing on. At about 10:15 a.m. Captain Burley in his office again told accused exactly what he expected of accused as far as duty was concerned, that accused was to be with his company except for the classes with the training company. At that time accused, in the opinion of Captain Burley, had a "hangover", was logy, had difficulty in expressing himself, and was slow in understanding what Captain Burley expected of him. The accused was not present with his company until retreat at about 5 p.m. He had not been given any duties by his company commander which would keep him away from the company. It was customary to prepare after duty hours material for classes which they were instructing (R. 6, 8-9, 10-11, 13).

The accused, as Company Officer of the Day from 8 a.m., Thursday, November 5, to 8 a.m., Friday, November 6, was required to stand reveille at 6:30 a.m., November 6, but was not present. The accused secured an ambulance to meet a troop train in Ozark at 8 or 8:30 a.m. on that day. He did not thereafter return to duty with the company. Captain Shaw found him asleep in quarters at about 9:30 a.m., and woke him up. The accused was "hazy" and apparently under the influence of liquor. Captain Shaw reported the facts to Captain Burley. The accused was again asleep at 10:30 a.m., when Captain Shaw returned with an ambulance to take accused to the hospital (R. 11-12, 18-19).

On the evening of October 24, 1942, the accused, in uniform, entered the Division Officers' Mess, came to the table of, and leaned on the shoulder of Lieutenant Brugh, moved away, then stumbled and fell over on another table, spilled the drinks on that table, and knocked several glasses off. In a few minutes accused left in company of two officers, one of whom was holding the right elbow of accused. The speech of accused was not intelligible, and his voice sounded as though he could not control his vocal cords. In the opinion of Lieutenant Brugh, the accused was drunk (R. 19-20).

4. The pertinent evidence for the defense upon the Specifications of which accused was found guilty is substantially as follows:

The accused made an unsworn statement, in substance, that in investigating the accident there were three witnesses whom he was supposed to see, (1) the manager of the cafe, (2) a police officer, and (3) a woman, Jane Willard, who was present at the scene of the accident. The woman was not in when he called, and he understood she would not be available until after working hours. He came back, ate, and returned to Dothan at 7 p.m. His reason for being in Dothan was to see her, but

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her testimony does not show in the line of duty investigation because he was unable to find her. He had arrived in Dothan at 8:30 a.m. and was there all that time. Accused was up at 6 a.m., Friday morning (Nov. 6). His failure to "make reveille" that morning was an oversight because he was up early enough to do it (R. 28).

First Lieutenant John T. Mason, Medical Corps, 306th Medical Battalion, was president of the line of duty board of which accused was a member. The proceedings were turned in by accused on Wednesday, November 4, and later were returned. He made a trip with accused to the hospital at about 2 p.m., Wednesday, and returned from the hospital to the motor school at about 3 p.m. There were no further meetings of the board that afternoon, but the accused was to compile the investigation for a meeting which was held from 1:30 to about 3:30 p.m., Thursday. There was no meeting of the board on Friday. On Wednesday a Lieutenant Goldfield was appointed a member in place of accused. The board did not have the testimony of a Mrs. Ethel Tillman as evidence in the board proceedings. The witness whom accused saw in Dothan was Police Officer G. R. Cherry (R. 23-24).

It was stipulated that Sergeant Madison E. Clemmer, if present, would identify a trip ticket on transportation issued to accused on Friday morning, November 6, which reads out at 7:45 at motor pool to Ozark depot, and in at the motor pool at 9:05, a distance of 27 miles, and that the accused was a passenger in the car (R. 24-25).

First Lieutenant Albert F. Whitman, M.A.C., occupied a room adjoining the room of accused. At about 5 p.m., Wednesday, November 4, accused was working in Whitman's room on the proceedings of a line of duty board. Whitman was going over the papers at the request of accused when Captain Burley came in and asked why accused was not at retreat. After accused replied that Lieutenant Price told him to hurry up and get this report out, Captain Burley relieved accused from the board. The accused gave no appearance at that time of having been drinking, and seemed sober. On the morning of November 6, the accused was up at 6 a.m., and was dressed at 6:30 when he told Lieutenant Whitman that he was going to meet a train. In the opinion of Lieutenant Whitman the accused was perfectly sober at that time (R. 25-26).

First Lieutenant Sidney B. Cohen testified that he entered the Central Officers' Mess with accused at about 9 p.m., October 24, 1942, where they had several drinks at a table with other officers. At about 9:30 p.m., after the accused left and went to another table, Lieutenant Cohen noticed that accused was in difficulty at the table at which he was seated alone, had spilled his own drink, and had his head down on

the table. Lieutenant Cohen thought it best to have accused return to his barracks, assisted accused to his feet and, aided by a second lieutenant, held accused by his elbows, helped him down the stairs and to the barracks, where he excused the lieutenant, and helped accused up the stairs and to bed. Lieutenant Cohen saw no table upset, nor any offensive conduct of accused, but did state that in his opinion the accused was drunk (R. 26-28).

First Lieutenant Price, Adjutant of the 306th Medical Battalion, testified that prior to his work on the line of duty board, the accused was an excellent soldier on the drill field, a particularly good officer in work in the field, and a good officer as an instructor in the class room (R. 25).

5. Specification , Charge I, alleges absence without leave from his organization and station, Camp Rucker, Alabama, from about 1915 (7:15 p.m.), November 2, to about 0200 (2 a.m.), November 3, 1942. The evidence shows that the accused left Camp Rucker at about 10:30 a.m., November 2, 1942, in an Army car to interview witnesses, as a member of a line of duty board. At about 4 p.m. accused left Dothan for Headland, about nine miles east of Dothan, and called upon a woman for an hour - the accused had stated that he had been unable to contact one witness until late afternoon - had some food at a tourist camp three miles north of Dothan, returned to Dothan at about 7, reached Ozark at about 8:30 p.m. where accused and his driver had some food, left the cafe with a waitress at 9 p.m. to go to a show, returned to the car at 12:45 a.m., and reached his quarters at Camp Rucker at about 1:30 a.m., November 3, 1942. There is nothing in the record to show that the accused had any duty to perform at Camp Rucker during the period of absence alleged, except that he was not present to conduct his regular scheduled class in the officers' school from 7:30 to 8:30 p.m.

The record fails to show that the accused was required to be continuously on duty, that he was not free to move about on his own business during normal off-duty hours, or any testimony that he was absent without leave except with respect to his failure to be present to conduct his regular scheduled class in the officers' school, 7:30 p.m. The Board is of the opinion that the proof supports only so much of the finding of guilty of Specification 1 as involves an absence from about 7:30 p.m. to about 8:30 p.m.

Specification 2, Charge I, alleges absence without leave from his properly appointed place of duty from about 0900 (9 a.m.) to 1530 (3:30 p.m.), November 3, 1942. The evidence shows that on the morning of Tuesday, November 3, 1942, after Captain Burley, the

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battalion commander, had inquired of accused why he had not come back at a reasonable time on November 2, 1942, he directed accused to complete the investigation as soon as possible. At 8:30 a.m. accused stated to Captain Shaw, his company commander, that he had some work to do on the board. Captain Shaw then told accused that he was coming back from the field to the post that afternoon and would pick up accused then. Captain Shaw came back to the post about 1:30 p.m. and did not find accused around the company orderly room. Captain Shaw did find accused asleep in barracks about 2:30 p.m., woke him, and directed him to be ready to leave in an ambulance at about 3 p.m. The ambulance returned to the field at about 5 p.m. without the accused. Captain Shaw testified, without objection, that the ambulance driver stated that he had been unable to find the accused. There is nothing in the record to show that accused was not complying with the direction of his battalion commander for the period of absence alleged, except that his company commander found him asleep in his quarters at about 2:30 p.m. Even if it be assumed that the direction of Captain Shaw became effective through the completion by accused of the investigation as directed by Captain Burley, the record fails to show that the ambulance driver attempted before 3:30 p.m. to find the accused. The Board is of the opinion that the proof fails to support the finding of guilty of Specification 2.

Specification 3, Charge I, alleges absence without leave from his organization and duties from about 1500 (3 p.m.) to about 1735 (5:35 p.m.), November 4, 1942. The adjutant handed back the report of the board to accused on November 3, told accused to work on the report, probably told accused to drop everything else he had to do and get the report in, and intended that accused was to drop his company duties for that day to finish the report, but did not intend that he should miss formations. The accused at 9 a.m., November 4, was working on the board report and went at 9:30 a.m. in a car to the hospital to see the man whose line of duty status was being investigated. Captain Shaw could not find accused at 1 p.m. Captain Shaw testified without objection, that a number of the board had told him that the members of the board, including accused, had returned from the hospital just before 3 p.m. At 4:45 p.m. Captain Shaw found accused in his room asleep, woke him, and told him to hurry and get dressed for retreat. Accused was not present at retreat. Because of the absence of accused from retreat, Captain Burley looked for and found accused in his room at 5:35 or 5:40 p.m., working on the report of the board and under the influence of alcohol. Captain Burley then told accused that he was relieved from duty on the board, and directed him to be on duty the following morning "full time", except for the classes he was scheduled to teach with the training company, which normally took one or two hours a day.

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There is nothing in the record to show that accused was not engaged, during the 2½ hours of absence alleged, upon the report as directed by the commanding officer and by the adjutant of the battalion, except that he was asleep in his room at 4:45 p.m. and awakened by Captain Shaw. When he was next observed at 5:35 p.m. he was found working on the report. The Board is of the opinion that the proof fails to support the finding of guilty of Specification 3.

Specification 4 alleges absence without leave from his organization and duties from about 0830 (8:30 a.m.) to about 1000 (10 a.m.), November 5, 1942. Captain Shaw was unable to find accused at 8:30 a.m., November 5, 1942, either at Company A or at the training company. At 9:30 a.m. Captain Shaw reported to Captain Burley that accused had not been present for duty with the company that morning. At about 10 a.m. Lieutenant Price went to the quarters of accused, found accused on his bunk with his clothes on, and escorted him to the office of Captain Burley. The proof supports the finding of guilty of Specification 4.

Specification 5 alleges absence without leave from his organization and duties from about 1245 (12:45 p.m.), to about 1700 (5 p.m.), November 5, 1942. At about 10:15 a.m., November 5, 1942, in his office, Captain Burley again told accused that accused was to be with his company except for the classes with the training company. Accused was not present with his company during that afternoon until retreat at about 5 p.m. He had not been given any duties by his company commander which would keep him away from his company. The proof supports the finding of guilty of Specification 5.

Specification 6 alleges that accused, as company officer of the day, failed to be present at reveille November 6, 1942. The accused was company officer of the day and required to stand reveille at 6:30 a.m., November 6. He was not present at reveille. The accused admitted his absence, stating that it was through oversight, as he was up at 6 a.m. The proof supports the finding of guilty of Specification 6.

Specification 7 alleges absence without leave from his organization and duties from about 0900 (9 a.m.) to 1030 (10:30 a.m.). November 6, 1942. The accused secured an ambulance to meet a troop train at 8:00 or 8:30 a.m., November 6, but did not return to the company after completing that duty. Captain Shaw found accused asleep in his barracks at about 9:30 a.m., and woke him up. When Captain Shaw returned at about 10:30 a.m. with an ambulance to take accused to the hospital, the accused was again asleep on his bunk. The accused seemed "hazy", and apparently under the influence of liquor. The proof supports the finding of guilty of Specification 7 for substantially the period alleged.

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6. Under the Specification, Charge II, the accused was found guilty of being drunk, October 24, 1942, in a public place, the 81st Infantry Division Officers' Mess. On the evening of October 24, 1942, accused, in uniform, entered the Officers' Mess of the 81st Division, stumbled, fell over on a table, spilled his drink, and knocked several glasses off the table. His speech was not intelligible. First Lieutenant Sidney B. Cohen, a defense witness, testified that accused sat with his head down on the table. Lieutenant Cohen assisted accused to feet and, aided by another officer, down the stairs to his barracks, where Lieutenant Cohen helped him up the stairs and to bed. In the opinion of First Lieutenant Robert G. Brugh and of Lieutenant Cohen, the accused was drunk. The proof supports the finding of guilty of the Specification, Charge II.

7. Specifications 1 and 2, Charge III, respectively, allege the unlawful use of a certain Government car for his own use and benefit from about 1600 (4 p.m.) to about 1900 (7 p.m.), November 2, 1942, and from about 2030 (8:30 p.m.), November 2, 1942, to about 0100 (1 a.m.), November 3, 1942. The accused was authorized to take a car to interview witnesses in connection with the investigation by the line of duty board. He left camp at about 10:30 a.m., November 2, and sought witnesses in the general vicinity of Dothan, Alabama. The car left the City Hall, Dothan, at about 4 p.m. and went to Headland about 9 miles east, to call upon a Mrs. Ethel Tillman. After an hour he went to a tourist camp 3 miles north of Dothan for food, returned by way of Dothan, reached Ozark at 8:30 p.m., and had some food in a cafe. The accused left the cafe with a waitress at about 9 p.m., went to a show, and returned to the car at 12:45 a.m., November 3. The accused and his driver returned in the car and reached Camp Rucker about 1:30 a.m. The accused testified that he was supposed to see three witnesses, the cafe manager, a police officer, and a woman, Jane Willard. The accused saw Police Officer G. R. Cherry in Dothan. The board proceedings did not contain the testimony of Mrs. Ethel Tillman, whom the accused visited at Headland. The record shows that the use of the car from about 4 p.m., November 2, when accused left the City Hall, Dothan, for Headland, until he returned to Ozark at about 8:30 p.m., did not serve any purpose of the investigation, and no results therefrom were incorporated in the report of the board. The accused kept the car in Ozark from about 9 p.m., when he went to a show with a cafe waitress, until he returned to the car at about 12:45 a.m., and then returned to camp at about 1:30 a.m. The proof supports the findings that the accused retained and used the Government car for his private purposes substantially for the periods alleged in Specifications 1 and 2, Charge III.

Specification 3, Charge III, alleges that accused furnished

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intoxicating liquor to the enlisted driver of his car, who was required to operate the car on public roads. The fact that accused, after he came out of the toilet at the cafe in Dothan, told his driver, Private Hall, that he saw a bottle in there, and that Hall could help himself if he cared for a drink, that Hall took a drink, brought out the nearly full 4/5th bottle of Scotch, put it in the car, and that both accused and Hall drank from the bottle while it remained all day in the car which Hall drove over the public roads, furnish satisfactory circumstantial proof that accused offered, furnished, and supplied Private Hall, while on duty as driver of the car, with intoxicating liquor. The proof supports the finding of guilty of Specification 3.

8. Evidence was introduced of one previous conviction by general court-martial on September 24, 1942, of going from his proper place of duty without proper leave, after having repaired thereto for the performance of that duty, and of being drunk in quarters and under which he was sentenced to forfeit $100 pay.

9. The accused is 32 years of age. The records of the Office of The Adjutant General show his service as follows:

Appointed first lieutenant, Medical Corps-Reserve from R.O.T.C., June 6, 1933; active duty C.C.C., June 6, 1934, to February 8, 1936; discharged from commission under paragraph 74c, Army Regulations 140-5, upon approved recommendation of board of officers that he was unfit for retention in Officers Reserve Corps, February 24, 1936; appointed first lieutenant, Medical Corps, Army of the United States, April 12, 1942; extended active duty, April 27, 1942.

10. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support only so much of the finding of guilty of Specification 1, Charge I, as involves a finding of guilty of absence without leave by accused from his organization and station on the date alleged from about 7:30 p.m. to about 8:30 p.m., legally insufficient to support the findings of guilty of Specifications 2 and 3, Charge I; legally sufficient to support the findings of guilty of Specifications 4, 5, 6, and 7, Charge I, and of Charge I, of Charge II and of the Specification thereunder, of Specifications

1, 2, and 3, Charge III, and of Charge III; legally sufficient to support the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 61st or the 96th Article of War.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

SPJGH
CM 228717 1st Ind.

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

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant John J. O'Malley (0-303373), Medical Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support only so much of the finding of guilty of Specification 1, Charge I, as involves a finding of guilty of absence without leave by accused from his organization and station on the date alleged from about 7:30 p.m. to about 8:30 p.m.; legally insufficient to support the findings of guilty of Specifications 2 and 3, Charge I; legally sufficient to support the findings of guilty of Specifications 4, 5, 6, and 7, Charge I, and of Charge I, of Charge II and the Specification thereunder, of Specifications 1, 2, and 3, Charge III, and of Charge III; legally sufficient to support the sentence and to warrant confirmation of the sentence.

I recommend that only so much of the finding of guilty of Specification 1, Charge I, be approved as involves a finding of guilty of absence without leave by accused from his organization and station on the date alleged from about 7:30 p.m. to about 8:30 p.m.; that the findings of guilty of Specifications 2 and 3, Charge I, be disapproved; and that the sentence be confirmed and ordered executed.

3. This officer was found guilty by general court-martial on September 24, 1942, of going from his proper place of duty without proper leave after having repaired thereto for the performance of that duty, and of being drunk in quarters, and sentenced to forfeit $100 pay.

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 to carry into effect that recommendation.

E. C. McNeil,
Brigadier General, U. S. Army,
Acting 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.

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(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed. G.C.M.O. 63, 27 Mar 1943)

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

SPJGK
CM 228742

UNITED STATES v. Private JOHN H. BLANCO (39084685), Headquarters Battery, 308th Coast Artillery Barrage Balloon Battalion.	NORTHWESTERN SECTOR WESTERN DEFENSE COMMAND Trial by G. C. M., convened at Bremerton, Washington, November 12, 1942. Dishonorable discharge and confinement for three (3) years. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
HOOVER, COPP and SARGENT, 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, under a single specification, of the larceny of "jewelry, value about $195.00, the property of Mr. and Mrs. George E. Reeve". Mr. Reeve testified that a 21-jewel Waltham wrist watch, a cigarette case, a ladies' ring, a man's gold ring, a tie clasp, a cigarette lighter and a pair of tweezers (R. 4) found in the possession of accused (R. 7), were stolen from witness' house. Questioned concerning the value of the entire group of articles, witness answered, "$175 to $200". He also testified that the watch was "valued at 75 dollars", that the ladies' ring had a value of $30, that the man's ring was a gift to witness and that he did not know its "exact value" (R. 4), that the tweezers were of a value of about 10¢ and that the cigarette case was given to witness "some years ago" (R. 4, 5). Reference was made by the witness to some pearls, apparently stolen with the other articles (R. 4) which witness said "are worth five or seven dollars" (R. 5). None of the stolen articles was received in evidence and it does not appear that the articles were examined by the court, although the articles other than the pearls were exhibited to the witness in open court (R. 4).

It is well established that:

> "Other than as to distinctive articles of government issue (par. 1533; Supp. V, Dig. Ops. JAG 1912-30) or other chattels which, because of their character, do not have readily determinable market

> values, the value of personal property to be considered in determining the punishment authorized for larceny thereof is the market value. CM 208002, Gilbert; CM 208481, Ragsdale; sec. 585, McClain on Criminal Law; People v. Gilbert, 128 N.W. (Mich.) 756" (CM 209131, Jacobs).

There is no competent evidence as to the market value of the stolen articles. It does not appear that Reeve intended to or attempted to estimate the market value, or that he was qualified to do so as an expert or as one who had familiarized himself with market prices or values. Assuming that the court was afforded the opportunity to observe the property, it could not, in such case, determine its market value. The Board of Review has said, in regard to proof of market value of a watch and other articles of stolen personal property before it, that the court could, from its inspection alone, determine that the property had some value but that to permit the court to find specific market value,

> "would be to attribute to the members of the court technical and expert trade knowledge which it cannot legally be assumed they possessed" (CM 208481, Ragsdale).

See also CM 218143, Rocco.

It may be inferred from the descriptions of the stolen articles that they had some substantial value not in excess of $20.

3. The maximum punishment by confinement authorized by paragraph 104c of the Manual for Courts-Martial for the larceny of property of value of not more than $20 is confinement at hard labor for six months.

4. For the reasons stated the Board of Review holds the record of trial legally sufficient to support only so much of the finding of guilty of the Specification as involves a finding of guilty of larceny by accused, at the place and time alleged, of jewelry of the ownership alleged, of some substantial value not in excess of $20; 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.

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[signature], Judge Advocate.

[signature], Judge Advocate.

[signature], Judge Advocate.

1st Ind.

War Department, J.A.G.O., JAN 4 1943 - To the Commanding General, Northwestern Sector, Western Defense Command, Fort Lewis, Washington.

1. In the case of Private John H. Blanco (39084685), Headquarters Battery, 308th Coast Artillery Barrage Balloon Battalion, I concur in the holding by the Board of Review and, for the reasons therein stated, recommend that only so much of the finding of guilty of the Specification be approved as involves a finding of guilty of larceny by accused, at the place and time alleged, of jewelry of the ownership alleged, of some substantial value not in excess of $20, and that only so much of the sentence be approved as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months. Thereupon, you will have authority to order the execution of the sentence.

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

(CM 228742).

Myron C. Cramer

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

1 Incl.
Record of trial.

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

SPJGN
CM 228793

FEB 1 2 1943

UNITED STATES	)	WEST COAST ARMY AIR FORCES TRAINING CENTER
	)	
v.	)	Trial by G.C.M., convened at
	)	Kirtland Field, New Mexico,
Second Lieutenant LEROY H.	)	November 24, 1942. Dismissal.
PETTERSON (0-442228), Air	)	
Corps.	)	

OPINION of the BOARD OF REVIEW
CRESSON, SNAPP 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 Charge and Specifications:

CHARGE: Violation of the 95th Article of War.

Specification 1: In that 2nd Lieutenant LEROY H. PETTERSON, 929th School Squadron (Sp), AAFAFS, Kirtland Field, Albuquerque, New Mexico, did, at Albuquerque, New Mexico, on or about June 27, 1942, with intent to defraud, wrongfully and unlawfully make and utter to G. M. WILLIAMS, a certain check in the following words and figures, to wit:

FRONT

SAN ANTONIO, TEXAS June 27 1942
30-65
NATIONAL BANK OF FORT SAM HOUSTON
AT SAN ANTONIO

PAY TO THE ORDER OF G. M. Williams $ 4 50/00
Four and 50/00 DOLLARS
511 S Spruce
Phone 5860 Lt Leroy H Petterson

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and by means thereof did fraudulently obtain from the said G. M. WILLIAMS, the owner of a mercantile and filling station establishment, groceries and gasoline of the value of Four Dollars and Fifty Cents ($4.50), he, the said 2nd Lieutenant LEROY H. PETTERSON, then well knowing that he did not have, and not intending that he should have sufficient funds in the said National Bank of Fort Sam Houston, for the payment of the said check.

Specification 2: In that 2nd Lieutenant LEROY H. PETTERSON, 929th School Squadron (Sp), AAFAFS, Kirtland Field, Albuquerque, New Mexico, did, at Albuquerque, New Mexico, on or about June 29, 1942, with intent to defraud, wrongfully and unlawfully make and utter to G. M. WILLIAMS, a certain check in the following words and figures, to wit:

FRONT

SAN ANTONIO, TEXAS June 29 1942
30-65
NATIONAL BANK OF FORT SAM HOUSTON
AT SAN ANTONIO

PAY TO THE ORDER OF G. M. Williams $ 4 71/00
Four and 71/00 DOLLARS
511 S Spruce
Phone 5860 Lt Leroy H Petterson

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and by means thereof did fraudulently obtain from the said G. M. WILLIAMS, the owner of a mercantile and filling station establishment, groceries and gasoline of the value of Four Dollars and Seventy one Cents ($4.71), he, the said 2nd Lieutenant LEROY H. PETTERSON, then well knowing that he did not have, and not intending that he should have sufficient funds in the said National Bank of Fort Sam Houston for the payment of the said check.

Specification 3: In that 2nd Lieutenant LEROY H. PETTERSON, 929th School Squadron (Sp), AAFAFS, Kirtland Field, Albuquerque, New Mexico, did, at Kirtland Field, Albuquerque, New Mexico, on or about July 8, 1942, with intent to defraud, wrongfully and unlawfully make and utter to the Post Exchange, Kirtland Field, Albuquerque, New Mexico, through GLADYS BRAYLES and MARY BACKHERMS, as agents for the said Post Exchange, a certain check in the following words and figures, to wit:

FRONT

SAN ANTONIO, TEXAS July 8 1942
30-65
NATIONAL BANK OF FORT SAM HOUSTON
AT SAN ANTONIO

PAY TO THE ORDER OF Post Exchange $18 77/00
Eighteen and 77/00 DOLLARS
511 S Spruce
Phone 5860 Lt Leroy H Petterson

and by means thereof did fraudulently obtain from the said Post Exchange, the sum of Ten Dollars ($10.00), professing at the same time to pay his outstanding account at the said Post Exchange, in the amount of Eight Dollars and Seventy-seven Cents ($8.77), he, the said 2nd Lieutenant LEROY H. PETTERSON, then well knowing that he did not have and not intending that he should have sufficient funds in the said National Bank of Fort Sam Houston, for the payment of said check.

Specification 4: In that 2nd Lieutenant LEROY H. PETTERSON, 929th School Squadron (Sp), AAFAFS, Kirtland Field, Albuquerque, New Mexico, did, at Albuquerque, New Mexico, on or about June 27, 1942, with intent to defraud, wrongfully and unlawfully make and utter to the Hilton Hotel, Albuquerque, New Mexico, through W. S. SALTER, Assistant Manager of the said Hilton Hotel, a certain check in the following words and figures, to wit:

FRONT

SAN ANTONIO, TEXAS June 27 1942

NATIONAL BANK OF FORT SAM HOUSTON
AT SAN ANTONIO

PAY TO THE ORDER OF Hilton Hotel $ 4 50/00
Four and 50/00 DOLLARS
511 S Spruce
Phone 5860 Lt Leroy H Petterson

and by means thereof did fraudulently obtain from the said Hilton Hotel, the sum of Four Dollars and Fifty Cents ($4.50), he, the said 2nd Lieutenant LEROY H. PETTERSON, then well knowing that he did not have, and not intending that he should have sufficient funds in the said National Bank of Fort Sam Houston, for the payment of the said check.

Specification 5: In that 2nd Lieutenant LEROY H. PETTERSON, 929th School Squadron (Sp), AAFAFS, Kirtland Field, Albuquerque, New Mexico, did, at Albuquerque, New Mexico, on or about August 3, 1942, with intent to defraud, wrongfully and unlawfully make and utter to the Sanitary Laundry, Albuquerque, New Mexico, through L. M. MC MINN, agent for the said laundry, a certain check in the following words and figures, to wit:

FRONT

National Bank of Fort Sam Houston
~~ALBUQUERQUE NATIONAL TRUST AND SAVINGS BANK~~
92-8
16-D
San Antonio, Texas
~~ALBUQUERQUE, NEW MEXICO~~ Aug 3 1942

PAY TO SANITARY LAUNDRY OR BEARER $ 15 04/00
Fifteen and 04/00 DOLLARS
511 S Spruce
Phone 5860 Lt Leroy H Petterson

and by means thereof did fraudently obtain from the said Sanitary Laundry cleaning and laundry service to the clothes and household linens and supplies of the said 2nd Lieutenant LEROY H. PETTERSON, and that of his wife, said service having a value of Fifteen Dollars and Four Cents ($15.04), and by means thereof did fraudulently obtain delivery of the said clothes and household linens and supplies at the time of the issuance of the said check, he, the said 2nd Lieutenant LEROY H. PETTERSON, then well knowing that he did not have and not intending that he should have sufficient funds in the said National Bank of Fort Sam Houston, for payment of the said check.

Specification 6: In that 2nd Lieutenant LEROY H. PETTERSON, 929th School Squadron (Sp), AAFAFS, Kirtland Field, Albuquerque, New Mexico, did, at Albuquerque, New Mexico, on or about July 7, 1942, with intent to defraud, wrongfully, and unlawfully make and utter to J. E. SPECTOR, operator of Spector's Trading and Loan Office, Albuquerque, New Mexico, a certain check in the following words and figures, to wit:

FRONT

SAN ANTONIO, TEXAS July 7 1942
30-65
NATIONAL BANK OF FORT SAM HOUSTON
AT SAN ANTONIO

PAY TO THE ORDER OF J. E. Spector $ 13 50/00
Thirteen and 50/00 DOLLARS
511 S Spruce
Phone 5860 Lt Leroy H petterson

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and by means thereof did fraudulently obtain from the said J. E. SPECTOR, delivery of the wrist watch of the said 2nd Lieutenant LEROY H. PETTERSON, previously deposited with the said J. E. SPECTOR, as security for a loan of Thirteen Dollars and Fifty Cents ($13.50), made to the said 2nd Lieutenant LEROY H. PETTERSON, and did thereby fraudulently defeat and destroy the collateral security rights of the said J. E. SPECTOR in the said wrist watch, the said colleteral security rights having a value of Thirteen Dollars and Fifty Cents ($13.50), he, the said 2nd Lieutenant LEROY H. PETTERSON, then well knowing that he did not have sufficient funds in the said National Bank of Fort Sam Houston, for payment of the said check.

Specification 7: In that 2nd Lieutenant LEROY H. PETTERSON, 929th School Squadron (Sp), AAFAFS, Kirtland Field, Albuquerque, Nex Mexico, did, at Albuquerque, New Mexico, on or about June 22, 1942, with intent to defraud, wrongfully and unlawfully make and utter to Mrs. L. M. MAULDIN, of Albuquerque, New Mexico, a certain check in the following words and figures, to wit:

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FRONT

SAN ANTONIO, TEXAS June 22 1942
30-65
NATIONAL BANK OF FORT SAM HOUSTON
AT SAN ANTONIO

PAY TO THE ORDER OF Mrs Mauldin $ 64 00/00
Sixty-four and no/00 DOLLARS

Lt Leroy H Petterson

and by means thereof did fraudulently obtain from the said Mrs. L. M. MAULDIN, for the month of June, 1942, lease occupation and lease rights of the premises and apartment located at 511 South Spruce Street, Albuquerque, New Mexico, owned by Mrs. L. M. MAULDIN, and leased by the said 2nd Lieutenant LEROY H. PETTERSON, the said lease and rental rights, and incidental rights having a value of Sixty-four Dollars ($64.00), he, the said 2nd Lieutenant LEROY H. PETTERSON, then well knowing that he did not have and not intending that he should have sufficient funds in the said National Bank of Fort Sam Houston, for payment of the said check.

Specification 8: In that 2nd Lieutenant LEROY H. PETTERSON, 929th School Squadron (Sp), AAFAFS, Kirtland Field, Albuquerque, New Mexico, did, at Albuquerque, New Mexico, on or about July 3, 1942, with intent to defraud, wrongfully and unlawfully make and utter to Mrs. L. M. MAULDIN, of Albuquerque, New Mexico, a certain check in the following words and figures, to wit:

FRONT

SAN ANTONIO, TEXAS July 3 1942
30-65
NATIONAL BANK OF FORT SAM HOUSTON
AT SAN ANTONIO

PAY TO THE ORDER OF Mrs Mauldin $ 124 80/00
One Hundred twenty four and 80/00 DOLLARS

Lt Leroy H Petterson

and by means thereof did fraudulently obtain from the said Mrs. L. M. MAULDIN, for the months of June and July, 1942, lease occupation and lease rights of the premises and apartment located at 511 South Spruce Street, Albuquerque, New Mexico, owned by the said Mrs. L. M. MAULDIN, and leased by the said 2nd Lieutenant LEROY H. PETTERSON, the said lease and rental rights and incidental rights having a value of One Hundred and Twenty four Dollars and Eighty Cents ($124.80), he, the said 2nd Lieutenant LEROY H. PETTERSON, then well knowing that he did not have and not intending that he should have sufficient funds in the said National Bank of Fort Sam Houston for payment of the said check.

Specification 9: In that 2nd Lieutenant LEROY H. PETTERSON, 929th School Squadron (Sp), AAFAFS, Kirtland Field, Albuquerque, New Mexico, did, at Albuquerque, New Mexico, on or about July 26, 1942, with intent to defraud, wrongfully and unlawfully make and utter to JOE LAWRENCE, a certain check in the following words and figures, to wit:

FRONT

SAN ANTONIO, TEXAS July 26 1942
30-65
NATIONAL BANK OF FORT SAM HOUSTON
AT SAN ANTONIO

PAY TO THE ORDER OF Joe Lawrence $ 35 00/00
Thirty five and 00/00 DOLLARS
511 S Spruce
Phone 5860 Lt Leroy H Petterson

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and by means thereof did fraudulently obtain from the said JOE LAWRENCE, one Cocker Spaniel pup, having a value of Thirty-five Dollars ($35.00), he, the said 2nd Lieutenant LEROY H. PETTERSON, then well knowing that he did not have, and not intending that he should have sufficient funds in the said National Bank of Fort Sam Houston for payment of the said check.

He pleaded not guilty to and was found guilty of the Charge and all 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. With reference to Specifications 1 and 2 the evidence shows that one G. M. Williams operates a service station and grocery store in Albuquerque, New Mexico, and accepted two checks, dated June 27, 1942, and June 29, 1942, respectively from the accused in exchange for groceries and gasoline. A few days later he transferred them to an oil company in payment for gasoline and a short time thereafter both checks were returned to him by the oil company marked "insufficient funds". At various times within a period of two months he reminded the accused of that fact, and the accused always promised to pay, but did not pay until the day of trial. As a result Mr. Williams was required to pay to the oil company the amount he had received as credit on his oil purchases (R. 12-15;Exs. 1, 2).

With reference to Specification 3 the evidence shows that the accused presented a check dated July 18, 1942 (Ex. 3), at the Post Exchange at Kirtland Field and received thereon a credit on his account in the amount of $8.77 and the sum of $10 in cash. The check was deposited by the Post Exchange and later was returned by the bank marked "insufficient funds". The cashier notified accused's organization and about two weeks later the Post Exchange was reimbursed by Major Tucker, acting on behalf of the accused (R. 16-20).

With reference to Specification 4 the evidence shows that on or about June 27, 1942, the accused presented a check (Ex. 5) at the Hilton Hotel in Albuquerque and received cash therefor. The check was deposited and later was returned to the hotel by the bank marked "insufficient funds". This fact was afterwards reported to the accused by representatives of the hotel, on five different occasions, and about November 1, 1942, the hotel was reimbursed by the accused, or by some one on his behalf (R. 20-24).

With reference to Specification 5 the evidence shows that laundry was delivered to the accused on August 3, 1942, by the Sanitary Laundry, and the agent of the laundry accepted from the accused in payment for such service the check signed by the accused (Ex. 11). The evidence does not show what was done with the check by the Sanitary Laundry and the check itself does not indicate that it was ever presented to the bank for payment or deposit. The evidence does show that the laundry received payment in full on the account about November 15, 1942 (R. 38-41).

With reference to Specification 6 the evidence shows that the accused had borrowed money from one Joseph E. Spector, who was engaged in the loan business, and had pledged with Spector, as security, a wrist watch on July 7, 1942, which he redeemed by giving Spector a check for $13.50 (Ex. 7), which was deposited and later returned by the bank

marked "insufficient funds". There is no competent evidence that Spector ever notified the accused that the bank had refused payment on the check, but the evidence does show that this indebtedness was discharged by the accused, or by some one for him, about November 1, 1942 (R. 24-28).

With reference to Specifications 7 and 8 the evidence shows that the accused was a tenant of Mrs. Loutisha M. Mauldin in Albuquerque during the period from June 1 to October 8, 1942, at a rental of $60 per month (R. 30). On June 22, 1942, the accused gave Mrs. Mauldin a check for $64 (Ex. 8) to reimburse her, together with protest charges, for an uncollected check for $60 covering June rent. The last check was deposited and sometime thereafter was returned to her by the bank marked "insufficient funds". She notified the accused who gave her another check (Ex. 9) for $124.80 dated July 3, 1942, to cover the first check (Ex. 8), including protest charges, and also to include July rent. This last check was deposited on the day of its date and about ten days later was returned marked "insufficient funds". Mrs. Mauldin notified the accused of this sometime afterwards, and on October 7, 1942, she was paid the amount of the check by Major Tucker, who stated that he was making the payment for the accused (R. 29-35).

With reference to Specification 9 the evidence shows that one Joe Lawrence, living in Albuquerque, was engaged in raising cocker spaniel dogs and on July 26, 1942, the accused purchased from him a puppy for consideration of $35 and gave him a check for that amount (Ex. 10), and Lawrence received the cash on the check from a bank in Albuquerque. The check was returned by the bank on which it was drawn, and Lawrence was compelled to reimburse the Albuquerque bank. He then reported the matter to Major Tucker at the base and, as a result, the accused took the puppy back to Lawrence, thereby effecting a complete adjustment of the transaction (R. 36-38).

William Logan Bailey, of San Antonio, Texas, assistant cashier of the National Bank of Fort Sam Houston, examined the original records of the bank pertaining to the checking account of the accused and testified that he opened his account on June 15, 1942, with a deposit of $600. A deposit was made to his account on July 2, 1942, in the amount of $245.50, and beginning with the month of August an allotment from his pay of $100 was deposited to his account monthly. Of the nine checks in evidence eight of them were deposited in the National Bank of Fort Sam Houston and all were returned for the reason that at the specific time of these deposits there were not sufficient funds from which to pay them. The accused continued to be a depositor and on November 12, 1942, his balance amounted to $52.52 (R. 41-50).

Major Stephen Sukovich, executive officer of the bombardier school, of which the accused was a member, testified that he was present

at a conversation between the accused and Colonel Ryan, his commanding officer, sometime late in June or early in July, at which time Colonel Ryan warned the accused not to write any more checks unless he was certain he had money enough in the bank to cover them (R. 51).

At the time of the trial all indebtedness represented by the checks in question had been fully discharged by the accused, or by others for him.

4. The accused testified in his own behalf, in substance, as follows:

He was about to be married and arranged by mail for a $600 loan at the First National Bank of Fort Sam Houston and a checking account at the same bank with the proceeds of the loan as the first deposit. His reason for establishing a banking connection at such a far distant point was that it was easy to secure a loan there. This was his first checking account. He did not keep any records on his stubs and did not know at any particular time what his balance was, but did not intend to defraud anyone. At the time he wrote the checks in question he believed that he had sufficient funds to cover them (R. 54).

On cross-examination he admitted that he had previously had an account at the American Trust Company of Oakland, California (R. 55). This admission was made after he had been confronted with a check drawn by him on that bank, dated May 16, 1942, and which bore on its face the rubber stamp mark of the bank, "Account closed" (Ex. 12). His explanation was that he opened the account at the American Trust Company shortly after he graduated from service school on March 16, 1942, and closed the account when he started negotiations with the National Bank of Fort Sam Houston (R. 60). He felt that the two accounts were a continuous account and did not intend to misrepresent any fact in this connection (R. 52-61).

5. The evidence does not show that the check described in Specification 5 (Ex. 11) was ever presented to the bank on which it was drawn, and there is no evidence that the bank did not have sufficient funds on deposit to the credit of accused to pay it had it been presented. As to Specification 5 the evidence is clearly insufficient to sustain the finding of guilty.

As to Specifications 1, 2, 3, 4, 6, 7, 8 and 9 the evidence shows that between June 22, 1942, and July 26, 1942, both dates inclusive, the accused made and uttered eight checks on the National Bank of Fort Sam Houston which were returned by that bank marked "insufficient funds" and are shown to have been worthless at the times they were presented to the bank for payment.

The accused, as a witness, made the unequivocal assertion that at the time he made and uttered the checks in question he believed he had

sufficient funds to cover them and that he did not intend to defraud anyone. There is no evidence, either direct or circumstantial, to the contrary. Rather, the evidence would seem to corroborate the truth of the accused's assertion. The original $600 deposit was made June 15, 1942, and his account was overdrawn, for the first time, on June 20, 1942, but it does not appear that he was notified of that fact by the bank. The accused was stationed at Albuquerque, New Mexico, at a great distance from San Antonio, Texas, where his bank was located. The checks in question were all in small amounts, were made to local creditors, and were initially negotiated at local banks. Four of them were uttered during the latter part of June, the first one on June 22, 1942, and on July 2, 1942, he made a deposit of $245.50. Three more of the checks were given during the first seven or eight days in July and there is no evidence that he was notified by the bank any time in July prior to the date of the last check, that is, July 26, that his account was overdrawn, and there is no evidence that he had any actual notice, prior to July 26, 1942, that any of the checks written in July had been dishonored by the bank or had been returned by it because of insufficient funds.

Charges in this case were preferred on October 21, 1942, and all of the indebtedness represented by the checks described in Specifications 3, 7, 8 and 9 was discharged by the accused prior to that time, some of it in August. All of the balance of the indebtedness represented by the checks described in Specifications 1, 2, 4, 5 and 6 was discharged by the accused prior to trial.

It does not appear from the evidence that the acts of the accused, as charged in Specifications 1, 2, 3, 4, 6, 7, 8 and 9 were fraudulent, in the sense that financial loss to others resulted therefrom, or that such loss was intended. Neither does it appear that at the times he made and uttered the checks he knew that he did not have sufficient funds in the bank to pay them, and did not intend to have. However, his continued attitude of careless indifference to the proper management of his personal business affairs, his reckless disregard for the rights of his creditors, his irresponsible behavior in the contraction of debts which he knew, or should have known he would be unable to properly discharge, and the making and uttering of checks without any adequate provision for the necessary funds or credit to meet the same, was conduct of a nature to bring discredit upon the service, in violation of the 96th Article of War, and such an offense is alleged by said Specifications when the words "with intent to defraud", "fraudulently", "well knowing that he", "and not intending that he should have", are excepted where the same appear.

6. The accused is 23 years of age. The records of the Office of The Adjutant General show that the accused was appointed a second

lieutenant, Air Corps Reserve, on March 16, 1942.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is not legally sufficient to support the finding of guilty of Specification 5, and is legally sufficient to support only so much of Specifications 1, 2, 3, 4, 6, 7, 8 and 9 as involves findings that the checks in question were wrongfully and unlawfully made and uttered by the accused for value, without sufficient funds in the bank to meet them, in violation of the 96th Article of War, and legally sufficient to support the sentence and to warrant confirmation thereof. A sentence of dismissal is authorized upon conviction of a violation of the 96th Article of War.

Charles Bresson, Judge Advocate.

Lorrain D. Snoke, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

1st Ind.

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

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Leroy H. Petterson (0-442228), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty of the Charge and Specifications 1, 2, 3, 4, 6, 7, 8, and 9 thereunder as involves findings that at the places and times alleged the accused wrongfully and unlawfully made and uttered the several checks described in the Specifications without having sufficient funds in bank to meet them, in violation of Article of War 96; legally insufficient to support the finding of guilty of Specification 5 of the Charge; and legally sufficient to support the sentence and to warrant confirmation thereof.

The checks wrongfully uttered by the accused were not shown to have been uttered fraudulently but only carelessly and wrongfully to the prejudice of the service, and have been redeemed. Accused is probably capable of future valuable service to the Government. I recommend action upon the findings in accordance with the opinion of the Board of Review, and recommend that the sentence be confirmed but suspended during the pleasure of the President.

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

E. C. McNeil,
Brigadier General, U. S. Army,
Acting The Judge Advocate General.

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

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but execution suspended. G.C.M.O. 87, 16 Apr 1943)

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

SPJGH
CM 228799
CM 228800

FEB 5 1943

UNITED STATES	)	81st INFANTRY DIVISION
v.	)	Common trial by G.C.M., convened at Camp Rucker, Alabama, November 5, 1942. As to each: Hard labor for thirty-nine (39) days, and forfeiture of fourteen dollars ($14) per month for three (3) months.
Privates WILLIAM M. BRADFORD (38175769), and JOHN C. THOMPSON (34351171), both of Company F, 323rd Infantry.	)	

OPINION of the BOARD OF REVIEW
HILL, LYON and SARGENT, Judge Advocates

1. The record of the 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 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. The accused were tried upon the following Charges and Specifications:

a. Private Bradford:

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

Specification 1: In that Private William M. Bradford, Company "F", 323rd Infantry, did, without proper leave, absent himself from his organization at Camp Rucker, Alabama, on or about 2300 CWT, October 5, 1942, until he did voluntarily surrender himself to military control at Camp Rucker, Alabama, on or about 1145 CWT, October 8, 1942.

CHARGE II: Violation of the 64th Article of War.
(Finding of Not Guilty)

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

Specification 1: In that Private William M. Bradford, Company "F", 323rd Infantry, did, at Camp Rucker, Alabama, on or about 0030 CWT, October 17, 1942, willfully and wrongfully lie in bed with one Private John C. Thompson, Company "F", 323rd Infantry, in an indecent manner while naked.

b. Private Thompson:

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

Specification 1: In that Private John C. Thompson, Company "F", 323rd Infantry, did, without proper leave, absent himself from his organization at Camp Rucker, Alabama, on or about 2300 CWT, October 5, 1942, until he did voluntarily surrender himself to military control at Camp Rucker, Alabama, on or about 1145 CWT, October 8, 1942.

CHARGE II: Violation of the 64th Article of War. (Finding of Not Guilty).

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

Specification 1: In that Private John C. Thompson, Company "F", 323rd Infantry, did, at Camp Rucker, Alabama, on or about 0030 CWT, October 17, 1942, willfully and wrongfully lie in bed with one Private William M. Bradford, Company "F", 323rd Infantry, in an indecent manner while naked.

Each accused, as to charges against him, pleaded guilty to Specification 1, Charge I, and Charge I; and not guilty to Charges II and III and Specification 1 under each. Each accused was found guilty of Specification 1, Charge I, and Charge I; not guilty of Specification 1, Charge II, and Charge II; guilty of Specification 1, Charge III, except the words "in an indecent manner while naked"; and guilty of Charge III. Each was sentenced to perform hard labor for 39 days, and to forfeit $14 per month for 3 months. The reviewing authority approved and ordered the execution of the sentence. The proceedings in regard to

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Private Thompson and to Private Bradford were published in General Court-Martial Orders No. 11 and 12, respectively, Headquarters, 81st Infantry Division, December 11, 1942.

3. The two accused were tried in a common trial upon charges alleging identical offenses. The evidence is legally sufficient to support the findings of guilty of each accused of Specification 1, Charge I, and of Charge I, respectively.

4. The only question requiring consideration is whether the record supports the findings of guilty of Specification 1, Charge III, and of Charge III, as to each accused.

As the court specifically excepted from its finding of guilty of each accused the words "in an indecent manner while naked", each accused stands convicted of willfully and wrongfully lying in bed with the other accused.

5. The evidence for the prosecution shows that after the members of Company F, 323rd Infantry, returned from a hike at about 12 p.m., October 17, 1942, the charge of quarters, Corporal Peterson, turned on the light in the barracks. When he observed the two accused asleep in a bed together, he walked over and tried to wake them up by shaking them. The accused Thompson told Corporal Peterson to get out and that he had no business waking them at that time of night. Corporal Peterson left and returned with First Lieutenant Charles T. Mincer, the company commander. After attention was called in a loud voice, Lieutenant Mincer ordered the two accused out of bed. After waiting for approximately one minute without results, Lieutenant Mincer turned the bed over, ordered the men to dress themselves, and go to their proper beds. Bradford had on his shorts and undershirt, and Thompson his undershirt. No one of the four prosecution witnesses of the incident observed anything unusual in the conduct of the two accused, or testified to any act of indecency by either accused (R. 7-11).

6. The two accused testified substantially to the same effect that they had been on kitchen police duty in the field for three days. Upon their return to the camp at about 2:30 p.m., they were immediately put to work cleaning a dirty kitchen, and worked overtime until about 11 p.m. When they then went to the barracks the lights were out and they were unable to untie the knots on their bedding rolls which were tied in one roll. Thompson had a comforter, told Bradford to get in bed with him, and last remembered Bradford sitting on the edge of the bed smoking. Bradford then got into the bed and the next thing each

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remembered was being out of bed on the floor and the company commander talking to them in a loud voice. Bradford intended to sleep there only until the lights were turned on when the company returned from the field, and he could see to untie the hard knots. Bradford had on an undershirt, shorts, and socks, and Thompson had on an undershirt. The lights were then on and the accused worked 15 minutes to get the pack of bedding rolls opened (R. 13-19).

7. The court by the exception in its findings has expressly found each accused not guilty of the allegation "in an indecent manner while naked". That finding accords with the proof. There was no suggestion of any indecent conduct on the part of either of the accused.

The record contains no proof that it was wrongful for the two men to sleep together in one bed under the circumstances shown in this case, nor is the Board of Review aware of any provision of Army Regulations to that effect.

8. The maximum authorized penalty for absence without leave for 3 days (Spec. 1, Chg. I) is confinement at hard labor for 9 days, or hard labor without confinement for 13 days, and forfeiture of 6 days' pay.

9. For the reasons stated, the Board of Review is of the opinion that the record of trial is, as to each accused, legally sufficient to support the findings of guilty of Specification 1, Charge I, and of Charge I; legally insufficient to support the findings of guilty of Specification 1, Charge III, and of Charge III; and legally sufficient to support only so much of the sentence as involves performance of hard labor for 13 days and forfeiture of 6 days' pay.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

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SPJGH
CM 228799
CM 228800

1st Ind.

War Department, J.A.G.O., FEB 5 1943 - To the Secretary of War.

1. Herewith transmitted for your action under Article of War 50½ as amended by the act of August 20, 1937 (50 Stat. 724; 10 U.S.C. 1522), is the record of common trial in the case of Privates William M. Bradford (38175769), and John C. Thompson (34351171), both of Company F, 323rd Infantry.

2. I concur in the opinion of the Board of Review, and for the reasons stated therein, recommend that the findings of guilty as to each accused of Charge III and Specification 1 thereunder be vacated, and that so much of the sentence of each accused as exceeds performance of hard labor for thirteen days and forfeiture of six days' pay be vacated.

3. Inclosed herewith is a form of action prepared for your signature to carry into effect the recommendation made above.

E. C. McNeil,
Brigadier General, U. S. Army,
Acting The Judge Advocate General.

2 Incls.
Incl.1-Record of trial.
Incl.2-Form of action
sig.Sec.of War.

(Findings of guilty as to each accused of Charge III and Specification 1 thereunder vacated, and so much of the sentence of each accused as is in excess of performance of hard labor for thirteen days and forfeiture of $10 of his pay vacated, by order of the Secretary of War. G.C.M.O. 4, 13 Feb 1943)

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

SPJGN
CM 228818

FEB 2 1943

UNITED STATES	)	45TH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Pine Camp, New York, December 8, 1942. Dismissal.
	)	
First Lieutenant DAN L. JOHNSON, Jr. (0-383512), 645th Tank Destroyer Battalion.	)	

OPINION of the BOARD OF REVIEW
CRESSON, SNAPP 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.
(Finding of not guilty.)

Specification: (Finding of not guilty.)

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

Specification: In that 1st Lt. Dan L. Johnson Jr., 645th Tank Destroyer Battalion, was at Leominster, Massachusetts, on or about November 1, 1942, in a public place, to-wit, on the streets of said city near the intersection of Pleasant and Pearl Street, drunk in uniform.

He pleaded not guilty to the Charges and Specifications and was found not guilty of the Specification, Charge I, and of Charge I, and guilty of the Specification, Charge II, and of Charge II. Evidence of one

previous conviction was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. With reference to the Specification of Charge II, Private Jack Stenier, of the military police, a witness for the prosecution, testified, in substance, that on Sunday, November 1, 1942, he and Private Arthur C. Sipple, also of the military police, were on duty in Leominster, Massachusetts, and saw accused about 7:45 p.m. on Pleasant Street in the business district of the town. Their attention was attracted to him by a civil police officer who had referred accused to them for information as to where accused, and the soldier who accompanied him, might find a room for the night. The accused and his companion were dressed in fatigue clothes which concealed their insignia, and, when interrogated, refused to give any information as to their identity. Stenier and Sipple then took them to the police station, where accused, after being threatened with confinement, identified himself. About fifteen minutes later Sergeant Battles, of the military police, came in. It had in some way been disclosed that accused had a "peep" but he would not say where it was, and about 9:00 o'clock Sergeant Battles found it. Its contents evidenced, among other things, a quart bottle of whiskey about one-half or one-third full (R.5-13).

In regard to accused's condition when he first saw him Stenier testified: "I would say that he was intoxicated" (R.6). As to the condition of accused later, at the police station, he testified: "He was beginning to sober up a little by that time". At the time Lieutenant Martin came in: "He was still intoxicated". With reference to his opinion that the accused was drunk he said: "I see a lot of drunken men and I know when a man is drunk or sober * * * by the way he acts". "I smelled liquor " (R.8,9,13). With reference to accused's condition while at the police station Sergeant Battles testified that in his opinion accused was drunk and that he was still drunk when Lieutenant Martin arrived forty-five minutes later (R.15,16). Private Sipple testified that when he and Stenier picked up accused and his companion he did not see anyone else on the street (R.18). As to the condition of accused at that time this witness testified that, in his judgment, the accused was drunk (R.17). Lieutenant William R. Martin, of the military police, testified that he talked to accused at the police station and smelled liquor on his breath. When asked whether or not accused was drunk this witness said: "Yes. He was" (R.20).

4. The accused testified, in substance, as follows:

Private Floyd was a candidate for a warrant as reconnaissance sergeant, and had importuned accused to give him special instruction. As a result accused took Floyd early on Sunday afternoon to the Fort Pond area for that purpose. They finished their work there about 5:45, or about dusk, and as it appeared to be too late for supper at

camp, they decided to go into Leominster to eat. Private Floyd had a bottle of liquor in the "peep" which they were using and accused had three drinks from this bottle after their work was finished and before reaching Leominster. He had one more drink after arriving there. Upon arrival they parked the "peep" across the street from a restaurant, went in and had their dinner. They stayed about forty-five minutes. In leaving Floyd preceded accused, who waited to pay the check. When accused came out Floyd was talking to a civilian policeman, and the policeman had apparently called two M.P.'s over. Accused asked the policeman for information as to how to get back on the road to Fort Devens, and when the M.P.'s came up the policeman said to them: "Maybe you can help these two soldiers". They said, "Lets go down to the station and talk to the sergeant", and accused went with them rather "than stand there and argue with them". At this time accused did not notice any other people on the street. He was not drunk, was not loud nor boisterous, and spoke to the police officers in a normal tone of voice. At the station he explained to the lieutenant that they had been out on a reconnaissance on their own initiative, and the lieutenant was about to let them go when the "two boys" came in, said they had found the "peep" and the liquor. Whereupon the lieutenant of military police took accused to his quarters (R.35-43).

The testimony of accused is corroborated by the testimony of Private Floyd, except as to the number of drinks. He stated that accused had one drink before reaching Leominster, and two afterwards, but was sober (R. 27-34).

5. The first question to be determined is whether it has been established beyond a reasonable doubt that accused was drunk at the time and place in question. The evidence is undisputed that when accused and Floyd went out on Sunday afternoon for the purpose they described Floyd had in his possession a quart bottle filled, or nearly filled, with whiskey; that when the military police searched the "peep", while accused was at the police station, they found the bottle and it was then one-half or one-third full; that accused and his companion had each taken several drinks from the bottle before and after reaching Leominster and approximately an hour before coming to the attention of the military police.

Accused asserted that while he had several drinks before dinner he was not drunk, and in this he is corroborated by his companion, Private Floyd. However, there is no other corroborative testimony on the part of disinterested witnesses, and four members of the military police testified that in their opinion he was intoxicated.

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The next question is, was accused's conduct unbecoming an officer and a gentleman, in violation of the 95th Article of War? The evidence shows that no one was present to witness the conduct of the accused other than his companion, the civilian police officer and the two privates of the military police. There is no evidence that he was grossly drunk, or that he was boisterous or disorderly, or that he was in any manner publicly offensive. The evidence tends to show that he was taken into custody by the military police, not on account of any indication of drunkenness, but rather on account of his reluctance to disclose his identity.

In CM 202290, Lowry, The Judge Advocate General quoted with approval and apparently adopted as the proper test the following language of Major General George B. McClellan (G.O. 111, Army of the Potomac, 1862):

> "These words, ('conduct unbecomeing', etc.) imply something more than indecorum, and military men do not consider the charge sustained unless the evidence shows the accused to be one with whom his brother officers cannot associate without loss of self respect."

Applying the above test to the present case the Board of Review is of the opinion that the record does not show accused to be one with whom his brother officers cannot associate without loss of self respect, or that his conduct was such as to bring dishonor and disrepute upon the profession which he represents; and therefore is of the opinion that the record is legally sufficient to support only so much of the findings of guilty of the Specification and the Charge as involves a finding of guilty of the Specification in violation of the 96th Article of War.

6. There was offered in evidence by the prosecution General Court-Martial Orders No. 186, Headquarters 45th Infantry Division, dated August 10, 1942, from which it appears that accused was, on July 29, 1942, convicted by general court-martial for being drunk in a public place while in unifrom and for drinking with and in the company of enlisted men in violation of the 96th Article of War. He was sentenced to a reprimand and forfeiture of $60 of his pay per month for a period of six months. The sentence was approved and duly executed.

7. At the time of the trial accused was 31-5/12 years of age. War Department records show that he was appointed second lieutenant, Field Artillery, National Guard of the United States, July 27, 1939;

accepted August 25, 1939; promoted to first lieutenant, Field Artillery, Army of the United States, March 20, 1941; accepted March 21, 1941. He was inducted into Federal service September 16, 1940, pursuant to the order of the President dated August 31, 1940.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is not legally sufficient to support the findings of guilty of violation of the 95th Article of War, but is legally sufficient to sustain the findings of guilty of the Specification and of a violation of the 96th Article of War, and the sentence, and to warrant confirmation of the sentence. A sentence of dismissal is authorized upon conviction of a violation of the 96th Article of War.

Elias Glasson Judge Advocate.

Dorrance D. Smith Judge Advocate.

Abner E. Lifcomb Judge Advocate.

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1st Ind.

War Department, J.A.G.O., FEB 16 1943 - 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 Dan L. Johnson, Jr. (0-383512), 645th Tank Destroyer Battalion.

2. I concur in the opinion of the Board of Review that the record of trial is not legally sufficient to support the finding of guilty of a violation of Article of War 95, but is legally sufficient to support a finding of guilty of the Specification in violation of Article of War 96, and legally sufficient to support the sentence, and to warrant confirmation thereof.

Although the drunkenness of which the accused was found guilty was not a gross offense within itself, it was a repetition of a similar offense for which the accused had been convicted only four months previously. Furthermore, only ten days prior to the present offense, a part of the forfeiture imposed by the previous sentence had been remitted. The failure of the accused to show himself worthy of the leniency recently extended to him, and his apparent lack of appreciation of his responsibilities as an officer, prove him to be unworthy of further clemency. I recommend, therefore, that the sentence of dismissal be approved and carried into execution.

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

E. C. McNeil,
Brigadier General, U. S. Army,
Acting The Judge Advocate General.

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

(Only so much of findings of guilty of Charge II and its Specification approved as involves guilty of Specification in violation of Article of War 96. Sentence confirmed. G.C.M.O. 58, 26 Mar 1943)

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

SPJGK
CM 228819

FEB 28 1942

UNITED STATES	38TH INFANTRY DIVISION
v.	Trial by C. C. M., convened at Camp Carrabelle, Florida, November 26, 1942. Dismissal.
First Lieutenant WILLIAM W. COVEY (0-1166251), 163rd Field Artillery Battalion.	

OPINION of the BOARD OF REVIEW
HOOVER, COPP and SARGENT, 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 61st Article of War.

Specification: In that First Lieutenant William W. Covey, 0-1166251, One-Sixty-Third Field Artillery Battalion, did, without proper leave absent himself from his duty, at or near Zimmerman Camp, Louisiana, from about October Sixth, Nineteen Hundred Forty-Two to about October Thirty-First, Nineteen Hundred Forty-Two.

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 for action under Article of War 48.

3. Major Doyle C. Skelton, 163rd Field Artillery Battalion, testified that he was accused's commanding officer between October 6 and October 31, 1942, and that during this period accused was absent

without leave from his battalion (R. 7). The prosecution introduced no other evidence.

Accused elected to remain silent (R. 7).

4. The pleas of guilty and the evidence fully support the findings of guilty.

5. War Department records show that accused is 31 years of age. He was graduated from high school and attended an evening business school for three years. He was inducted February 14, 1941, released from active duty December 1, 1941, and recalled January 28, 1942. On July 7, 1942, upon completion of a course at the Field Artillery Officers' Candidate School, Fort Sill, Oklahoma, he was appointed a second lieutenant, Army of the United States, and was promoted to first lieutenant September 23, 1942. When recommending accused for appointment to the Officers' Candidate School, his battery commander stated that accused had demonstrated outstanding qualities of leadership and that his character was excellent.

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

Robert H. Hanna, Judge Advocate.
Andrew S. Lapp Jr., Judge Advocate.
Lloyd H. Sargent, Judge Advocate.

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1st Ind.

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

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant William W. Covey (O-1166251), 163rd Field Artillery Battalion.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. Accused was absent without leave from about October 6, 1942, to about October 31, 1942. The record of trial is silent as to the circumstances of the absence but papers accompanying the record contain a statement by accused to the effect that he was originally drafted into the service, that he subsequently found himself handicapped by assignment to a National Guard organization and that he absented himself because of his dissatisfaction. He was sentenced to dismissal. I believe accused is capable of further valuable service and accordingly recommend that the sentence be confirmed but suspended during the pleasure of the President.

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

Myron C. Cramer

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

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

(Sentence confirmed but execution suspended. G.C.M.O. 25, 8 Mar 1943)

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

SPJGH
CM 228831

FEB 11 1943

UNITED STATES	)	NEW YORK-PHILADELPHIA SECTOR NORTH ATLANTIC COASTAL FRONTIER
v.	)	Trial by G.C.M., convened at Fort Wadsworth, New York, November 21, 1942. Dishonorable discharge and confinement for five (5) years. Disciplinary Barracks.
Private JAMES WIGGINS (34044615), Company C, 731st Military Police Battalion.	)	

HOLDING BY THE BOARD OF REVIEW
HILL, LYON and SARGENT, 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 James Wiggins, Co. "C", 731st M.P. Bn., (ZI) did, at Fort Wadsworth, N.Y., on or about 12 October 1942, willfully main himself in the right hand by shooting himself with an Ithaca 12 gauge shot gun, Model 37, Serial Number 44339, thereby unfitting himself for the full performance of Military Service.

The accused pleaded not guilty to and was found guilty of the Charge and Specification. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for ten years. The reviewing authority approved the sentence, reduced the period of confinement to five years, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution shows that accused was posted as a guard at the motor pool, Fort Wadsworth, New York, from midnight, October 11, to 2 a.m., October 12, 1942. About 1:30 a.m. Captain Lewis Cowan, Medical Corps, 5th Coast Artillery, parked his car and walked toward his barracks, which was opposite the motor pool area. He passed the motor pool, did not see the motor pool guard, and was not challenged. He entered his barracks and immediately began to undress. In two or three minutes he heard someone calling several times, "Post! Post! Corporal of the Guard!" When the shouting became clearer, Captain Cowan opened the door of his room and saw accused in the hallway, holding his right arm with his left hand. Accused said, "I am shot". After Captain Cowan wrapped a towel around the hand of accused, the officer of the day, First Lieutenant Vincent J. Lynch, Corps of Engineers, appeared. Lieutenant Lynch, who was quartered in the same building, had, at about 1:30 a.m., heard someone call, "Post Post! Corporal of the Guard!" When he entered the hallway, he found Captain Cowan administering first aid to accused (R. 13, 14, 20-21, 29).

Lieutenant Lynch testified that accused stated at the time that:

> "two men had attacked him while he was a sentry at the motor park. He stated that after the scuffle that one of these men had grabbed the gun and he had attempted to get it back; that in attempting to get the gun back, the gun went off and he shot his fingers. The accused claimed that he challenged the stranger who approached on his post. He stated that the stranger asked the location of the ammunition dump and Wiggins stated that he did not tell him. He then told how a second stranger whom he had not seen previously came upon him from the rear and grabbed hold of his gun. It was during this scuffle to retain possession of the gun that it went off and shot the accused in the hand severing the first two fingers"(R. 15-16).

Captain Cowan testified that accused said:

> "that two men had approached him and demanded to know where the ammunition dump was located. He said that he would rather die than to disclose where it was. He stated that one was tall, dressed in black and masked, but he did not see the other man to tell whether he was tall or short. He stated that when he refused to dis-

close where the ammunition dump was they said that they would kill him and grabbed for his gun which he held and the gun went off. He felt immediate pain in his hand. He let the gun go and immediately after that he came running over to the building" (R. 22).

The clothing of accused was not disarranged or torn, nor did it bear any evidence that accused had been in a struggle. Accused was "very excited", and "in a cold sweat". Within a few minutes of the occurrence Lieutenant Lynch ordered the main and rear gates of the post closed. The guard on all posts was doubled and the area searched. No strangers were found on the post, and it was reported to Lieutenant Lynch that no one had passed through the gates, which were reopened between 3:30 and 3:45 a.m. The gun of accused was found in the middle of the motor pool area about 25 to 30 feet from the nearest bush. An empty shell was found in the gun, together with two other shells. The motor pool area showed no signs that a struggle had occurred. The area was "very open", "it is a dirt road and there is grass there". One witness stated that in his opinion "it is incapable of hiding a man there" (R. 16-18, 22, 25, 28-30).

Private First Class Edgar D. Brown, Company C, 731st Military Police Battalion, testified that on the evening in question he was the guard at post number 4, which post was near the motor pool. At 1 a.m. he heard a shot, followed by "hollering". No one came along the road by his post. Brown could not see the motor pool from his post because his view was blocked by a hill (R. 47-49).

First Lieutenant Benedict X. Weinstein, Medical Corps, was summond to the barracks and found that the second and third fingers of the right hand of accused were partially amputated by the injury. There was no evidence of powder burns. Accused was "rather pleasant" and sober. The following morning, both fingers were amputated. Accused was, as a result, completely disabled for full military duty. Although unfit for further field service, he was fit for limited military service of a noncombatant nature. The opinion of the witness was that the shot could not have started from the palm of the hand, that it "came from the outside toward the inside", and that it went laterally through the fingers (R. 23-26, 53-54).

It was further shown by the evidence that prior to October 9, 1942, accused asked Private First Class Harrison R. Ross, 731st Military Police Battalion, if he would write for accused a letter to the commanding officer of the organization requesting a transfer to an organization "where he could do religious work". Ross went to the first sergeant, informed him of the request of accused, and asked for

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the first name of accused. The sergeant told Ross that accused would be "sticking his neck out", but furnished the first name of accused. Ross then typed the letter, gave it to accused on October 10, and told him what the sergeant had said. Accused replied that "he had an idea as to how he could get the transfer through" or "I have an idea how I can get transferred", or some such remark (R. 36-40).

On October 11, accused was scheduled to perform guard duty but had previously been granted a pass. A Private Osborne, who was scheduled to perform guard duty, asked if anyone wished to take his place. Accused volunteered. At about 11:30 a.m., October 11, accused volunteered to perform guard duty in place of a Private Wicks. The request was granted. In posting the guard there was no fixed policy as to assignments. Accused asked for the post at the motor pool, and the post was given to him on the basis of "First come, first served". It was customary for the men in the company to volunteer for guard duty as "Monday was usually the day they took a hike and so they preferred taking guard duty to going on a hike" (R. 42, 44, 45, 51).

4. The question presented for consideration is whether the evidence submitted was competent to support the findings of guilty of the Charge and Specification thereunder. A few days prior to the day on which the offense is alleged to have been committed, accused asked another soldier to prepare for him a request for transfer to an organization where he would be afforded the opportunity to do religious work. Upon learning that his first sergeant stated that accused would be "sticking his neck out", accused remarked, in substance, that he had an idea how he could obtain a transfer. Accused twice volunteered to perform guard duty on the night in question and requested that he be assigned to the motor pool area. Accused claimed to have been assaulted by two strangers who had suddenly appeared and demanded the location of the ammunition dump. Accused stated that he refused to give the directions, that a struggle ensued, during the course of which the gun was discharged and he received the injury to his hand. The clothing of accused bore no signs of his having been involved in a struggle, nor did the area in which the struggle was supposed to have occurred. The gates to the post were closed for about two hours, the area was searched, but no strangers were found.

The evidence, if believed by the court, was not of such a substantial nature as to support the finding that accused willfully maimed himself as alleged. The fact that accused desired to transfer to another branch of the service, and that he had an idea as to how he could obtain it, is equally indicative of an honest intent as it

is of a guilty purpose. The same is true with reference to the fact that he volunteered for guard duty. The evidence shows that it was a common practice in the company to request guard duty, as the performance of such duty relieved the soldier from going on the weekly hike. The facts that the clothing of accused was not disheveled, that the motor pool area disclosed no signs of a struggle, and that no strangers were found on the post, although tending to establish that the story of accused was false, do not alone, or in conjunction with the other evidence, constitute proof that accused willfully maimed himself as alleged. Furthermore, the testimony of Lieutenant Lynch that the guards told him no one had passed through the gates was grossly incompetent as hearsay and highly prejudicial (R. 18).

In the case of CM 124906 (1919) (Dig. Ops. JAG, 1912-1940, sec. 454 (82)), accused was charged with committing mayhem upon himself by blowing off his hand with a grenade. The evidence for the prosecution was that accused had been posted in a front line trench not far from the enemy; that a rifle shot was heard, then the explosion of a hand grenade. A few moments later accused appeared with his left hand blown off. Examination of the scene of the acts disclosed a small hole in the earth just above the place where accused had been sitting and that pieces of flesh were found just outside the parapet. One witness testified that accused was right-handed. The Judge Advocate General held:

> "* * * This evidence is not sufficient to show that the act was willful. The evidence is entirely consistent with his having injured himself in repelling an enemy attack, real or fancied. It is hardly conceivable that a soldier wishing to disable himself for military service would resort to a weapon so destructive. Where circumstantial evidence is relied upon as proof of guilt, all circumstances must be inconsistent with any reasonable hypothesis of the defendant's innocence".

See also CM 153330 (1922), and CM 169811 (1926),(Dig. Ops. JAG, 1912-1940, sec. 395 (9)), holding that:

> "Where the only competent evidence is circumstantial, it must, in order to be sufficient to support conviction, be of such nature as to exclude every reasonable hypothesis except that of accused's guilt".

To the same effect is CM 195705 (1931), in which case The Judge Advocate General held:

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"Where circumstances are relied on entirely to justify conviction, they must not only be consistent with guilt but inconsistent with innocence".

As was held in the case of CM 212505, Tipton:

"The Board of Review, in scrutinizing proof and the bases of inferences does not weigh evidence or usurp the functions of courts and reviewing authorities in determining controverted questions of fact. In its capacity of an appellate body, it must, however, in every case determine whether there is evidence of record legally sufficient to support the findings of guilty (A.W. 50½). If any part of a finding of guilty rests on an inference of fact, it is the duty of the Board of Review to determine whether there is in the evidence a reasonable basis for that inference (CM 150828, Robles; CM 150100, Bruch; CM 150298, Johnson; CM 151502, Gage; CM 152797, Viens; CM 154854, Wilson; CM 156009, Green; CM 206522, Young; CM 207591, Nash, et al.)."

The following has been quoted with approval by the Board of Review:

"While we may be convinced of the guilt of the defendant, we cannot act upon such conviction unless it is founded upon evidence which, under the rules of law, is deemed sufficient to exclude every reasonable hypothesis except the one of defendant's guilt. We must look alone to the evidence as we find it in the record, and applying it to the measure of the law, ascertain whether or not it fills the measure. It will not do to sustain convictions based upon suspicions * * *. It would be a dangerous precedent to do so, and would render precarious the protection which the law seeks to throw around the lives and liberties of the citizens. Buntain v. State, 15 Tex. App. 490." (CM 207591, Nash, et al.).

5. Consideration has been given to the request for clemency by the accused, dated December 26, 1942, addressed to the Commanding General, Second Corps Area.

6. For the reasons indicated, the Board of Review holds the

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record of trial legally insufficient to support the findings of guilty and the sentence.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

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SPJGH
CM 228831

1st Ind.

Mar. 13, 1943

War Department, J.A.G.O., - To the Commanding General, New York-Philadelphia Sector, North Atlantic Coastal Frontier, Fort Hamilton, New York.

1. In the case of Private James Wiggins (34044615), Company C, 731st Military Police Battalion, I concur in the holding of the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence.

The evidence of guilt is very slight. Assuming without deciding that the record contains some competent evidence from which it might reasonably be inferred that accused willfully maimed himself as alleged, I am convinced that errors committed by the court in the admission of testimony injuriously affected the substantial rights of accused and that the findings must fall on that account.

As noted by the Board of Review the court erroneously received hearsay testimony that following the injury no one passed through the post gates. This testimony had an important bearing upon the truth of the declarations by accused that he had been assaulted by persons of unknown identity. The court, moreover, of its own initiative examined a medical witness concerning the absence of powder burns on the injured hand of accused and thereupon elicited opinion testimony by this witness as to the position possibly assumed and the means possibly employed by accused whereby he could intentionally have inflicted the injury without causing powder burns. The witness was not, in so far as appears, qualified as an expert in the premises. The admission of the expressions of opinion was erroneous. Absence of powder burns was a circumstance strongly supporting the denial by accused of self-injury and I have no doubt that the reception of the incompetent opinion testimony substantially influenced the findings of guilty.

I recommended that the findings of guilty and the sentence be disapproved.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:
(CM 228831).

E. C. McNeil 316
E. C. McNeil,
Brigadier General, U. S. Army,
Acting 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.

SPJGN
CM 228866

FEB 23 1943

UNITED STATES v. Private RICHARD R. BURT (36167034) Company E, 364th Infantry.	SOUTHERN LAND FRONTIER SECTOR WESTERN DEFENSE COMMAND Trial by G.C.M., convened at Camp Lockett, California, November 25, 1942. Dishonorable discharge and confinement for thirty (30) years. No place of confinement designated

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REVIEW by the BOARD OF REVIEW
CRESSON, LIPSCOMB and COWLES, 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 66th Article of War.

Specification: In that Private Richard R. Burt, Company "E", 364th Infantry, did at Papago Park, Phoenix, Arizona, on or about November 13, 1942, cause a mutiny in the 364th Infantry, Regiment by causing a group of members of said 364th Infantry, Regiment concertedly to disregard and defy the lawful orders of Colonel Fred O. Wickham, their Commanding Officer, to disperse and go to their respective company areas.

He pleaded not guilty to and was found guilty of the Charge and 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 a period of thirty years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution shows that on November 13, 1942, the accused, a member of Company E, 364th Infantry Regiment, was a prisoner in the regimental stockade of that organization at Phoenix, Arizona. At about 8:30 p.m. on that date, a crowd of 200 to 300 soldiers of the 364th Infantry Regiment gathered before the stockade and, for some reason which is not disclosed in the record, began shouting and making noises, while at the same time a number of prisoners in the stockade lined against the stockade fence and shouted and yelled to the soldiers on the outside. The stockade was inclosed by two fences with a ten-foot runway between the outer and the inner fence. During this disturbance Colonel Fred O. Wickham, the Commanding Officer, 364th Infantry Regiment, accompanied by his regimental adjutant came to the scene of the disturbance. Colonel Wickham made his way through the crowd of soldiers on the outside of the stockade to a position near the outer fence and commanded the prisoners, who were standing by the inner fence, to leave the fence and go to their beds. As Colonel Wickham gave this command he directed a flashlight along the line of prisoners and all the prisoners except the accused turned their backs to the fence. The accused, however, who was facing the fence with his hands upon it only turned his head aside so as to keep the glare of the flashlight out of his eyes. Colonel Wickham held the light on him long enough to assure himself that he could identify the accused in the future. Colonel Wickham then turned to the crowd of soldiers on the outside of the stockade and ordered them to disperse and go to their company areas and to bed. Colonel Wickham repeated this order each time there was a lull in the noise until he had given the order three times. A few men in his immediate vicinity turned and started to walk away. After they had taken several steps the clamor inside the stockade increased, and the voice of the accused was heard above the voices of the other prisoners. Colonel Wickham testified that he saw that his orders were not being obeyed and were not going to be obeyed, so he said to the soldiers on the outside: "Let's go across the street and I will get to the bottom of this thing and see what it is all about" (R. 10). Three or four men said, "Let's follow the Colonel and see what he has got to say." (R. 11). As the colonel started across the street the accused said "You men on the outside should do something about this" (R. 20). The noise both inside and outside the stockade continued. When Colonel Wickham had crossed the street he tried to talk to the men gathered about him. He testified, as follows:

> "* * * Each time that there would be a lull, I would hear Burt's voice from the stockade yelling and shouting

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and then the noise would start again. I saw that it was not going to do any good so - and that the men were not going to listen to me - so I told them, the men immediately around me, that I was going back to my tent and go to bed and I wanted them to keep quiet. They opened up a path for me and I walked out and as I started out, I heard one man on the outskirts of the crowd start to boo and as he did so, it was evident that someone grabbed him quickly and stopped him and I went on to my tent." (R. 11)

"* * * There was no disrespect shown me in my vicinity other than just crowding and all talking at once." * * * (R. 16)

Colonel Wickham described the crowd as being angry and disobedient and he testified that at the time he left he "considered it was dangerous". Colonel Wickham added, however, that the disturbance had not "reached the size or point of a riot". (R. 11, 8-16)

In the meantime as Colonel Wickham was talking with the crowd of soldiers across the street, Captain Edward B. Peabody had taken a position near the southwest corner of the stockade. Upon Captain Peabody's arrival before the stockade his attention was attracted to the yelling between the prisoners and the men on the outside, and in particular his attention was attracted by the loud yelling of the accused. Captain Peabody described the accused as the apparent leader of the disturbance. Within a short time after Colonel Wickham had talked to the crowd across the street from the stockade, the crowd moved slowly back toward the stockade fence. As the crowd approached him, Captain Peabody stepped out in front of it and shouted "halt" three or four times in a loud voice. The crowd, however, continued toward him until five or six soldiers had placed their hands upon him. Some of the men in the crowd called out to him with the challenge "Why don't you shoot". "Why don't you use your gun", and others said "tear that down". The latter remark was interpreted by Captain Peabody as referring to the stockade fence. Captain Peabody did not, however, draw his gun. He described the crowd as a dangerous mob. The accused, he described as being a leader and as being very angry and profane. In his shouting to the crowd on the outside, the accused went up and down the inner stockade fence, shouting to one group of soldiers after another. (R. 41-50)

At, or near the same time Colonel Wickham was with the crowd before the stockade, the officer of the day entered the stockade and made what he described as "a desperate effort to quiet them [the

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prisoners/," but the more that he talked, "the more they talked". The officer of the day then had the accused, whom he considered to be talking the loudest, brought to him and made the statement to him that "If you will get quiet and get these other prisoners quiet, *** the crowd on the outside will leave". The accused then stepped back a pace or two and said in an ordinary tone of voice "You all go on off". His voice carried only a short distance (R. 28). Within a short time, the accused was again hollering and talking loud (R. 25-37).

Sometime thereafter someone threw a tear gas bomb into the crowd and the crowd temporarily dispersed (R. 57, 60).

4. The accused elected to remain silent, and the court ruled that the only evidence presented by the defense was "immaterial to the issue" of the case.

5. The Specification alleges that the accused, "*** did *** cause a mutiny in the 364th Infantry Regiment by causing a group of members of said 364th Infantry, Regiment concertedly to disregard and defy the lawful orders of Colonel Fred O. Wickham, their commanding officer, to disperse and go to their respective company areas". Mutiny has been authoritatively defined as follows: "Mutiny imports collective insubordination and necessarily includes some combination of two or more persons in resisting lawful military authority ***" (par. 136, MCM, 1928). Mutiny has also been defined as, "concerted insubordination, or concerted opposition or resistance to, or defiance of, lawful military authority by two or more persons subject to such authority with the intent to usurp, subvert or override such authority or to neutralize it for the time being" (sec. 424, Dig. Op. JAG, 1912-40).

In order, therefore, to sustain the findings of guilty under the above Specification the proof must establish the following facts:

(1) That the accused heard and understood the order given by Colonel Fred O. Wickham to the group of soldiers before the stockade "to disperse and go to their respective company areas",

(2) That the accused did certain acts or engaged in certain conduct with the specific purpose of causing collective disobedience of the command to disperse,

(3) That the acts or conduct of the accused were a direct contributing cause to the collective disobedience alleged, and

(4) That the concerted disobedience to the orders of Colonel Wickham by the crowd of soldiers before the stockade constituted mutiny.

Concerning the first requirement of proof, the evidence shows that Colonel Wickham gave the order alleged in the Specification to the group of soldiers assembled before the stockade. The facts show also that this order was given when Colonel Wickham was standing only a few feet from the outer fence of the stockade and when the accused was standing facing the inner fence of the stockade which was only ten feet from the outer fence. Although there is no direct proof that the accused heard and understood the command given by Colonel Wickham, the evidence that Colonel Wickham was only a short distance from him when the command was given, that Colonel Wickham had a flash light in his hand, that he had just given a command to the prisoners within the stockade, that the command was followed by a lull in the shouting, and that following the command at least a part of the crowd followed Colonel Wickham across the street from the stockade afforded the court a trustworthy basis for the inference that the accused recognized Colonel Wickham as an officer and understood the purpose and nature of his command.

Concerning the second requirement of proof, the evidence shows that following Colonel Wickham's order to the crowd there was a lull in the shouting which was immediately followed by the loud yelling and shouting of the accused to the soldiers on the outside of the stockade. Also the evidence shows that the accused moved up and down the inner fence of the stockade yelling to groups of the milling crowd on the outside. These facts show that although the ultimate motive of the accused may have been to excite the crowd to some particular act other than disobedience of Colonel Wickham, his immediate purpose was to promote and encourage disobedience and defiance to military authority which necessarily included the specific purpose of causing in some material degree the disobedience to the command of Colonel Wickham.

Concerning the third requirement of proof, the evidence shows that each time there was a lull in the noise from the crowd, the accused yelled and shouted to them and that the crowd in turn responded by renewed yelling and disorder. The evidence also shows that the accused moved along the fence of the stockade exciting and encouraging the crowd on the outside by his yelling and conduct to responsive yelling and disobedience. Each of the witnesses for the prosecution who observed the conduct of the accused, described him as the leader in the disturbance. Although this evidence does not show that the accused alone caused the

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original disorderly assembly, it does show very clearly that the act of the accused was a direct contributing cause to its continuation and to the collective insubordination which nullified, for the time being, the order of Colonel Wickham. It follows, therefore, that the allegation that the accused "caused a mutiny" is sustained by the proof.

Finally, we must conclude that the concerted disobedience of the crowd to the orders of Colonel Wickham constituted mutiny. The extent of the concerted disobedience of the crowd and the nature of its defiance to military authority and to the order of Colonel Wickham, is shown not only in its disobedience of Colonel Wickham's positive order, but also in its defiant and challenging attitude toward Captain Peabody, by its challenge to Captain Peabody to use his gun, and by its threat to tear down the stockade. These facts show a collective disobedience of such magnitude as to constitute mutiny, and, together with the other facts in evidence, justify the findings of guilty.

6. Two evidentiary rulings of the court deserve consideration.

Private Frederick Kelly, a witness for the defense, testified that he was a prisoner in the 364th Infantry Regiment stockade on the evening of November 13, 1942. Witness Kelly testified further that at approximately 9 o'clock while writing a letter, he heard three shots fired, that he ran out to see what the excitement was about, and that he saw the prisoners of the stockade running toward the stockade fence. "Someone said that the Major shot --" (R. 54).

The prosecution objected to the introduction of the above testimony on the ground that it was not related to the accused. The law member ruled, however, that the defendant might proceed with his line of questioning upon the assurance that he would develop the relevancy of the witness' testimony. The witness then continued his testimony by saying three shots were fired and that a crowd of soldiers came over to the stockade from the theater. Concerning the conduct and activities of the crowd of soldiers coming from the theater, the witness testified as follows:

> "*** They all seemed confused and wanted to know who fired the shot and did anyone get shot. At the time that the Officer of the Day, Captain Somerville, came up to the fence and told the boys would they leave the fence because it was out of his control and he had nothing to do with it. I was standing along the fence at the time. He asked me, he said to me, 'You are a pretty good boy. Will you see if you can get the boys away from the fence and quiet them down?', so I did so. Then, later, he came to shake my hand and say that I was all right. Later on Colonel Wickham came down and told the boys to get away from the fence and go in the tents and get some rest because he can not sleep. At

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> that time the crowd which was around the stockade formed around Colonel Wickham and no one responded. Then later Colonel Wickham left and an officer on the outside of the stockade tried to remove the crowd from around the stockade and then they didn't respond so later some tear gas was thrown. They removed temporarily and then returned back and swarmed around the stockade. Later, I went in my tent and went to bed" (R. 56-57).

The witness also testified that in all the disturbance he could not distinguish any statement or any individual remark (R. 58). The witness testified further that after he had asked the prisoners to withdraw from the fence, and to keep quiet,

> "*** the majority of them did, and Colonel Wickham came up and everyone went to the fence to see what he had to say and he told them to go to their tents and to sleep because he could not get any rest and they all just stood there and the Captain on the outside told them to go away" (R. 54-62).

At the completion of this testimony the prosecution requested that it be stricken from the record because it was not related to the accused, and not relevant to the issues of the case. The court, after considering the request of the prosecution, did not order the evidence stricken from the record, but stated through its president that the court was of the opinion that the testimony given by the witness was "immaterial to the issue" (R. 62).

Although this evidence did not mention the accused, it did tend to show some of the circumstances and confusion which existed both within and without the stockade, and had, therefore, a logical relation to the fact leading up to the alleged mutiny. The court, therefore, might well have considered the testimony of Private Kelly for what it may have been worth in mitigation of the offenses charged. On the other hand, the creditability of the witness, and the weight and value of his testimony were matters exclusively within the provisions of the court. The unusual and premature action of the court in ruling that the testimony was "immaterial" cannot be regarded as a violation of the fundamental rights of the accused.

During the cross examination of Captain Charles B. Barnwell, a witness for the prosecution, the prosecution objected to a question seeking to develop the cause of the assembly of the crowd before the stockade on the ground that the cause or reason for the assembly was not related to the accused (R. 32). The objection was sustained. The

court's action in this respect cannot be regarded as legally objectionable. First, it should be observed that the accused was not being tried for any act relating to the original gathering of the excited crowd before the stockade. The accused was tried rather for his conduct in causing the crowd to disobey the order of Colonel Wickham to disperse and return to their company areas. Regardless, therefore, of the real or imaginary grievance which may have brought the crowd together, both the accused and the crowd were under a military duty to respond promptly to the order of Colonel Wickham to disperse. Necessarily, therefore, the reason for the original assembly of the crowd before the stockade could have no logical relevancy to the issue of the guilt or innocence of the accused. Secondly, the question by the defense counsel as to the cause of the assembly was legally improper for the reason that it exceeded the scope of the direct examination. Although the defense should have been allowed to introduce as a part of its own case any evidence of mitigating circumstances or of any facts which might have a logical bearing on the ultimate question of clemency, it should not have attempted to develop such matters on cross examination when such matters had not been inquired into during the direct examination. Furthermore, at the close of the case, and unrestricted by the rules of evidence, the defense had the right to have submitted any matters as to clemency which it desired to be considered by the court or the reviewing authority (par. 81, MCM, 1928).

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.

Charles Lessson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Willard B. Cowles, Judge Advocate.

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

SPJGH
CM 228867

JAN 27 1943

UNITED STATES	)	FOURTH SERVICE COMMAND
v.	)	Trial by G.C.M., convened at Fort Benning, Georgia, November 20, 1942. Dismissal, total forfeitures, and confinement for eighteen (18) months. Disciplinary Barracks.
Second Lieutenant LUTHER M. SHEPHERD, Jr. (0-1633541), 161st Signal Photographic Company.	)	

OPINION of the BOARD OF REVIEW
HILL, LYON and SARGENT, 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 63rd Article of War.

Specification: In that Second Lieutenant Luther M. Shepherd, Jr., 161st Signal Photographic Company, did, at Fort Benning, Georgia, on or about October 5, 1942, behave himself with disrespect toward Major John A. Supensky, Quartermaster Corps, his superior officer, by saying to him, "go ahead and sign it you son-of-a-bitch", or words to that effect.

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

Specification: In that Second Lieutenant Luther M. Shepherd, Jr., 161st Signal Photographic Company, did, at Fort Benning, Georgia, on or about October 5, 1942, strike Captain Neil R. Maxey, Quartermaster Corps, his superior officer, who was then

in the execution of his office, in the face with his fist.

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

Specification: In that Second Lieutenant Luther M. Shepherd, Jr., 161st Signal Photo Company was, at Fort Benning, Georgia, on or about August 30, 1942, drunk and disorderly in quarters and station.

He pleaded not guilty to and was found guilty of all Charges and Specifications. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for eighteen months. The reviewing authority approved only so much of the findings of guilty of the Specification of Charge III and of Charge III as involve findings of guilty of the lesser included offense of being drunk in quarters and station at the time and place alleged, in violation of Article of War 96, approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution with respect to the Specification, Charge I, and the Specification, Charge II, shows that about 5 p.m., at the time and place alleged, accused entered the office of Captain Neil R. Maxey, Quartermaster Corps, Headquarters, 4th Detachment, Special Troops, Second Army, who was adjutant of that organization, "pitched his cap" on Captain Maxey's desk, and said that he wished to see Colonel Sharpless. The captain told accused that as it was obvious that he had been drinking, he was in no condition to see the colonel. Accused continued to request permission to see Colonel Sharpless, stating that although he had been drinking, he could see the colonel without the latter knowing that he had been drinking. Finally, Captain Maxey entered Colonel Sharpless' office, found he was not there, and informed accused that he should return the following morning. Accused became irked and was loud and boisterous, causing "quite a bit of disturbance in the office", which was noticed by the enlisted men present. Accused demanded that he be granted leave, and was told by Captain Maxey that Captain Maxey had no authority to grant such a request. Accused then asked to be allowed to resign from the Army. Captain Maxey replied that it was necessary that resignations be in writing. When accused insisted that he be allowed to resign, the captain ordered him to go to his quarters and remain there until he was no longer under the influence of alcohol. Accused refused. Captain Maxey then told accused that he would give him 15 minutes to comply with the order. Accused told the captain that he "could not order him around and tell him what to do" (R. 6-8, 11, 13, 15-16).

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Accused then asked for permission to be seated, which request was granted. The accused continued to talk loudly and called Captain Maxey a son of a bitch. He asked Captain Maxey if he was from Kentucky, a fact which accused already knew. When Captain Maxey stated that he was from Kentucky, accused said that he was not fit to be a Kentuckian and stated, "I would like to have your life, you no-good son of a bitch". Major John A. Supensky, Infantry, 4th Detachment, Special Troops, Second Army, then entered and was told by Captain Maxey that the captain was forced to place accused under arrest. When Captain Maxey reached for the telephone directory to call the provost marshal, accused, who was standing behind him to the left, struck him and made his nose and mouth bleed. "It was a pretty good blow, and I reeled from it". First Lieutenant Alvin E. Raettig, 183rd Ordnance Company, seized accused behind the arms and "pinned him". Accused stated to Lieutenant Raettig that he could turn him loose, that accused was "all right now". Upon being released, accused, with his left foot, kicked at Captain Maxey, who was then seated, but because of the pain which he was then undergoing, Captain Maxey did not know whether the blow landed. Lieutenant Raettig again seized accused and held him against the wall. Accused then ordered some enlisted men to "come here". Lieutenant Raettig motioned them to remain where they were. Accused said, "I'm an officer. Come here". The men did not move. Major Supensky told accused to be quiet, that he was under arrest, and ordered an enlisted man to call the prison officer. Captain Maxey ordered another to type out a request to place accused in arrest in the post stockade. Accused stated "I want to get out of this goddamned Army". As Major Supensky was signing the confinement order, accused said "Major, do you know you are violating the articles of war by signing that? Major, you know that, don't you?" When Major Supensky did not reply, accused said "Well, sign it, you son of a bitch". The military police then entered and removed accused from the premises. As he left, accused asked, "Do you hate me, major?" Major Supensky replied in the negative. Technician Fourth Grade Robert R. Forsyth, Headquarters, 4th Detachment, Special Troops, Second Army, took shorthand notes from the time Captain Maxey was first cursed by accused. Forsyth testified as to the contents of the notes which were introduced in evidence (R. 8-9, 11-14, 16-19; Ex. I).

The evidence further shows that accused was drunk, that his breath smelled of alcohol, and his face was flushed. He had a "wild look in his eyes" and his clothes "looked like he had been wallowing around some place and sleeping in them" (R. 9-12, 14-15, 17, 19-21).

With reference to Charge III and Specification thereunder,

the evidence for the prosecution shows that Major Supensky, at the request of his commanding officer, investigated certain incidents concerning accused. Accused told Major Supensky that at about 5 p.m., August 30, 1942, he was tired, and drank five or six bottles of beer very rapidly. He then had two drinks of liquor, went to Columbus, Georgia, and shortly thereafter returned to Fort Benning. He was hot, "and the alcohol had taken effect" (R. 21).

Private Harold Williams, Company C, Service Battalion, 1st Student Training Regiment, was, on August 30, 1942, a sentinel on duty at Fort Benning, Georgia. Accused asked Williams if he was a guard at that post and upon being told that he was, said to Williams, "Follow me". While he was following accused, Williams stated that he was not allowed to leave his post. Accused came to a building, looked in the front door, hesitated, and told Williams to enter by the side door, saying that he would meet him in the building. Williams obeyed and met accused outside a door marked "Shepherd". Accused opened the door and said "Look over there in the corner". Williams turned his flashlight and noticed "bed clothes and a little table". Accused closed the door and said "Undress". Williams replied that he did not know what to do, whereupon accused said "Do as you are told". Accused again ordered him to undress and to do as he was told. Williams then said "I don't know what you mean", put his stick in his left hand and left. Williams testified that the facial expressions of accused appeared normal "until we got to the room. He looked so much like the OD that I didn't think anything was wrong with him. The only time I had a chance to look at his face was in the room" (R. 23-24).

Private Edmund L. Lake, Company B, Service Battalion, 1st Student Training Regiment, ISSC, testified that on August 30, 1942, he was talking with another soldier in front of the barracks. Accused asked them if they were on guard. Lake replied that neither he or the other soldier was on guard. Accused walked away, returned, and said that one of the soldiers was to follow him. Lake followed accused across the road. They entered a room in a barrack for officers, accused turned on the light, closed the door, and ordered Lake to take off his clothes. Lake said he would not obey that order, and upon again being told to take off his clothes, said that he could not do so. Accused asked if he wanted to go to the guardhouse. Lake replied that "if it was for disobeying an order like that, I'd have to go". Accused then told Lake to leave, and Lake complied with his request. Accused was intoxicated and "walked like it". His breath smelled of whiskey (R. 24-26).

4. For the defense, accused testified that he drank frequently

and "considerably", and that he had no control over the amounts consumed. "I commence to drink and keep on until I pass out or until I run out of liquor or someone prevents me from drinking any further". "I lose all account of what's going on. I frequently wind up in entirely different places from where I start drinking. I don't know how I get there" (R. 27, 28, 30).

At 10:30 a.m. on the day on which he was alleged to have struck Captain Maxey (October 5, 1942), accused purchased a quart of whiskey. He drank "on through noon and until some time during the afternoon". He "took a large drink after lunch, and several more after that". The next thing he recalled was waking up in the post stockade. He did not recall striking Captain Maxey or being in Captain Maxey's office. Neither did he remember saying that he wished "to get out of the goddamned Army", or saying anything to Major Supensky. "He "just drew a blank". He admitted knowing that Captain Maxey was Adjutant of the 4th Detachment Headquarters, and that he was from the home state of accused, Kentucky. He had, on occasion, worked with Captain Maxey (R. 28, 30, 31).

With reference to Charge III and Specification thereunder, accused stated that he did not see Williams or Jones on October 5th, and stated that he had never seen them until he was confronted by them at a subsequent investigation. Accused testified further that on August 30, 1942, he entered a hospital for observation because of his drinking. He was there two weeks and was interviewed six times by Major Tureen, acting chief of the psychopathic ward (R. 29-32).

Captain Anthony H. Gallis, Medical Corps, testified that he was registrar of the Station Hospital at Fort Benning and in charge of all hospital charts and clinical records. He identified a "progress record" of accused while at the Station Hospital, dated September 11, 1942, and identified a signature thereon as that of Major Louis L. Tureen, then head of neuropsychiatry at the hospital. The progress report was rewritten from an old chart which was drafted when the original chart was lost. The report was introduced in evidence over the objection of the prosecution. It is stated in pertinent part that:

> "Patient has the personality of an alcoholic. He is observed early in his career of alcoholism. * * * His conflicts are deep seated & require adequate & intensive study and psychotherapy. Alcoholism is a symptom of his

psychoneurosis. I would make a diagnosis of psychoneurosis - type unclassified (compulsive?) with chronic alcoholism. He is not psychotic, responsible for his acts, but he should be considered for reclassification rather than for punishment" (R. 32-34; Ex. A).

Second Lieutenant John E. Sims, Academic Regiment, Infantry School Service Command, testified that he had known accused for about six weeks and had observed him drinking frequently. On Sunday (October 4, 1942), accused entered the room of Lieutenant Sims, "all shaky" and said he must have something to drink. Accused saw a bottle of sun tan lotion, said "Ah!" and picked it up. Lieutenant Sims said "That's no good", and accused put the bottle down. He then took a bottle of Aqua-Velva from a trunk, and in spite of the remonstrances of Lieutenant Sims, "gulped it down". The next morning accused asked the witness to "stake" him to some liquor. The following morning at 4 a.m., accused rapped loudly on the door and opened it. Lieutenant Sims said "I don't have anything, and don't wake me at this time of morning". Accused was in a disheveled state, his hair was over his eyes, and "was about the same way he was the previous time he came in". Accused excused himself and departed (R. 34-36).

5. It is clearly established by the evidence that accused, at the time and place alleged, addressed to Major Supensky, his superior officer, the words alleged in the Specification, Charge I. It was further convincingly shown that at the time and place alleged, accused struck his superior officer, Captain Maxey, in the face with his fist (Spec., Charge II). Accused contended that he was so drunk that he did not recall the incident. His testimony in this regard was self-serving. In addition, it cannot be doubted that he recognized Captain Maxey and knew that he was his superior officer. He had previously worked with the captain, and testified that he had previously known him to be the adjutant of the organization and from the same state as the accused. When in the office, he emphasized the fact that Captain Maxey was "not fit to be a Kentuckian". Accused twice addressed Major Supensky by his correct rank, and knew that that officer was signing an order for his confinement when he addressed the disrespectful language alleged. He had the presence of mind to know that various enlisted men were present and to insist on their obedience of his order to "come here". The contention of accused that he "drew a blank" and did not recall the incident, is unworthy of belief.

When accused struck Captain Maxey, the latter had just informed Major Supensky that he would have to place accused in arrest, and was about to call the provost marshal. Accused was drunk, had been

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cursing his superior officer, and had refused to obey Captain Maxey's order to return to his quarters.

> "* * * 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" (par. 134a, M.C.M., 1928, p. 148).

As it was then clearly the duty of Captain Maxey to maintain discipline over accused because of his previous behavior, the captain was in the execution of his office as alleged when struck by accused, at a time when he was about to have accused placed in arrest.

It was also clearly established by the evidence that accused was, at the time and place alleged, drunk while in quarters and station (Spec., Charge III). During the course of an investigation, accused told Major Supensky that, at about 5 p.m., August 30, 1942, he was tired and drank five or six bottles of beer very rapidly and then had two drinks of liquor. He went to Columbus, Georgia, and shortly thereafter returned to Fort Benning. He was hot and "the alcohol had taken effect". The time of the occurrence on the same day, to which Private Lake testified, was not established in evidence. That it was dark was evidenced by the fact that accused turned on the light after Lake entered the room. Lake testified that accused was intoxicated, that he "walked like it", and that his breath smelled of alcohol. It is possible that accused met Lake in the early morning of August 30, and prior to his drinking. However, the fact that at 5 p.m., of the same day, accused consumed such amounts of beer and liquor while in a tired condition, and that he was later affected by this drinking, may be considered as possibly corroborative of the positive testimony of Lake that accused was intoxicated.

6. Accused is 28 years of age, and was graduated from high school. The records of the Office of The Adjutant General show his service as follows: Inducted November 17, 1941; graduated from Officer Candidate School, appointed second lieutenant, Army of the United States, and entered on extended active duty, June 3, 1942.

7. 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 and sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of violation of Article of War 63, 64, or 96.

_____ Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

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SPJGH
CM 228867 1st Ind.

War Department, J.A.G.O., FEB 1 - 1943 - 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 Luther M. Shepherd, Jr. (O-1633541), 161st Signal Photographic Company.

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.

The accused on October 5, 1942, while in a drunken condition at Fort Benning, Georgia, addressed a superior officer with highly reprehensible language, assaulted another superior officer, and, on August 30, 1942, was drunk in quarters and station. He was sentenced to dismissal, to forfeit all pay and allowances due or to become due, and to confinement at hard labor for eighteen months. In view of the particularly serious nature of the offenses with respect to the superior officers of accused, I recommend that the sentence, including the confinement adjudged, be confirmed and carried into execution.

3. Inclosed are a draft of letter for your signature, transmitting the record to the President for his action, and a form of Executive action carrying into effect the above recommendation.

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.

(Sentence confirmed. G.C.M.O. 39, 16 Mar 1943)

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

SPJGN
CM 228891

UNITED STATES	)	THIRD DISTRICT, ARMY AIR FORCES TECHNICAL TRAINING COMMAND
v.	)	
Staff Sergeant JOSEPH J. ROBNETT (17026995), 396th Technical School Squadron (Special), Assigned.	)	Trial by G.C.M., convened at Keesler Field, Mississippi, October 28, 29 and 30, 1942. Dishonorable discharge and confinement for life. Penitentiary.

REVIEW by the BOARD OF REVIEW
CRESSON, SNAPP 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 92nd Article of War.

Specification: In that Staff Sergeant Joseph J. Robnett, 396th Technical School Squadron (Sp), did, at Biloxi, Mississippi, on or about August 26, 1942, forcibly and feloniously, against her will, have carnal knowledge of Hilda Ouida Lowe.

He pleaded not guilty to and was found guilty of the Charge and Specification. Three-fourths of the members of the court present concurring, he was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Atlanta, Georgia, as the place of confinement, and forwarded the record for action under Article of War 50½.

3. The evidence for the prosecution shows that on August 26, 1942, the prosecutrix, Hilda Ouida Lowe, a young girl 15 years of age, was visiting her married sister, Mrs. Lyna Lowe Wilson, in Biloxi, Mississippi (R. 9, 43). Mrs. Wilson and her husband, Staff Sergeant William C.

Wilson lived at 420 East Howard Avenue in Biloxi. On the evening of August 26, about 7 p.m., Mrs. Wilson took Hilda to a nearby theater, bought a ticket for her, left her and returned home (R. 9, 31, 43) where she remained with her husband until about 9:15 or 9:30 (R. 31, 43). At about 9:30 p.m. Sergeant and Mrs. Wilson went to the U.S.O., where they expected to see Sergeant Robnett, and stayed until about 10:20 p.m. (R. 43). After she had seen the show Hilda went home and as she went in saw Sergeant Robnett on the front porch (R. 10). She had met him, casually, about eleven days before (R. 9). Sergeant Robnett and Sergeant Wilson worked together in the orderly room of the squadron and were friends (R. 34). Hilda went on into her sister's apartment, turned on the light and radio in the living room and started to listen to a news broadcast. At this moment the door, which had not been locked, was opened, and Sergeant Robnett came in and sat down on the opposite side of the room, and in response to his questions Hilda told him that she had been to the movies and that her sister and Sergeant Wilson were at the U.S.O. He then asked how old she was and invited her to have a cigarette which she refused. He then stood up, turned the radio to some orchestra music and turned out the light. What happened further is described by the prosecutrix as follows (R. 12, 13, 28):

> "*** I told him to turn it back on, and he didn't do it, and I started to turn it back on, and he grabbed me by the throat with his right hand and on the shoulder with his left hand and started choking me, and I started screaming, but I couldn't holler. *** He started pulling up my clothes and pulling down my pants. *** He put his penis in my private parts. *** I was able to scream just once, and then when I could I tried. *** He had his hand on my throat. *** He said, 'If you make any noise or holler, I'll choke you to death.' *** He started going up and down, and he said if you don't put it in for me, I'll kill you, but I didn't do it, and to keep him from killing me, I just touched him, and it hurt so bad I almost let him kill me. *** I heard someone —some people—walking down the street, and I knew they were ladies, but I just happened to get where I could say anything, and I said, 'There is Bill—he is going to kill you,'— talking about Sergeant Wilson. *** He jumped up and sat up and I ran out the door and *** down East Howard Avenue *** and I felt something cold in my pants *** something gooey. *** I turned down Elmer Street *** and met my sister and her husband and I told them the soldier had come in

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> the room and scared me, and about that time, Sergeant Robnett walked up, and my sister and I had a little private conversation, and I told her what had happened ***.
>
> * * *
>
> Q. Did you at any time give him permission to touch you or to put it into you, in any way?
> A. No.
>
> * * *
>
> Q. Now, will you tell the Court again, if you know, what it was that went into your private parts?
> A. His penis."

When she met her sister and brother-in-law she was crying and hysterical. Her hair was mussed up and unpinned and her blouse was out of her skirt all the way around (R. 31, 33, 44). Over the objection of the defense Mrs. Wilson was permitted to testify as follows:

> "*** I said, 'Well, what did he do and she said, 'He tried to choke me,' and I said, 'Did he do that,' and she knew what I was talking about, and she said, 'Yes.'" (R. 45).

During this meeting in the street Sergeant Wilson was holding accused's arm - he thought he was drunk - and when Mrs. Wilson reported what Ouida had said, the accused made this statement to Wilson: "Wilson, I done it; I don't know why I done it, and I'm sorry" (R. 33). Mrs. Wilson testified that accused said: "Wilson, I'm sorry I did it; I know I shouldn't have done it" (R. 45).

An examination of the prosecutrix by two medical officers about midnight on August 26 (R. 55) disclosed red marks and scratches on the neck, and the vaginal membrane or hymen had been recently torn in three places, and was slightly oozing bright red blood. One of these medical officers testified that in his opinion "she was a virgin prior to the injury" (R. 56).

About midnight on August 26 accused was taken to the hospital for a blood alcohol test and hence to the office of Second Lieutenant Stephen S. Brown, Assistant Provost Marshal. Those present were Lieutenant Brown, Private Brassell and the accused (R. 96). While the three were seated at the desk Lieutenant Brown said to the accused: "Sergeant, there is no doubt in your mind about what this is all about, is there?" and the accused replied, "No sir, I did it". Lieutenant Brown then said: "You understand, don't you, that anything you say may

be used against you, you understand your constitutional rights are that if you want to make a statement it must be a voluntary statement?" To which accused replied, "I do, sir, I want to get this off my mind". In this connection Lieutenant Brown testified further as follows:

> "As he talked I wrote down what he was saying on a sheet of paper. When he finished, I read back to him what he said. I then handed the sheet of paper to him and asked him to read it. He read it, and as he picked up a pen to sign it, I said, 'Sergeant, you understand you do not have to sign this statement'. He said, 'Yes, sir'; and signed it" (R. 97).

This statement was admitted in evidence, over the objection of the defense, as Prosecution's Exhibit 5, and is as follows:

> "8/27/42
>
> "I, S/Sgt Joseph J. Robnett, ASN 17026995, 396 T. SS., having been first duly advised of my consitutional rights and warned that any statement I may make may be used against, desire to make the following statement of my own free will and volition:
>
> "Last night I went to the USO club to meet S/Sgt and Mrs. Wilson. Failing to find them there I went to their home at 420 E. Howard St to await their arrival. After a short while Hilda Ouida Lowe, the sister of Mrs. Wilson, returned from a movie and entered the house. I do not remember whether I had entered the house before her or after she entered. However, while we were both in the house, I seized her and against her will overcame her efforts to resist me, threw her to the floor and held her while I had intercourse with her.
>
> "I then left the house, following Ouida who had run out the door as soon as I released her. I walked after Ouida some distance behind her until I met S/Sgt Wilson and Mrs. Wilson. Sgt Wilson told me to go home which I did".

The condition of accused, with respect to sobriety, at and shortly before the time the statement was signed, was described by witnesses as follows: Was calm, well balanced, and co-ordinated physically (R. 58). His speech was clear and he walked in a normal manner (R. 76, 58, 87). He had a faint trace of alcohol on his breath (R. 58, 80). In the opinion of two witnesses he was sober (R. 76, 87).

4. Evidence for the defense:

The accused testified in his own behalf in substance as follows:

That he left his work on the evening of August 26 accompanied by Sergeant Wilson and went to the N.C.O. Club where he stayed until about 6 p.m. and had six drinks of beer or whiskey. He then went to "Ma Millers" where he had a beer and a highball. From there he went to the Rendezvous pier where he had beer and whiskey, and as to what occurred after that his memory is blank, although he has a vague recollection of being at the U.S.O. and of having seen Sergeant Wilson somewhere that night. He does not recall seeing the military police that night and has no recollection of signing a statement, although he admits the signature on Prosecution Exhibit 5 is his. He does not remember having been to Sergeant Wilson's apartment (R. 135-148).

A number of witnesses testified on behalf of accused as to his general reputation for good character, both in the Army and in his home town, and a number of witnesses testified as to his periodic habit of getting drunk and his subsequent inability to remember anything that occurred while in that condition.

5. The corpus delicti is established by the testimony of the prosecutrix, which is corroborated by the testimony of the sister concerning the complaint made to her by the prosecutrix within a few moments thereafter, and by the testimony of the medical officers who examined her. The fact that accused was the perpetrator is established by his own admissions against interest made a few moments after the commission of the offense, by the testimony of the prosecutrix and by his signed written confession made a few hours later.

The fact that penetration had been accomplished is established by the testimony of the prosecutrix and is corroborated by the testimony of the examining medical officer.

After a careful consideration of all the evidence in the case, together with the written arguments of counsel, the Board of Review is of the opinion that the evidence is legally sufficient to support the finding of guilty, and that the record contains no errors which injuriously affect the substantial rights of the accused.

It is urged by counsel that due to the lack of sobriety of accused the confession was not voluntary and that his substantial rights were therefore prejudiced by its admission. There is evidence that accused had been drinking, and he testified that he had no recollection of the offense, or of having signed a statement, but there is no evidence that at either of these times he was sufficiently intoxicated to be unconscious of what he was doing or saying. Intoxication, in itself,

excepting such a degree of intoxication as would render him unconscious of what he was saying, is not sufficient to render a confession inadmissible. That fact goes only to its weight and is a matter for the consideration of the court. However, there is sufficient competent evidence to establish guilt beyond a reasonable doubt without consideration of the signed confession, and the substantial rights of the accused were not, therefore, injuriously affected by its admission.

It is further urged that it was prejudicial error to admit the testimony of Mrs. Wilson as to the complaint made to her by prosecutrix shortly after the offense was committed. Evidence as to a complaint made shortly after the commission of the offense of rape is admissible for the purpose of corroborating the testimony of the prosecutrix relative to the corpus delicti, and the substantial rights of the accused were not thereby injuriously affected.

6. The service data on the charge sheet shows the age of the accused as 27 years. He enlisted on June 10, 1941, in the Regular Army to serve for three years, governed by the Service Extension Act of 1941.

7. The Board of Review has very carefully considered the briefs and written arguments of Mr. John W. Moncrief, civilian counsel for the accused, the oral arguments presented to the Board by the Honorable William Frank Norrell, Representative in Congress from the State of Arkansas, and letters from Mrs. Alfred E. Robnett to The Judge Advocate General.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. Confinement in a penitentiary is authorized for the offense of rape, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by section 458, Title 18 of the United States Code. Imprisonment for life is authorized upon conviction of a violation of the 92nd Article of War.

Thos. L. Gresson, Judge Advocate.

Lorrain D. Snapp, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

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

(365)

SPJGK
CM 228894

FEB 6 1943

UNITED STATES)	THIRD AIR FORCE
)	
v.)	Trial by G. C. M., convened at Morris Field, North Carolina, November 21, 1942. Dismissal.
)	
First Lieutenant WILLIAM L. PETERSON (0-336704), Air Corps.)	

OPINION of the BOARD OF REVIEW
HOOVER, COPP and ANDREWS, Judge Advocates.

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: In that 1st Lt. William L. Peterson, 16th Obsn. Sq., 68th Obsn. Gp., was, at Morris Field, N. C., in the Officers' Club, on or about Sept. 13, 1942, drunk and disorderly while in uniform.

Specification 2: In that 1st Lt. William L. Peterson, 16th Obsn. Sq., 68th Obsn. Gp., being indebted to the Citizens State Bank, Okemah, Oklahoma, in the sum of $263.02, for value received, which amount became due and payable on June 1, 1942, did, at Morris Field, N. C., from June 1, 1942, to Sept. 4, 1942, dishonorably fail and neglect to pay said debt.

Specification 3: In that 1st Lt. William L. Peterson, 16th Obsn. Sq., 68th Obsn. Group, being indebted to the Citizens National Bank, Abilene, Texas, in the sum of $250.00, for value received, which amount became due and payable on June 2, 1942, did, at Morris Field, N. C., from June 2, 1942, to Sept. 3, 1942, dishonorably fail and neglect to pay

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said debt.

Specification 4: (Finding of not guilty).

Specification 5: In that 1st Lt. William L. Peterson, 16th Obsn. Sq., 68th Obsn. Group, having on or about September 1, 1941, became indebted to the Security Bank and Trust Company, Lawton, Oklahoma, in the sum of $170.00, for value received, and having failed without due cause to liquidate said indebtedness, and having on or about June 13, 1942, promised in writing to said Security Bank and Trust Company, that he would on or about August 1, 1942, settle such indebtedness in full, did, without due cause, at Morris Field, N. C., on or about August 1, 1942, dishonorably fail to keep said promise.

He pleaded not guilty to the Charge and Specifications. He was found guilty of the Charge and Specifications 1, 2, 3 and 5 thereunder, and not guilty of Specification 4. 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 for action under Article of War 48.

3. The evidence relating to Specification 1 of the Charge is substantially as follows:

From about 4:30 p.m. to about 5 p.m., September 13, 1942, accused was in the "bar" of the officers' club at Morris Field, North Carolina, at which field he was on duty. Two visiting officers accompanied by one or two ladies were in the bar. (R. 10; Ex. 1) One of the visiting officers wore a winter blouse. Accused leaned against the bar and talked loudly. First Lieutenant Keith E. Gerchow, Medical Corps, who entered the bar and observed accused, testified that

> "His speech was thick and disconnected and he seemed unable to support himself, without hanging to the bar for support" (Ex. 1).

In witness' opinion accused was "obviously drunk". Accused "was talking

to himself" and the bartender and attempted to involve Lieutenant Gerchow in conversation. Talking loudly enough for the officer in the winter blouse to hear, accused said that an officer of the Army, "or any damn fool, would have more sense than to wear a uniform like that at that time of year". He repeated the phrase "'any damned fool would have more sense'" often and in a "very offensive and embarrassing manner". As Lieutenant Gerchow left the club, he reported the matter to First Lieutenant Jack E. Christensen, Air Corps, assistant club officer (R. 8; Ex. 1).

Lieutenant Christensen went to accused, observed that he was still at the bar drinking, and said: "'Hello, Lt. Peterson, how are you today?'". Accused, in response, upbraided Lieutenant Christensen for "working in the Officers' Club", stating that he "was a yellow Son of a Bitch for trying to avoid combat duty there, and that that was not a man's job". Lieutenant Christensen asked accused if he was "trying to get in shape for combat duty by sitting here all afternoon drinking liquor?". Accused then "reprimanded" Lieutenant Christensen "for being insubordinate" (R. 9). Lieutenant Christensen requested that accused leave the bar and drink no more liquor there that afternoon. Accused refused to leave and said he would drink when and as much as he liked. (R. 10) The conversation covered a period of about five minutes (R. 9). Lieutenant Christensen testified that accused spoke in a very low tone and that his conversation could not be heard from "one end of the bar to the other end of the room". His speech was slow and deliberate but witness did not deem it incoherent. The manner of accused, according to Lieutenant Christensen, was that of one who had had "considerable drink" - "When he spoke, his eyes were shining and glassy *** his head would kind of roll". (R. 10) Lieutenant Christensen believed "he was under the influence of liquor" (R. 9). Before the occasion described the relations between Lieutenant Christensen and accused had been pleasant (R. 11). Lieutenant Christensen at least twice requested accused to leave the club (R. 11). Accused did not comply and Lieutenant Christensen called the officer of the day (R. 11), Second Lieutenant Daniel M. Muhlmeister, Air Corps (R. 13), who came to the bar.

Lieutenant Muhlmeister, who was in uniform, wearing a pistol and holster and a brassard (R. 15), told accused he thought he had had enough to drink and that it "would be best" if he left the club and returned to his quarters. Accused refused to leave and Lieutenant Muhlmeister then told accused he was officer of the day and that it was his business to see that accused was removed. (R. 14) Accused said he would not take orders from a "Shave-tail" (R. 15). Lieutenant

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Muhlmeister, not believing that accused realized his official position, again explained that he was officer of the day and had authority to remove him. Accused still refused to go. (R. 15) He said he was "from Oklahoma and people out there would shoot it out" and that if Lieutenant Muhlmeister "would get another gun" and come outside they "would shoot it out" (R. 15). When accused said this he was offering Lieutenant Muhlmeister a cigarette (R. 17). During the conversation, accused's speech was in a normal conversational tone (R. 17) but was "rather incoherent" (R. 16). At Lieutenant Muhlmeister's request, Lieutenant Christensen reported the occurrences to the commanding officer of the 68th Observation Group, of which accused was a member (R. 11, 12, 15).

About ten minutes later two officers came and took accused out of the bar, one officer on either side supporting his arm (R. 16). He was "quite unsteady and appeared to need assistance in walking straight" on his way to his quarters (R. 12, 16). On arrival at his quarters accused was urged to go to bed. This he opposed doing, talking for some ten minutes in a rather loud and excitable manner and alternately crying and laughing. His voice was higher pitched than usual. This, together with a sound like scuffling, awakened an officer who had been sleeping in his quarters on the floor below the quarters occupied by accused. (R. 19, 20)

Second Lieutenant Robert P. Ziegert, Air Corps, testified for the defense that he was in the club bar during the afternoon of September 13 and noticed Lieutenant Muhlmeister talking to accused, but did not observe any disorder in the form of loud talking or otherwise (R. 24, 25).

Accused testified:

> "*** regarding the incident at the bar; I had been very much under the influence of intoxicating liquor in a number of bars, and I think a lot of other people have. As regarding this Medical Officer - he was there, and the reason he was so insulted was that he made a remark about my khaki uniform and all I said in return was that people living in glass houses should not be throwing stones. He was out of uniform. I was in the uniform directed by the 68th Observation Group".

To his knowledge he did not have a conversation with Lieutenant Gerchow. (R. 27, 28) When accused reached his quarters he was "plain mad" but "there was no disturbance" (R. 28).

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From the testimony of other officers who observed him and from his own admissions, it thus appears that at the place and time alleged in Specification 1 of the Charge, accused was drunk in uniform. He was unsteady on his feet and physically uncoordinated in other respects, his speech was somewhat abnormal, and his demeanor was such that responsible officers found it necessary to remove him from the officers' club. He was disorderly in that he declined to leave the bar when requested to do so, in that he made offensive remarks to other officers and in that he created a noticeable commotion when escorted to his quarters. Although his condition and actions were discreditable, his drunkenness could not properly be characterized as gross or his disorderly behavior as conspicuous. The proof with respect to this transaction falls short of demonstrating that moral unfitness in accused which is the essence of a violation of Article of War 95 (par. 151, M.C.M.). The evidence is legally sufficient to support only so much of the findings of guilty with respect to this Specification as involves a finding of guilty of the Specification in violation of Article of War 96.

4. The evidence relating to Specifications 2, 3 and 5 of the Charge is substantially as follows:

On October 25, 1941, to cover a loan by the bank, accused gave to the Citizens State Bank, Okemah, Oklahoma, his promissory note for $313.02, with interest at 10% per annum, payable June 1, 1942. Installments aggregating $50 were paid on the note prior to June 1, 1942, leaving a balance on that date of $263.02, plus interest. No further payment was made prior to October 28, 1942. (Ex. 2) (Specification 2)

On May 8, 1942, also to cover a loan, accused gave to the Citizens National Bank, Abilene, Texas, his promissory note for $250, payable June 2, 1942, with interest at 10% per annum. Accused did not pay the note when due. On June 11, 1942, he sent the bank a worthless check for $75 to be credited on account. At the same time he asked that the note be renewed for 30 days. The request for renewal was denied. On July 25 he again wrote to the bank asking for a renewal. On August 19 he wrote promising early payments, and on August 28 he wrote that arrangements were being made to meet his obligations by prorating his pay. No payment was made prior to October 21, 1942. (Ex. 3) (Specification 3)

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On February 13, 1942, to cover balances owing on two previous loans, accused gave to the Security Bank and Trust Company of Lawton, Oklahoma, his promissory note for $203.62, with interest at 10% per annum, payable in monthly installments of $25.46, beginning March 1, 1942. On March 9 $26 was paid on account, leaving a balance of $177.62. No further payment was made prior to October, 1942. (Ex. 5) In April, 1942, accused wrote a letter to the bank expressing regret at his delay in making payments and stating that "because of change of station my pay has not caught up with me" (Ex. 7). On May 10 he wrote to the bank that payments had been delayed because of failure promptly to receive "part of my pay" (Ex. 8). On June 13 he wrote the bank stating, among other things:

> "I am going to ask one more favor of you and it will be the last I promise. My financial condition now is very unstable and I have not received some of my pay for the past three months. If you will set my note up for a period of ninety days from June 1st I will have the money in your bank on August 1st which will pay the debt in full. I have been decidedly delinquent in this matter I know but you can and will have the same remedies on August 1st as you have now and I will still be in Augusta, Georgia or vicinity on that date.
>
> "I ask this favor as seriously as a drowning man grasps for a straw and if the money is not in your hands on August 1, 1942 with interest in full I will be more than willing to ask my commanding officer to courtmartial me and kick me out for failure to pay my just debts". (Ex. 9)

On August 28 accused wrote the bank stating that he had made arrangements with his commanding officer to liquidate his debts by prorated payments and

> "I will each month turn over to him for administration all of my pay and you will receive your money in order of priority of debt" (Ex. 10).

Accused testified that before entering the Army he was an attorney for a School Land Commission in Oklahoma City, Oklahoma, at a salary of $450 per month (R. 29) or "at least that" (R. 30). He was able to meet his living expenses. After his entrance into the Army

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as a second lieutenant on September 16, 1940, he had difficulty in keeping up "payments of the debts I had in civilian life" and had to borrow money. Upon entering the active service he owed $1500 on a house he had purchased, but after six months surrendered his equity in the property to secure relief from the debt. (R. 27) About a year after entering the service he surrendered his car for a similar reason (R. 31). The note to the Citizens State Bank of Okemah, Oklahoma, was given as a renewal of an existing obligation incurred in July, 1940 (R. 30). He tried many times to make arrangements whereby someone would distribute his pay among his creditors but found that each creditor wanted all his money at once. Accused could not pay them "all at one time". Following his letter (of June 13, 1942) to the Security Bank and Trust Company of Lawton, Oklahoma, the note was extended to August 1, but accused found that he had to refund $57.28 to a finance officer on account of "overpay" and, after providing for his allotments, living expenses and a payment of $50 to "another fellow", he could not keep his promise of payment. (R. 27, 28) Accused is married and has three children (R. 31, 32). After four months on active duty he was promoted to first lieutenant with pay at $166.66 per month plus subsistence, a total of about $195 per month. On March 25, 1942, he was placed on flying status (R. 34) with pay and allowances aggregating about $391.99 per month (R. 30). His personal living expenses amounted to $75 or $80 per month (R. 33). He had allotments aggregating $217.28 a month, one of $100 for support of his family, one of $7.40 for insurance, one of $9.88 for insurance and one of $100 for installment payments on a note to a Fort Sam Houston, Texas, bank (R. 32). After payment of his living expenses and allotments he had about $90 a month available for payment of the notes described in the Specifications. The allotment to the bank covered a loan of $600 negotiated about February, 1942, the proceeds of which were used to pay "scattered debts". (R. 33) Accused had "paid approximately $200.00 per month" on his debts while in the Army (R. 28). At the time of the trial he had debts other than those involved in the Charges (R. 33).

It is undisputed that during the months of June, July, August and September, 1942, accused failed to pay any part of his indebtedness described in Specifications 2, 3 and 5 of the Charge. His letter of June 13, 1942, must be construed as a specific promise to pay the note to the Lawton, Oklahoma, bank on August 1, 1942, as alleged in Specification 5. Accepting as true the assertion by accused that he had allotments for the support of his family and for other purposes aggregating some $217 per month and that his personal living expenses amounted to $75 or $80 per month, he had available from his pay during the period in question, for liquidation of his debts, between $90 and $100 each

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month. This he conceded. He contended that he had other debts and that he had consistently paid some $200 per month on all his obligations, but his contention as to such liquidation of his obligations was unsupported by detailed statements of payments other than those involved in the allotments described. It was not proved that he had the means to pay all his debts in full. Upon the evidence, however, the court was fully justified in concluding that accused did in fact have financial resources with which to make substantial payments on each of the debts described in Specifications 2, 3 and 5 during the periods in question. It was also justified in concluding that his failure and neglect to make payments on the debts described in Specifications 2 and 3, as well as his failure to keep his promise to pay the debt described in Specification 5, was the result of deliberate dishonesty or of culpable indifference or evasion, and was, therefore, dishonorable. His conduct in this regard was unbecoming an officer and a gentleman within the meaning of Article of War 95.

5. War Department records show that accused is 35 years of age. He attended Wentworth Military Academy for two years and a high school for a like period. He was admitted to practice law in Oklahoma in 1930. He was a member of the naval reserve for two years and a member of the Oklahoma National Guard for seven years. He was inducted into active Federal service as a second lieutenant, 180th Infantry, on September 16, 1940. He was promoted to first lieutenant on January 28, 1941. He was assigned to the Air Corps on March 25, 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 only so much of the findings of guilty under Specification 1 of the Charge as involves findings of guilty of the Specification in violation of Article of War 96, legally sufficient to support the findings of guilty of the Charge and Specifications 2, 3 and 5 thereunder and legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of violation of Article of War 96 and is mandatory upon conviction of violation of Article of War 95.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

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1st Ind.

War Department, J.A.G.O., FEB 13 1943 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant William L. Peterson (0-336704), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty under Specification 1 of the Charge as involves findings of guilty of the Specification in violation of Article of War 96, legally sufficient to support the findings of guilty of the Charge and Specifications 2, 3 and 5 thereunder and legally sufficient to support the sentence and to warrant confirmation thereof. Accused was drunk and disorderly in uniform on September 13, 1942, at Morris Field, North Carolina. Prior to that time, over a period of about three months, he had dishonorably failed and neglected to pay two promissory notes owing by him, and had failed to keep a specific promise to pay another note, although he had sufficient financial resources to make substantial payments. He was sentenced to dismissal. The officer is deeply in debt and his attitude toward his debts, as well as his other misbehavior, convinces me that his usefulness as an officer is at an end. I recommend that only so much of the findings of guilty under Specification 1 of the Charge be approved as involves findings of guilty of the Specification in violation of Article of War 96, and that the sentence be confirmed and carried into execution.

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

E. C. McNeil,
Brigadier General, U. S. Army,
Acting 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.

(Only so much of findings of guilty under Specification 1 of the Charge approved as involves findings of guilty of Specification in violation of Article of War 96. Sentence confirmed. G.C.M.O. 60, 26 Mar 1943)

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

SPJGH
CM 228952

FEB 16 1943

UNITED STATES	)	85th INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Camp Shelby, Mississippi, December 9, 1942. Dismissal.
First Lieutenant HERBERT A. STONE (0-452460), 338th Infantry.	)	

OPINION of the BOARD OF REVIEW
HILL, LYON and SARGENT, Judge Advocates

1. The record of trial in the case of the officer above named 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 69th Article of War.

Specification: In that 1st Lt Herbert A. Stone, Service Company, 338th Infantry, having been duly placed in arrest of quarters on or about November 13, 1942, did, at Camp Shelby, Mississippi on or about November 14, 1942, break his said arrest before he was set at liberty by proper authority.

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

Specification I: In that 1st Lt Herbert A. Stone, 410th Infantry (Cadre), did, without proper leave, absent himself from his organization at Camp Claiborne, Louisiana from about October 10, 1942 to about October 12, 1942.

Specification II: In that 1st Lt Herbert A. Stone, Service Company, 338th Infantry, did, without proper leave, absent himself from his organization

at Camp Shelby, Mississippi from about November 7, 1942 to about November 8, 1942.

Specification III: In that 1st Lt Herbert A. Stone, Service Company, 338th Infantry, did, without proper leave, absent himself from his organization at Camp Shelby, Mississippi from about November 8, 1942 to about November 12, 1942.

CHARGE III: Violation of the 95th Article of War. (Nolle prosequi entered).

Specification: (Nolle prosequi entered).

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

Specification I: In that 1st Lt. Herbert A. Stone, Service Company, 338th Infantry, did, at Camp Shelby, on or about June 11, 1942, wrongfully fail to maintain a sufficient bank balance to meet a check issued by him to Camp Exchange, Camp Shelby, Mississippi, drawn on the Citizens and Southern National Bank, Macon, Georgia, for the amount of $30.15 for which he received money, goods or services of like value and did thereby bring discredit on the military service.

Specification II: In that 1st Lt. Herbert A. Stone, Service Company, 338th Infantry, did, at Camp Shelby, on or about June 13, 1942, wrongfully fail to maintain a sufficient bank balance to meet a check issued by him to Camp Exchange, Camp Shelby, Mississippi, drawn on the Citizens and Southern National Bank, Macon, Georgia, for the amount of $25.00 for which he received money, goods or services of like value and did thereby bring discredit on the military service.

Specification III: In that 1st Lt. Herbert A. Stone, Service Company, 338th Infantry, did, at Camp Shelby, on or about July 3, 1942, wrongfully fail to maintain a sufficient bank balance to meet a check issued by him to Camp Exchange, Camp Shelby, Mississippi, drawn on the Citizens and Southern National Bank, Macon, Georgia, for the amount of $90.00 for which he received money,

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goods or services of like value and did thereby bring discredit on the military service.

Specification IV: In that 1st Lt. Herbert A. Stone, Service Company, 338th Infantry, did, at Camp Shelby, on or about July 10, 1942, wrongfully fail to maintain a sufficient bank balance to meet a check issued by him to Camp Exchange, Camp Shelby, Mississippi, drawn on the Citizens and Southern National Bank, Macon, Georgia, for the amount of $25.00 for which he received money, goods or services of like value and did thereby bring discredit on the military service.

Specifications V to XI, inclusive: (Nolle prosequi entered).

He pleaded not guilty to and was found guilty of all Charges and Specifications. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved only so much of the sentence as involves dismissal, and forwarded the record of trial under the provisions of Article of War 50½. The record has been acted upon by the Board of Review under the provisions of Article of War 48.

3. With respect to Charge I, breach of arrest, in violation of the 69th Article of War, the undisputed evidence discloses that:

a. The accused, on the 13th day of November 1942, upon return from absence without leave, was placed under arrest personally by the Commanding General, 85th Infantry Division. The Commanding General asked the accused if he understood the order, and accused replied, "Yes, Sir, I do". The Chief of Staff, in the presence of accused, instructed Captain McCally to have accused report to the senior officer of the 338th Infantry area (R. 9).

b. Pursuant to instructions from Captain Davis, Adjutant General, 85th Infantry Division, Captain Willis O. Jackson, 338th Infantry, about noon of November 13th, explained to the accused the meaning of his status of arrest in quarters; that under the terms of his arrest he was limited to his hutment, and that he would leave his hutment only for the purpose of going to his meals and to the latrine. The accused "signified that he understood that he was not to leave his hutment except to go to the latrine and to take his meals at the nearest mess hall, which was the 2nd Battalion Headquarters Company mess" (R. 10).

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c. On the night of November 14, 1942, Captain Jack Pelowitz, 338th Infantry, officer of the day of the interior guard of the 338th Infantry, ordered the sergeant of the guard on every second round to inspect the hutment of accused and if accused should be found absent to report the same. The sergeant of the guard, in making his rounds, requested First Lieutenant Thomas H. Ray, 338th Infantry, to direct him to the accused's hutment. Arriving at accused's hutment, they found the lights out. Switching on the lights it was observed that accused was absent, and on turning back the covers of the bed, a barracks bag was found in the bed. Lieutenant Ray and the sergeant of the guard searched the officers' club, the officers' mess, the latrine, and all the hutments, but accused was not found. The sergeant of the guard was directed to report the matter to the officer of the day. Later in the evening (8:45 p.m.), the officer of the day received a report from the officer of the guard that the accused was not in his hutment, whereupon the officer of the day, the officer of the guard, and the sergeant of the guard went to accused's quarters and verified his absence. The officer of the day then checked the hutments of the 1st and 2nd Battalions, the officers' latrine, and post exchange. The officer of the guard checked the officers' hutments of the 3rd Battalion. The accused could not be found, and did not return during the tour of duty of Captain Pelowitz as officer of the day (R. 11-13).

4. The evidence relating to the three Specifications, Charge II, is as follows:

Specification I: Absence without leave from his organization at Camp Claiborne from October 10, 1942, to October 12, 1942.

The accused was, by paragraph 13, Special Orders 201, Headquarters Third Army, August 21, 1942, relieved from Camp Shelby, Mississippi, ordered to proceed to, and arrive at the Infantry School, Fort Benning, Georgia, not later than September 5, 1942, and upon completion of temporary duty, proceed to Camp Claiborne, Louisiana, and to the 103rd Infantry Division upon activation (R. 13; Ex. P-1). By paragraph 23, Special Orders No. 20, Headquarters The Infantry School, Fort Benning, Georgia, September 24, 1942, he was relieved from duty at the school, directed to comply with the above order, and to report at new station not later than October 10, 1942 (R. 14; Ex. P-2). The Incoming Officers Register, 103rd Infantry Division (Cadre), Camp Claiborne, Louisiana, contained the entry of the arrival of accused, of the 410th Infantry, at 2215, October 12, 1942, from Fort Benning, Georgia (R. 14; Ex. P-3). The morning report, Headquarters Camp Claiborne, Louisiana, October 15, 1942, shows as of October 12, the accused attached unassigned, awaiting

activation of the 103rd Infantry Division (R. 14; Ex. P-4).

Specification II: Absence without leave from his organization at Camp Shelby, Mississippi, from about November 7, 1942, to about November 8, 1942.

The accused was, by paragraph 2, Special Orders No. 199, Headquarters Army Ground Forces, October 28, 1942, relieved from Camp Claiborne and from the 103rd Infantry Division upon activation, assigned to the 85th Infantry Division, and directed to proceed to Camp Shelby, Mississippi (R. 15; Ex. P-5). The Outgoing Officers Register, 103rd Infantry Division (Cadre), contained the entry of the departure of accused at 1355, November 5, 1942, for Camp Shelby, Mississippi (R. 15; Ex. P-6). The court took judicial notice of paragraph 1 e(3), Army Regulations 605-180, July 16, 1942, authorizing for automobile travel, travel time at the rate of one day for each 250 miles or major fraction traveled (R. 15; Ex. P-7); and of the official mileage tables showing the distance from Camp Claiborne, Louisiana, to Camp Shelby, Mississippi, as 257 miles by highway, and 332 miles by rail (R. 15; Ex. P-8). The Officers' Register, 85th Infantry Division, contained the entry of the arrival of accused at 1800, November 8, 1942, from Camp Claiborne, with no entry as to mode of travel (R. 16; Ex. P-9). A guard on duty at Headquarters, 85th Infantry Division, Camp Shelby, saw the accused sign the register between 6 and 7 p.m., November 8, 1942 (R. 16-17).

Specification III: Absence without leave from his organization at Camp Shelby, Mississippi, from about November 8, 1942, to about November 12, 1942.

The morning report of the Service Company, 338th Infantry, Camp Shelby, Mississippi, November 11, 1942, shows the accused assigned from Headquarters, 85th Infantry Division, and from duty to A.W.O.L., both as of November 8, 1942, and on November 13, 1942, shows accused from A.W.O.L. to arrest in quarters (R. 19-21; Ex. P-10).

5. Charge IV, violation of the 96th Article of War.

The four Specifications under this Charge allege that accused did, at Camp Shelby, Mississippi, wrongfully fail to maintain a sufficient bank balance to meet checks drawn by him on the Citizens and Southern National Bank, Macon, Georgia, and issued to Camp Exchange, Camp Shelby, Mississippi, for which he received money, goods, or services of like value on dates and in amounts as follows: Specification 1 - June 11, 1942, $30.15; Specification 2 - June 13, 1942, $25; Specification 3 - July 3, 1942, $90; and Specification 4 - July 10, 1942, $25.

The four checks were negotiated by the accused at the Camp

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Exchange on the dates alleged, and the accused received in exchange cash or merchandise, except for the check of $30.15, which was credited on his account. All checks were presented in due course for payment and were returned by drawee bank marked "insufficient funds". The Adjutant, 338th Infantry, was notified of the return of the checks. The check for $30.15, dated June 11, 1942, and the check for $25, dated June 13, 1942, were returned on June 24, 1942, and were both redeemed on June 29, 1942. The $90 check, dated July 3, 1942, was returned on July 17, and was redeemed on July 23, 1942. The check dated July 10, 1942, for $25 was returned on July 21, and was redeemed on July 25, 1942 (R. 21-23).

It was stipulated that the cashier, Citizens and Southern National Bank of Macon, Georgia, if present, would testify that during the period June 11, 1942, to August 10, 1942, the accused had a checking account with the bank; that the checks described in the four Specifications and signed by the accused, were presented to the bank for payment; and that all were returned unpaid because in each case there were insufficient funds in the account of accused at the time each was presented (R. 24; Ex. P-11).

6. For the defense, Mrs. Ella Stone testified that she and the accused had been married since October 31st. She had suffered from a sinus infection during the last two years and since her marriage her condition had become worse. She normally relieved her condition with Standback and B.C. tablets. The medicine had affected her heart, and she had had several heart attacks in the last few weeks. She visited her husband, the accused, at his hutment at Camp Shelby on November 14, 1942. She had been suffering with her head several days, and while at the hutment she took several Standback tablets. At about 5 o'clock at the hutment she suffered a heart attack and wanted to leave, but as her husband hated for her to go alone, she remained with him until about 6:45 p.m., and reached home at about 8:30 p.m. She drove home alone in her car, and did not visit a doctor. Her last prior heart attack had been a week earlier (R. 25, 26).

The accused testified that he enlisted in the National Guard, March 1939; was inducted into Federal service, November 16, 1940; was commissioned second lieutenant, December 12, 1942 (1941?); obtained his commission through Officer Candidate School, Infantry School, Fort Benning, Georgia; assigned to the 338th Infantry about April 27, 1942; and was promoted to first lieutenant, May 21, 1942. The accused, prior to November 14, 1942, knew of his wife's heart attacks, and he honestly believed she suffered an attack while at his hutment on November 14, 1942. She was complaining at that time about her breath, could hardly breath on the bed of the hutment, where she lay for a half hour,

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and although she was not able to breath very well, she finally went home. On cross-examination, the accused admitted that he made no effort to obtain a leave or a pass when he found that his wife was sick (R. 26-27). The accused closed his case with his statement to the court: "Sir, before this court-martial and since my confinement to the Station Hospital, I have tried my utmost to be a good officer" (R. 27).

7. a. With respect to Charge I and its Specification, the undisputed evidence clearly establishes that the accused was personally placed in arrest by his commanding general on November 13, 1942, understood the terms and limits of his restraint, and on the night of November 14, 1942, before he was set at liberty by proper authority, departed from the limits of his arrest.

b. Charge II.

As to Specification 1, the evidence shows that accused was relieved from temporary duty at Camp Benning, Georgia, assigned to the 103rd Infantry Division, and directed to proceed to, and to report not later than October 10, 1942, at Camp Claiborne, Louisiana. The accused arrived at Headquarters, Camp Claiborne, at 2215, October 12, 1942. The accused is accordingly shown to have been absent without leave at Camp Claiborne from October 10 to October 12, 1942.

As to Specification 2, the evidence shows that the accused was relieved from Camp Claiborne and from the 103rd Infantry Division, assigned to the 85th Infantry Division, and directed to proceed to Camp Shelby, Mississippi. He departed from Camp Claiborne at 1355, November 5, 1942, and arrived at Headquarters, 85th Infantry Division, at 1800, November 8, 1942. The official distance between Camp Claiborne and Camp Shelby is 257 miles by highway and 332 miles by rail. The authorized travel time by automobile is one day. (It is not shown whether accused traveled by automobile or by train). If the travel was by train, according to the Official Guide of the Railways of the United States, the journey should have been completed within thirteen hours. Assuming that accused did not leave Camp Claiborne until the morning of November 6th, the journey by rail should have been completed at 11:35 p.m. of the same day. Since he did not arrive at Camp Shelby until 1800 o'clock November 8th, regardless of mode of travel, an unauthorized absence of one day, November 7th to 8th, is clearly established.

As to Specification 3, the evidence shows that the accused, upon assignment to the Service Company, 338th Infantry, Camp Shelby, on November 8, 1942, was absent without leave from that date to November 13, 1942.

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The findings of guilty of Charge IV, in violation of the 96th Article of War, and of Specifications 1 to 4, inclusive, thereunder, alleging wrongful failure to maintain a sufficient bank balance to meet the checks described in the respective Specifications, are supported by proof that the checks signed and negotiated at the post exchange over a period of a month by accused, and for which he received cash, merchandise, or credit, were dishonored because of an insufficient balance in his account. All of the unpaid checks were redeemed by accused.

The accused made no attempt to contradict upon any Specification the testimony presented by the prosecution, but limited the evidence for the defense to offering a reason for and in extenuation of the offenses alleged.

8. The accused is 25 years of age. There are no records available in the Office of The Adjutant General relative to the service of Lieutenant Stone. The charge sheet states that he was inducted as an enlisted man with the National Guard, September 16, 1940; appointed temporary second lieutenant, Infantry, Army of the United States, December 12, 1941, and appointed temporary first lieutenant, May 21, 1942.

9. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record is legally sufficient to support the findings of guilty, and the sentence. Dismissal is authorized upon conviction of violation of the 61st, 69th, or 96th Article of War.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

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SPJGH
CM 228952 1st Ind.

War Department, J.A.G.O., FEB 18 1943 - 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 Herbert A. Stone (O-452460), 338th 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. In my opinion these offenses demonstrate a lack of responsibility on the part of accused, inconsistent with the performance of his duties as an officer. 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 of trial to the President for his action, and a form of Executive action designed to carry into effect the recommendation made above.

E. C. McNeil,
Brigadier General, U. S. Army,
Acting 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.

(Sentence confirmed. G.C.M.O. 82, 8 Apr 1943)

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

SPJGK
CM 228954

JAN 13 1943

UNITED STATES v. Private JAMES D. McKINNON (11007747), Company E, 5th Infantry.	PANAMA MOBILE FORCE Trial by G. C. M., convened at Camp Paraiso, Canal Zone, September 30 and October 6, 1942. Dishonorable discharge and confinement for twenty (20) years. Disciplinary Barracks.

REVIEW by the BOARD OF REVIEW
HOOVER, COPP and ANDREWS, 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: In that Private James D. McKinnon, Company "E", 5th Infantry, did, at Rio Hato, R de P, on or about August 5, 1942, desert the service of the United States by absenting himself from his organization without proper leave, and did remain absent in desertion until he was apprehended at Cheppillo Island, R de P., on or about August 9, 1942.

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

Specification: In that Private James D. McKinnon, Company "E", 5th Infantry, having been duly placed in confinement in the Guardhouse, Camp Paraiso, Canal Zone on or about August 15, 1942, did, on or about August 18, 1942, escape from said confinement before he was set at liberty by proper authority.

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

Specification: In that Private James D. McKinnon, Company "E", 5th Infantry, a prisoner lawfully in confinement in the jail on Chepillo Island, did, at Chepillo Island, R de P., on or about August 11, 1942, attempt to escape from such confinement.

CHARGE IV: Violation of the 93rd Article of War. (Finding of guilty disapproved).

Specification: (Finding of guilty disapproved).

He pleaded not guilty to the Charges and Specifications. He was found guilty of Charges I, II and III and their Specifications, guilty of the Specification, Charge IV, and not guilty of Charge IV but guilty of violation of the 94th Article of War. Evidence of two previous convictions, one by special court-martial for failure to obey the lawful order of an officer in violation of Article of War 64, and one by general court-martial for escape in violation of Article of War 69, 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 twenty years. The reviewing authority disapproved the findings of guilty of Charge IV and its Specification, approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record for action under Article of War 50½.

3. The evidence shows that at about 5 a.m., August 5, 1942, accused absented himself without leave (Ex. C) while his company was encamped at Rio Hato, Republic of Panama (R. 10, 11). Accused had been on duty as kitchen police (R. 8, 10, 11) and had been criticised by his first sergeant for idleness (R. 8, 11). When so criticised accused said nothing, looked at the first sergeant (R. 11) and went outside of the kitchen, ostensibly to wash pots and pans (R. 8). There he put on his shirt and said he was going to the latrine (R. 8), making the statement, "What the hell am I hanging around here for?" (R. 12). About fifteen minutes later he was found to be missing (R. 8, 11).

About August 10, at Pecora, Republic of Panama, accused approached a Panamanian civilian and asked him to transport him by boat to Darien,

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Republic of Panama (R. 23, 24). The civilian agreed to do so upon payment of $25, which sum was paid in advance by accused (R. 24). Accused and the civilian then proceeded in a "cayuca" (R. 23, 24). On reaching Chepillo Island, which lies near the mouth of the Bayano river in the vicinity of the Canal Zone, and while anchored near the island they were seen by an outpost of the 158th Infantry located there (R. 13). First Lieutenant John W. Hunter, 158th Infantry, testified that after he had received a report of a "strange cayuca" he went by boat

> "around the island *** to the spot where this boat was last sighted, the distance being approximately two miles. When we approached to within about three hundred yards from the boat, I hailed the boat and told them to heave to and asked them who they were, and got no answer. We kept approaching the boat, and through sign language and what Spanish I understand, I asked the Panamanian policeman to hail in Spanish. He did this, and upon his second hail, the man paddling the boat answered. By that time, we were within fifty to one hundred yards of the boat. In answering, this man identified himself, but did not identify the other person in the boat with him, who, as we could see, was a white man. We came alongside, and in English I again asked the occupants of the boat who they were and what they were doing. I got no answer. I next told them that they had better go ashore, and I told the white man in the boat to get over into my boat. The first three times, this was disregarded. I then drew a pistol, placing them both under arrest, and I took them ashore. The white man — who was the accused here — got in my cayuca after the pistol was drawn. He was dressed in civilian clothes and he made the statement — the first time that he had spoken was after he had gotten into our boat — that if I had been several hours later, I wouldn't have gotten him" (R. 14, 15).

Accused was brought ashore, searched and questioned (R. 15) and after having been warned that "whatever he said could be used against him in court" (R. 16), he stated to Lieutenant Hunter, "I might be a deserter" (R. 16).

Accused was confined alone in a cell of a jail on the island (R. 17). On August 11, while so confined, a scratching sound within his cell was heard (R. 27) and it was discovered that he had a nail about three or four inches in length (R. 29) in his hand (R. 27, 28). Examination of the cell showed that some mortar between the bricks of the outside wall (R. 30) had been freshly scratched (R. 28, 30) to a depth of less than one-half inch (R. 30) and to a length of four or five inches (R. 31). This mortar had not been scratched when the cell had first been occupied by accused (R. 28, 31). The walls of the cell were about twelve inches thick (R. 29). The mortar was "very poor" (R. 30). A sentinel on guard at the jail overheard accused say to another sentinel, "if they didn't have a guard posted at the jail *** he would get out — he would make his escape" (R. 32).

Accused was confined in the guardhouse at Camp Paraiso, Canal Zone, on August 15, 1942 (Ex. D). Sometime during the early morning hours on August 18, 1942, he escaped from confinement (R. 35), apparently through "a hole in the ceiling large enough for a man to crawl through and drop down to the ground on the outside" (R. 38). This hole had not existed at 9 o'clock the night before (R. 39). Accused was apprehended at Fort Clayton (R. 42, 43) during the forenoon of August 18 (R. 35), and was returned to the guardhouse at about 11 a.m. (R. 38).

Accused declined to testify or make an unsworn statement.

4. The evidence shows, in respect to Charge I and its Specification, that accused, without authority, left his organization, Company "E", 5th Infantry, at Rio Hato, Republic of Panama, on August 5, 1942, and remained absent until he was apprehended off Chepillo Island, Republic of Panama, on August 10, 1942. The circumstances of his absence and apprehension, together with his declarations attendant thereon, clearly justify an inference that he did not intend to return. The court was justified in finding that accused did, at the place and time alleged, desert the service of the United States.

The evidence is undisputed that, after having been duly placed in confinement in the guardhouse at Camp Paraiso on or about August 15, 1942, accused did, at the place and time alleged, in the Specification, Charge II, escape from said confinement before he was set at liberty by proper authority.

The evidence in respect to Charge III and its Specification sufficiently shows that accused, having been lawfully confined in the jail on Chepillo Island, did, at the place and time alleged, attempt to escape from such confinement. By the use of a nail, three or four inches long, he began scraping away the mortar in the outer wall of his cell. By this means he could have removed bricks and could have effected his escape had he not been interrupted. That he was attempting to escape is indicated by his statement overheard by the sentinel.

5. The charge sheet shows that accused was 20 years of age upon his enlistment on August 20, 1940.

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 and sentence.

(Absent), Judge Advocate.
Andrew Sapp Jr., Judge Advocate.
Fletcher R. Andrews, Judge Advocate.

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

SPJGK
CM 228964

FEB 2 3 1943

UNITED STATES v. Private LEON R. DAVIS (39300104), Headquarters Battery, 2nd Battalion, 249th Coast Artillery.	NORTHWESTERN SECTOR WESTERN DEFENSE COMMAND Trial by G. C. M., convened at Fort Stevens, Oregon, November 27, 1942. Dishonorable discharge and confinement for three (3) months. Fort Stevens, Oregon.

OPINION of the BOARD OF REVIEW
COPP, HILL and ANDREWS, Judge Advocates.

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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 Leon R. Davis, Headquarters Battery, 2nd Battalion, 249th Coast Artillery, did, without proper leave, absent himself from his station at Fort Stevens, Oregon from about November 2nd, 1942 to about November 3rd, 1942.

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

Specification: In that Private Leon R. Davis, Headquarters Battery, 2nd Battalion, 249th Coast Artillery, having been restricted to the limits of Fort Stevens, Oregon, did, at Fort Stevens, Oregon, on or about November 2nd, 1942, break said restriction by going to Portland, Oregon.

He pleaded guilty to and was found guilty of the Charges and Specifications. Evidence of five 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 months. The reviewing authority approved the sentence and directed its execution. The proceedings were published in General Court-Martial Order No. 68, Headquarters Northwestern Sector, Western Defense Command, December 14, 1942.

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

The maximum sentence permissible under paragraph 104c, section A, Manual for Courts-Martial, 1928, for the offenses of which accused was found guilty is confinement at hard labor for one month and three days and forfeiture of two-thirds of his pay for a like period. The sentence imposed by the court was in excess of that, to-wit: dishonorable discharge, total forfeitures and confinement at hard labor for three months. Section B of paragraph 104c, Manual for Courts-Martial provides:

> "If an accused be found guilty by the court of an offense or offenses for none of which dishonorable discharge is authorized, proof of five or more previous convictions will authorize dishonorable discharge, total forfeitures, and, if the confinement otherwise authorized is less than three months, confinement at hard labor for three months."

After the accused was found guilty of the Charges and Specifications the trial judge advocate read to the court evidence of five previous convictions, as follows:

> "Sum C.M. #15. 61st AW. Date of offense, May 5, 1941. AWOL from about May 5, 1941 to about June 15, 1941. Sentence announced and adjudged June 20, 1941. Sentence as approved Confined at Hard Labor for one (1) month. Approved June 20, 1941.
>
> "Special C.M. #9, 58th A.W. Date of offense, August 4, 1941. Desert the service of the US. August 4, 1941 and surrendered himself at Ft. Crook Nebraska on or about Jan 21, 1942. Sentence announced and adjudged April 4, 11942. Sentence as approved: To be

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confined at Hard Labor for three (3) months & forfeit $20.00 pay per mo for like period. Approved April 8, 1942.

"Special C.M. # 19, 93rd A.W. Date of offense, August 4, 1941. #1. Steal civilian suit, value $20.00. #2. Did embezzle $13.00 fr Cpl Clyde G. Barker, on August 3, 1941. Sentence announced and adjudged May 14, 1942. Sentence as approved: To perform Hard Labor without conf for three (3) months. Approved May 22, 1942.

"Special C.M. #26, 61st A.W. Date of Offense, June 30, 1942. AWOL from about June 30/42 to about Sept 5/42. Sentence announced and adjudged October 5, 1942. Sentence as approved: To perform H/L W/O conf for 3 mos, rest to limits of post for 1 mo, forf $18.00 pay per mo for 6 mos. Approved Oct 12, 1942.

"SCM #63, 61st & 96th A.W. Date of offense, Oct 10, 1942. AWOL 10-10 to 10-12-42 Incl, Breaking restriction Oct 10/42. Sentence announced and adjudged October 27, 1942. Sentence as approved: To perform Hard Labor without confinement for 45 days and to forfeit $18.00 of his pay. Approved Oct 31/42." (Ex. 2)

Upon this evidence the additional punishment was imposed.

4. To decide the main question it is necessary only to determine whether or not all of the aforementioned convictions were provable against the accused; whether the evidence of each prior conviction was admissible.

The Manual for Courts-Martial, 1928, is controlling. It states:

> "Evidence of previous convictions *** must *** relate to offenses committed during a current enlistment, *** and in the case of an enlisted man during the one year *** next preceding the commission of any offense charged". (par. 79c)

To meet the requirements of the foregoing rule the evidence of previous convictions must be such as establishes proof of the following essential elements:

a. An offense.
b. The commission thereof within the period of

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> limitation (which is, in the case of an enlisted man, during a current enlistment and during the one year next preceding the commission of any offense charged), and
>
> c. Conviction thereof.

The regulation defines the phrase "evidence of previous convictions" as used in the text and establishes as its equivalent proof of an offense, the commission thereof within the period of limitation and conviction thereof. The next sentence in the same paragraph of the Manual for Courts-Martial clarifies the period of limitation and reads as follows:

> "In computing the one *** year* *** periods of unauthorized absences as shown by the findings in the case or by the evidence of previous convictions should be excluded." (par. 79c)

In the foregoing sentence provision is made for exclusion from and additions to the basic one year period under either or both of two possible circumstances relating to unauthorized absences shown by (a) evidence in the case, or (b) evidence of previous convictions. This provision merely furnishes a mathematical computation of addition and subtraction. The basic period of one year is subject to the process of simultaneous subtraction and addition in exactly the same period of time that represents unauthorized absences that arise under (a) or (b). There are possible unauthorized absences that are not included in (a) or (b). For example, unauthorized absences for which there have been no convictions, or unauthorized absences following the commission of an offense in violation of Article of War 61 or Article of War 58 outside of the period of limitation. Only periods of unauthorized absences arising under (a) or (b) are subject to the process of subtraction from and addition to the basic period of one year to the exclusion of all other types and forms of unauthorized absences. This clearly appears from the fact that in each of the two sentences of paragraph 79c of the Manual for Courts-Martial, above quoted, the phrase "evidence of previous convictions" appears in close juxtaposition. Nothing in the context indicates that it was intended that the phrase should not have the same meaning when used twice in the same paragraph. In fact, when first used, its meaning is clearly defined. According to

a generally accepted rule of interpretation the same meaning shall be given to the phrase when used again in the same paragraph. Applying this rule of construction and paraphrasing the second sentence by deleting the phrase "evidence of previous convictions" and substituting therefor its defined equivalent, the sentence reads:

> "In computing the one *** year* *** periods of unauthorized absences as shown by the findings in the case or by 'proof of an offense, the commission thereof within the period of limitation and conviction thereof' should be excluded."

The two deductible authorized absences are therefore only and exclusively those shown by the findings in the case and those constituting an offense committed within the period of limitation for which the offender has been convicted. All and any other unauthorized absences do not enter into the computation and evidence thereof is inadmissible for the purpose of authorizing the imposition of a more severe sentence.

The foregoing construction of the regulation is strict and so it should be. The regulation under consideration authorized a more severe penalty to be inflicted upon one who is a persistent offender and for that reason evinces a depravity and incorrigibility which merit greater punishment (16 C.J. 1339). The rule is well stated in Ruling Case Law in relation to the construction of penal statutes generally:

> "It has long been the well settled general rule that penal statutes are subject to the rule of strict construction. They will not be construed to include anything beyond their letter even though within their spirit, and nothing can be added to them by inference or intendment. More correctly it may be said that such laws are to be expounded strictly against an offender and liberally in his favor." (25 R.C.L., 1081, 1082, 1083)

The Judge Advocate General has followed this rule of construction (Dig. Op. J.A.G., 1912-40, sec. 402 (5)).

"Criminal and penal statutes must be strictly construed; that is, they can not be enlarged or extended by intendment, implication, or by any equitable considerations *** where there is any reasonable doubt, it must be resolved in favor of the person accused of violating the statute; that is, all questions in doubt will be resolved in favor of those from whom the penalty is sought." (Crawford, Construction of Statutes (1940), sec. 240)

"Statutes which provide for a severer punishment on conviction of a second or subsequent offense, being highly penal, must be strictly construed. (U. S. v. Lindquist, 285 Fed. 447) They should not be extended by implication, and the legislative intent must be ascertained from the words used by the lawmakers.***" (Crawford, Construction of Statutes (1940), sec. 361)

In United States v. Lindquist, 285 Fed. 447, 448 (1921), the court stated: "A statute providing for severer punishment on conviction for second offense is highly penal, and must be strictly construed."

By application of the rule of strict construction to the findings and facts in the case under consideration the findings show that accused committed the offense of absence without leave in violation of Article of War 61 and breach of restriction in violation of Article of War 96 on November 2, 1942, and remained absent without leave until November 3, 1942, a period of unauthorized absence of one day. The basic year for determining previous convictions is from November 2, 1941, to November 2, 1942. By excluding from that year the one day period of unauthorized absence as shown by the findings in the case and by retrojecting the year by the same period the computed year commences on November 1, 1941. Of the five records of convictions by courts-martial offered in evidence as evidence of previous convictions two only were admissible as posessing the essential requirements under the rule:

(a) SCM #63, 61st & 96th A.W. Date of offense, October 10, 1942. AWOL 10-10 to 10-12-42 incl. Breaking restriction Oct. 10, 1942. Sentence announced and adjudged October 27, 1942. Sentence as approved: To perform hard labor without confinement for 45 days and to forfeit $18 of his pay. Approved October 31, 1942.

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Comment: These convictions possessed the necessary requirements in that there were involved as to both convictions offenses, commission thereof on October 10, 1942, which was within the period of limitation (November 1, 1941, to November 2, 1942) and conviction duly approved. Evidence of this conviction was properly admitted. As an unauthorized absence of two days was shown thereby that period enters into the computation in like manner as the unauthorized absence shown by the findings in the case. By that re-computation the commencement of the year is fixed at October 30, 1941.

(b) Special C. M. #26, 61st A.W. Date of offense, June 30, 1942. AWOL from about June 30/42 to about Sept. 5/42. Sentence announced and adjudged October 5/42. Sentence as approved: To perform hard labor without confinement for 3 months, restriction to limits of post for 1 month, and forfeiture $18 pay per month for 6 months. Approved October 12, 1942.

Comment: This conviction possessed the necessary requirements in that there were involved an offense, commission thereof on June 30, 1942, which was within the period of limitation (October 30, 1941, to November 2, 1942) and conviction duly approved. Evidence of this conviction was properly admitted. As an unauthorized absence of 67 days was shown thereby that period enters into the computation in like manner as the unauthorized absences shown by the findings in the case and the foregoing evidence of previous conviction. By such re-computation the commencement of the year is fixed at August 24, 1941.

The other three records of convictions by courts-martial offered and received in evidence as evidence of previous convictions involved offenses committed prior to August 24, 1941, to-wit: August 4, 1941, August 4, 1941, and May 5, 1941, respectively, dates which were prior to the authorized period of limitation and their consideration was barred on that account. Those three records of convictions lacked, fatally, the essential elements of "commission within the period of limitation", were improperly received in evidence and considered by the court as evidence of previous convictions within the meaning of paragraph 79c of the Manual for Courts-Martial and furnish no support for the more severe penalty imposed by the court than that authorized by paragraph 104c of the Manual for Courts-Martial.

5. Inasmuch as five previous convictions were not properly received in evidence against this accused, the additional punishment imposed under paragraph 104c (sec. B) of the Manual for Courts-Martial was

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improper, and the sentence imposed was excessive. The maximum punishment for absence without leave for one day and breach of restriction is confinement at hard labor for one month and three days and forfeiture of two-thirds pay for a like period (sec. A, par. 104c, M.C.M.).

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 sentence as involves confinement at hard labor for one month and three days and forfeiture of two-thirds pay for a like period.

Judson Capps Jr., Judge Advocate.

John Trumbull, Judge Advocate.

(Dissent), Judge Advocate.

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

SPJGK
CM 228964

UNITED STATES	NORTHWESTERN SECTOR WESTERN DEFENSE COMMAND
v.	Trial by G. C. M., convened at Fort Stevens, Oregon, November 27, 1942. Dishonorable discharge and confinement for three (3) months. Fort Stevens, Oregon.
Private LEON R. DAVIS (39300104), Headquarters Battery, 2nd Battalion, 249th Coast Artillery.	

DISSENTING OPINION of MAJOR ANDREWS

I do not concur in the majority opinion. By excluding the periods of unauthorized absence evidenced by the fourth and fifth prior convictions, the one year "deadline" for the introduction of previous convictions was extended back to approximately August 26, 1941. The trial judge advocate produced evidence of a previous conviction for desertion commencing on August 4, 1941, and extending until January 21, 1942. Obviously this showed another period of unauthorized absence and the period was "shown *** by the evidence of previous convictions", as required by paragraph 79c of the Manual for Courts-Martial. But the majority opinion contends that this unauthorized absence may not be considered because the offense occurred on August 4, 1941, the first day of the absence. It is true that the offense occurred on August 4, but it is equally true that the conviction reveals an unauthorized absence of several months. I cannot believe that the requirement of the Manual was intended to constitute a blindfold concealing the unauthorized absence from the court's view. In addition to the language quoted in the majority opinion, paragraph 79a of the Manual contains the following:

> "In the event of conviction of an accused the court will open for the purpose of *** giving the trial judge advocate an opportunity to introduce evidence of the accused's previous convictions by court-martial."

It seems to me that the conviction for desertion was "introduced" by the trial judge advocate and that the unauthorized absence "shown" thereby may properly be considered by the court to extend the deadline. This interpretation of the Manual appears to me more consonant

with the reason for the requirement. Conceding that desertion and absence without leave are not continuing offenses (par. 67, M.C.M.), the fact is that the unauthorized absence does continue. The requirement that the absence be shown by previous convictions rather than by mere morning reports or oral evidence is for the purpose of conclusively establishing the absence. Once that absence has been established, the period may be used to extend the deadline to include the "offense" of absence without leave committed on August 4, 1941. Admittedly, if the court could properly take cognizance of the absence from August 4, 1941, to January 21, 1942, all five previous convictions were properly received and the sentence to dishonorable discharge and confinement for three months was authorized (p. 101, M.C.M.). A construction which denies to the court the right to consider an unauthorized absence appearing upon the face of a previous conviction introduced by the trial judge advocate does not accord with my conception of the manifest purpose of the language used in the Manual.

Fletcher R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O., April 7, 1943 - To the Secretary of War.

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of August 20, 1937 (50 Stat. 724; 10 U.S.C. 1522), is the record of trial in the case of Private Leon R. Davis (39300104), Headquarters Battery, 2nd Battalion, 249th Coast Artillery.

2. I do not concur in the opinion of the Board of Review, and, for the reasons hereinafter set forth, am of the opinion that the sentence is legal and should be confirmed.

3. The only question involved concerns the legality of the sentence. The court sentenced accused 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 three months. The maximum sentence permissible under paragraph 104c, Section A, Manual for Courts-Martial, for the offenses of which accused was found guilty, is confinement at hard labor for one month and three days, and forfeiture of two-thirds pay for a like period. The sentence imposed by the court was arrived at by virtue of paragraph 104c, Section B, Manual for Courts-Martial, which provides:

> "If an accused be found guilty by the court of an offense or offenses for none of which dishonorable discharge is authorized, proof of five or more previous convictions will authorize dishonorable discharge, total forfeitures, and, if the confinement otherwise authorized is less than three months, confinement at hard labor for three months."

Evidence of five previous convictions was considered by the court. If the court acted properly in considering the five previous convictions, the sentence is legal. If the consideration by the court of any of the five previous convictions was improper, so much of the sentence as exceeds the maximum permissible under paragraph 104c, section A, is illegal.

The Board of Review (one member dissenting) held that three of the previous convictions were improperly admitted in evidence by the court and that as a consequence the record of trial was legally sufficient to support only so much of the sentence as involved confinement at hard labor for one month and three days and forfeiture of two-thirds pay for a like period.

4. The sole issue is whether the five previous convictions should have been admitted in evidence and considered by the court. Paragraph 79c, Manual for Courts-Martial, reads as follows:

> "Evidence of previous convictions. - Such evidence is not limited to evidence relating to offenses similar to the one of which the accused stands convicted or to the evidence referred with the charges. Such evidence must, however, relate to offenses committed during a current enlistment, appointment, or other engagement or obligation for service of the accused, and in the case of an enlisted man during the one year, and in the case of others during the three years next preceding the commission of any offense charged. In computing the one or three years, as the case may be, periods of unauthorized absences as shown by the findings in the case or by the evidence of previous convictions should be excluded."

The paragraph thus stipulates that in the case of an enlisted man the evidence of previous convictions must relate to offenses committed during the one year next preceding the commission of the offense charged. However, in computing the one year, periods of unauthorized absences as shown by the evidence of previous convictions are to be excluded. Read as a whole the quoted paragraph expresses a clear purpose to consider all convictions for offenses committed within the preceding one year during which accused was present for duty. The paragraph has been consistently so interpreted by this office and the Board of Review since the rule was established in 1928. So interpreted the paragraph is simple and easy of application by officers in the field. The administrative practice in this regard is entitled to great weight and should not be abandoned in favor of a narrow and technical construction difficult of application.

5. In the present case the offenses for which accused was tried occurred on November 2, 1942. Accordingly, it was proper for the court to admit evidence of previous convictions for offenses committed after November 2, 1941. Two of the previous convictions introduced satisfied this requirement. Each of these previous convictions included the offense of absence without leave. In accordance with the Manual, these periods of unauthorized absence had the effect of "pushing back" the "deadline" beyond November 2, 1941. The two periods of unauthorized absence, added together, amounted to 69 days. Consequently, the "one year" as re-computed by excluding the two periods of unauthorized absence, extended back to August 24, 1941, and evidence of previous convictions for offenses occurring on or after that date was admissible. However,

the offenses covered by the other three previous convictions considered by the court all took place prior to August 24, 1941. But one of these convictions related to an unauthorized absence of 170 days, commencing on August 4, 1941. If this unauthorized absence could properly be considered by the court, it would serve to "push back" the one-year period far enough to embrace the remaining previous convictions, the earliest of which related to an offense committed on May 5, 1941. Absence without leave is not a continuing offense and is committed on the date on which the person absents himself (par. 67, Manual for Courts-Martial). Since the absence without leave commenced on August 4, 1941, the majority of the Board of Review held that the 170-day absence could not be considered in computing the one-year "deadline". In their opinion the language of paragraph 79c prohibits consideration of an unauthorized absence commencing prior to the previously established deadline even though in fact the unauthorized absence continues into the one-year period. Their opinion is based upon the proposition that the unauthorized absence must be shown only by evidence of an offense committed within the one-year period, and that since the absence in question began, and therefore, technically speaking, was committed prior to August 24, 1941, it could not be considered.

In my opinion this is a strained and overtechnical construction of the Manual and not in conformity with the apparent intent of the language used. A simple example will illustrate the consequences of adopting the majority opinion. A soldier is on trial for a larceny committed on March 1, 1943. On February 1, 1942, he absented himself without leave and remained so absent for six months. He was convicted for this absence. Under the rule announced by the majority opinion, evidence of this conviction would be inadmissible in the larceny trial because the absence did not begin within the one year next preceding the larceny. In my opinion this is an absurd result, wholly incompatible with the intention of the Manual. When the paragraph in question is read as a whole, it is clear that the intention is to compute the year by excluding all periods of unauthorized absence for which the accused previously has been convicted, and to go back one year excluding all such absences. As observed above, this accords with the long-standing interpretation placed upon the language by this office.

6. I recommend that the action of the reviewing authority approving the sentence be confirmed and carried into execution.

7. Inclosed are two forms of action prepared for your signature. Draft A will accomplish the confirmation of the sentence in accordance with my views, and Draft B will accomplish the disapproval of so much of the sentence as exceeds confinement at hard labor for one month

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and three days and forfeiture of two-thirds pay for a like period, in accordance with the views of the majority of the Board of Review.

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"

(Draft A executed by Secretary of War 12 Apr 1943)

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TITLE

DATE	BORROWER'S NAME	EXT.