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Judge Advocate General's Department

BOARD OF REVIEW

Holdings, Opinions and Reviews

Volume XXVII

including

CM 242147 to CM 243500

(1943-1944)

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

SPJGN
CM 242147

25 OCT 1943

UNITED STATES v. Second Lieutenant CARLOS F. CALDWELL (0-793893), Air Corps.	ARMY AIR FORCES GULF COAST TRAINING CENTER Trial by G.C.M., convened at Foster Field, Texas, 2 October 1943. Dismissal, total forfeitures and confinement for one (1) year.

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

---

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Second Lieutenant Carlos F. Caldwell, 855th Single Engine Gunnery Training Squadron, Air Corps, did, at Foster Field, Texas, on or about 18 September 1943, feloniously take, steal, and carry away one Gallet Chronograph silver color wrist watch with gold expansion bracelet, value about One Hundred ($100.00) Dollars, the property of Second Lieutenant Ben H. Beckett, Jr.

He pleaded guilty to and was found guilty of the Charge and its Specification, except the words and figures One Hundred Dollars ($100.00), substituting therefor, respectively, the words and figures Eighty-Five Dollars ($85.00), of the excepted words not guilty, of the substituted words guilty. 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 two (2) years. The reviewing authority approved the sentence but reduced the period of confinement to one (1) year and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution, supplementing the accused's plea of guilty, shows that Second Lieutenant Ben H. Beckett, Jr., first met the accused on 18 September 1943 in the bus station at Victoria, Texas, while both were awaiting a bus to transport them to nearby Foster Field where the

former was reporting for temporary duty and where, upon arrival, about 1800, he was assigned to a barrack room adjoining and having a connecting door with that of the accused. While only the two officers and the janitor were in the barracks, Lieutenant Beckett placed his Gallet Chronograph wrist watch and band upon a ledge in his room and, leaving all doors open and unlocked, went to take a shower, during which time the accused entered the shower room, spoke to Lieutenant Beckett, apparently returned to his own room and returned with his shaving equipment and shaved. Thereafter, they left the barracks together but returned when the watch was missed and searched for it with the accused making remarks casting suspicion upon the janitor. Lieutenant Beckett had authorized no one to move his watch, and promptly reported its theft to proper authority (R. 6-11; Exs. "A", "B").

The accused left Foster Field the next morning for a sub-station before Lieutenant Beckett arose. Five days later, on 24 September 1943, the watch, which was admitted into evidence and identified by its owner, was found by Military Police officers, locked in the accused's metal lock box in his quarters at the sub-station. The band, similarly admitted into evidence and identified, was found by such officers upon accused's person, affixed to his own watch, when he was apprehended. At that time the accused, after appropriate warning of his rights, admitted taking the watch, which he claimed to have found in the shower under a towel, changing the bands and intending to keep it. Subsequently, after further warning of his right to speak or remain silent, he executed a written statement to the same effect but included therein the admission of his knowledge of the actual ownership of the watch (R. 12-15, 16-18, 19-20; Ex. "C").

The market value of the watch and band was shown to be about $85 by competent expert testimony (R. 21-22).

4. The accused, after explanation of his rights as a witness, elected to make a brief unsworn statement as follows:

> "My name is Carlos F. Caldwell, Second Lieutenant, Air Corps, Matagorda Peninsula. My Principal duty is Tow Target Pilot. I was raised in an Army Camp. My father being a Lieutenant Colonel on active duty at the present. My brother is a commissioned officer at this time. I know that I have disgraced my family and myself by this act that I have committed. Why, I don't know. Just something I did under an impulse. I realized what I had done and wanted to take it back to the owner. I was undecided as to what procedure would take place under these circumstances. I kept the watch in my possession in the strong box and never wore it. Although I did wear the band. I don't believe I could have kept the watch much longer without taking it back to the owner. I am not offering any excuse for why I took the watch. I don't know myself. In reference to the

statement, Exhibit "C", I signed a false statement trying to protect my wife and my family and after thinking it over, I decided the best thing to do was to make a clean breast of the affair as any officer and gentlemen would."

5. The Specification of the Charge alleges that the accused on or about 18 September 1943, at Foster Field, Texas, feloniously took, stole and carried away the described watch and band valued at about $100, the property of Second Lieutenant Ben H. Beckett, Jr. The offense alleged is that of larceny which is defined as follows:

"Larceny is the taking and carrying away, by trespass, of personal property which the trespasser knows to belong * * * to another, with intent to deprive such owner permanently of his property therein. (Clark.)" (MCM, 1928, par. 149g).

The evidence adduced by the prosecution abundantly supplements the accused's plea of guilty and his unsworn statement contains admissions conclusively fastening the commission of the crime upon him. The expression by the accused in his unsworn statement of a belief that he would have ultimately returned the property to its owner is belied by his acts of secreting the watch in a lock box, wearing the band and the utterance by him of prior inconsistent statements, all of which impel the conclusion that he intended to permanently deprive the owner of the watch and band. Every element of the offense alleged was, therefore, established beyond a reasonable doubt and the competent evidence conclusively supports the findings of guilty of the Charge and its Specification as amended by exceptions and substitutions.

6. The accused is about 22 years of age. The War Department records show that he has had enlisted service from 1 July 1939 to 30 June 1940 and from 15 January 1942 until 9 November 1942 when he was discharged to accept a commission as a second lieutenant on 10 November 1942 since which date he has been on active duty as an officer.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of the Charge and its Specification as amended by exceptions and substitutions and the sentence, and to warrant confirmation thereof. Dismissal is authorized upon a conviction of a violation of Article of War 93.

Abner E. Lipscomb, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

(4)
SPJGN
CM 242147

1st Ind.

War Department, J.A.G.O., 30 OCT 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 Carlos F. Caldwell (0-793893), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence as approved by the reviewing authority and legally sufficient to warrant confirmation thereof. I recommend that the sentence be confirmed and carried into execution, and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

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

T. H. Green,
Brigadier General, U. S. Army,
Acting The Judge Advocate General.

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

(Sentence confirmed. G.C.M.O. 396, 21 Dec 1943)

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

SPJGK
CM 242152

2 NOV 1943

UNITED STATES	)	XIII CORPS
v.	)	Trial by G.C.M., convened at Fort Dix, New Jersey, 5 October 1943. Dismissal, total forfeitures and confinement for three years.
Second Lieutenant GEORGE W. HOOEY (0-1585639), Quartermaster Corps.	)	

OPINION of the BOARD OF REVIEW
LYON, HILL 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. The accused was tried upon the following Charges and Specifications:

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

Specification: In that 2nd Lieutenant GEORGE W. HOOEY, Headquarters and Headquarters Detachment, 561st Quartermaster Service Battalion, Fort Dix, New Jersey, did, without proper leave, absent himself from his organization and station at Fort Dix, New Jersey, from about 1000 14 July 1943 to about 1900 22 August 1943.

CHARGE II: (Finding of Not Guilty).

Specification: (Finding of Not Guilty).

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

Specification: In that 2nd Lt. GEORGE W. HOOEY, 561st QM Serv Bn., Fort Dix, N. J., having been duly placed in arrest at Fort Dix, N. J., on or about 1900 22 August 1943 did at Fort Dix, N. J., on or about 1930 15 September 1943 break his said arrest before he was set at liberty by proper authority.

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

Specification 1: (Finding of guilty disapproved by reviewing authority).

Specification 2: In that Second Lieutenant George W. Hooey, 561st Quartermaster Service Battalion, Fort Dix, New Jersey, did, at Fort Dix, New Jersey on or about 15 September 1943, wrongfully and willfully take women into the officer's barracks contrary to rules and regulations pertaining thereto, all to the prejudice of good order and discipline.

ADDITIONAL CHARGE III: (Finding of Not Guilty).

Specification: (Finding of Not Guilty).

He pleaded guilty to Charge I and its Specification, guilty to Additional Charge I and its Specification, and not guilty to the remaining Charges and Specifications. He was found not guilty of Charge II and its Specification, not guilty of Additional Charge III and its Specification and guilty of the remaining Charges and Specifications. No evidence of previous convictions was submitted. He was sentenced to dismissal, total forfeitures and confinement at hard labor for five years. The reviewing authority disapproved the finding of guilty of Specification 1 of Additional Charge II, approved only so much of the sentence as provides for dismissal, total forfeitures, and confinement at hard labor for three years, designated the Eastern Branch, United States Disciplinary Barracks, Beekman, New York, as the place of confinement, and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution shows that accused is a second lieutenant, Quartermaster Corps. On 8 July 1943, he was relieved from duty with the 262nd Quartermaster Service Battalion, at Camp Pickett, Virginia, and assigned to the 561st Quartermaster Service Battalion, Fort Dix, New Jersey. He was directed to proceed to his new station (R. 10-11; Ex. 1). It was stipulated that accused cleared Camp Pickett at 12 o'clock noon on 13 July 1943 (R. 20). First Lieutenant C. F. Wilson, Jr., Transportation Corps, Fort Dix, New Jersey, qualified as an expert in railroad time tables, and train movements, testified as to available train service by which accused could have arrived at Trenton, New Jersey, at 10:15 the same night or at 6:15 the following morning (R. 21-25). Fort Dix is less than 25 miles from Trenton, New Jersey, less than one hour by bus or connecting train. It was stipulated that

accused traveled by rail between Camp Pickett and Trenton, New Jersey (R. 25). Morning reports of the Headquarters and Headquarters Detachment of the 561st Quartermaster Service Battalion show that accused did not join the Headquarters and Headquarters Detachment of the 561st Service Battalion and was absent from this organization at its station at Fort Dix, New Jersey, until 7 p.m. 22 August 1943 (R. 13-17; Exs. 2, 3, 4 and 5). On 22 August 1943 Second Lieutenant John H. Wells, Quartermaster Corps, Fort Dix, was Officer of the Day (R. 15-17). About 9 o'clock in the evening of that day he went to the officers' quarters, recognized accused, and as battalion Officer of the Day placed accused under arrest in quarters (R. 15, 17, 18). Major Irving Thurston, 561st Quartermaster Battalion, Fort Dix, was Executive Officer of this battalion during August 1943. He saw accused on 23 August. At that time, after a talk with the Major, accused dictated, stenographically, a statement which was transcribed and signed by accused. On 28 August 1943 Major Thurston had a further talk with accused, at which time he "got out the article of war that pertains to investigation", and advised accused "of his rights as to a statement." Major Thurston then showed accused the statement which accused had made on 23 August, asked him to read it over, and then asked him if he cared "to make this as a sworn statement, that he need make no statement at all, that he could make an unsworn statement or he could make a sworn statement." Accused elected to make the sworn statement. Accordingly, accused swore to the truth of the 23 August statement before Major Thurston, who took the verification as investigating officer and as president, special court-martial, on 28 August 1943. In this statement accused stated that after his arrival in Trenton, New Jersey, instead of going to Fort Dix, he went to New York and remained away from Fort Dix until the evening of 22 August 1943 (R. 35-38, 41, 43; Ex. 6).

On 23 August, Major Thurston "defined" to accused "what arrest in quarters meant" (R. 37). He told him that he should stay in his room and "not leave it without permission except to go to the adjacent quarters building, two buildings away, for his meals." Accused had not been set at liberty by proper authority "on or about 15 September 1943"(R. 43-44). Lieutenant Colonel Charles E. Bloxsom, Commanding Officer of the 561st Quartermaster Service Battalion, testified that "on or about 15 September 1943", accused had not been set at liberty by proper authority. Colonel Bloxsom testified further that he had issued a memorandum to the officers of his battalion who were quartered in Building T 31-100, the building where accused quartered, forbidding the taking of ladies into this building which was described in the memorandum as "sleeping quarters" and "bachelor officers' quarters". This memorandum was dated 26 July 1943 and was posted on the bulletin board of that building. There was a "Day Room" in this building (R. 45-47, 49, Ex. 7). Colonel Bloxsom could not "say for sure" that this memorandum was on the bulletin board on 22 August, the date accused arrived at Fort Dix.

Private Minnie L. Davis, Women's Army Corps, Detachment No. 2, Fort Dix, New Jersey, testified that on the night of 15 September 1943 she saw accused in front of Barracks No. 9, Station Hospital. She was there with two or three other members of the Women's Army Corps and accused was there with two other officers. After a conversation this witness, Private Mary Maupin, accused and the other two officers got in a car and drove to the bus station at the Wrightstown entrance to the post. After some conversation the party drove back to Barracks No. 9, Station Hospital, where Private Elizabeth Pope, Women's Army Corps, joined the group. They again drove back to the bus station at Wrightstown. The officers got out of the car, were gone for 15 minutes and returned. Accused was carrying a tall slender bottle. The party then drove to the "officers' quarters" and entered the room of "Lieutenant Parham." A little later, accused took Private Davis to his room, where they were alone (R. 52-57). Private Mary Maupin, Women's Army Corps, corroborated Private Davis (R. 66-70).

On 16 September 1943 Private Edward F. McKenney, Military Police Detachment, Fort Dix, New Jersey, took a statement in longhand from accused, after first having ascertained from accused that he was familiar with Article of War 24. This statement was then typed by a clerk and signed by accused about noon of that day. In this statement accused admitted that he had been placed under arrest on 22 August 1943 and had observed "the arrest of quarters" up until 15 September. He said that on that night he went down to the "WAC" area. He said further: "While we were there three WACs came up to the car * * *.we invited them to go back down to the quarters with us * * * Building T 31-100. We * * * all went into Lt. Parham's room" (R. 70-75; Ex. 9).

First Lieutenant James B. Venable, Quartermaster Corps, testified for the defense. He said that he had been commanding officer of Company A, accused's unit at Camp Pickett, Virginia, from November 1942 until April 1943, since which time he had been "the executive"; that accused had been with this company until July; that during this time he had observed accused and found him to be efficient; that accused had been a good soldier and had never had to be disciplined; and that as a range officer accused was very efficient (R. 88-92).

Second Lieutenant Wilbur G. Valentine, Quartermaster Corps, Fort Dix, New Jersey, testified that he had been in the same company with accused from 20 April until 13 July and that he found accused to be a very conscientious worker; that accused's former outfit had been sent overseas, while accused had been sent to Fort Dix; and that accused was very resentful of the fact that he was not going over with his outfit (R. 92-96).

Accused did not take the stand. An unsworn statement was made by his counsel. Counsel stated that accused had a good record "prior to the events leading up to the present trial" (R. 96-97).

4. The evidence shows that accused was transferred from Camp Pickett, Virginia, to the 561st Quartermaster Service Battalion at Fort Dix, New Jersey. He left Camp Pickett, pursuant to this transfer, 13 July 1943. He did not appear or report at Fort Dix, until 22 August 1943. Available train service made it possible for accused to have reached Fort Dix by 14 July 1943. This evidence together with the confession of accused and his plea of guilty shows that accused was guilty of absence from his organization and station, without leave, from 14 July 1943 to 22 August 1943, as alleged in the Specification of Charge I. The evidence further shows that upon his arrival at Fort Dix on 22 August 1943, accused was placed under arrest in quarters at Fort Dix, and that the meaning of "arrest" and the limits thereof were explained to him by the executive officer of his battalion. On the night of 15 September 1943, before accused had been released from this arrest, he went off the post, outside the main entrance, beyond the limits of the area to which he had been restricted by his arrest. This evidence shows accused guilty of a violation of breach of arrest as alleged in the Specification of Additional Charge I, to which Additional Charge and Specification accused pleaded guilty. Finally, the evidence shows that on the evening of 15 September 1943 accused with two other officers took women into the Bachelor Officers' Quarters T 31-100 at Fort Dix. Accused took one of the women to his room (bedroom). A memorandum issued by the battalion commander forbade any officer taking a woman into this building. This memorandum was issued in July, prior to the arrival of accused at Fort Dix. It was not shown beyond a reasonable doubt that accused had knowledge of this memorandum. Specification 2 of Additional Charge II alleges the wrongful and willful taking of women by accused to the officers' barracks contrary to rules and regulations pertaining thereto, all to the prejudice of good order and discipline in violation of Article of War 96. Since there was failure of proof that accused knew of the "rules and regulations" alleged in the Specification, the finding of the Board of Review is that accused was guilty of the conduct alleged in Specification 2 of Additional Charge II, except as to the words "contrary to rules and regulations pertaining thereto." These words are surplusage under the circumstances existing in this case. The remainder of the Specification states a violation of Article of War 96. It is prejudicial to good order and military discipline to take women into bachelor barracks and into the private rooms of officers. The word "wrongfully" used in the Specification is sustained by the attendant circumstances and facts.

5. Accused is 32 years of age. He is married and is a high school graduate. He attended Tuskegee Institute in Alabama for 1½ years. He was commissioned second lieutenant, Quartermaster Corps, 23 December 1942.

There was prior enlisted service from 26 May 1942 until 23 December 1942.

6. The court was legally constituted and had jurisdiction of the person and the 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 and the sentence and to warrant confirmation thereof. Dismissal is authorized under Articles of War 61, 69 and 96.

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

1st Ind.

War Department, J.A.G.O. 4 NOV 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 W. Hooey (0-1585639), Quartermaster Corps.

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

3. Consideration has been given to the attached letters from the accused to The Judge Advocate General and the Secretary of War, dated 8 and 12 October 1943, respectively.

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.

T. H. Green,
Brigadier General, U. S. Army,
Acting The Judge Advocate General.

5 Incls.
1-Record of trial.
2-Dft. ltr. for sig. S/W.
3-Form of Executive action.
4-Ltr. dated 8/10/43.
5-Ltr. dated 12/10/43.

(Sentence confirmed but confinement and forfeitures remitted. G.C.M.O. 400, 22 Dec 1943)

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

SPJGH
CM 242170

5 NOV 1943

UNITED STATES v. Second Lieutenant HERMAN E. STEPHAN (0-1168092), Field Artillery.	)	EIGHTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Fort Sill, Oklahoma, 6 October 1943. Dismissal, total forfeitures and confinement for three (3) years. Disciplinary Barracks.

OPINION of the BOARD OF REVIEW
DRIVER, LOTTERHOS and LATTIN, 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 Herman E. Stephan, Field Artillery, Department of Air Training, Field Artillery School, Fort Sill, Oklahoma, did, without proper leave, absent himself from his station at Fort Sill, Oklahoma, from about 24 June 1943 to about 24 August 1943.

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

Specification 1: In that Second Lieutenant Herman E. Stephan, Field Artillery, Department of Air Training, Field Artillery School, Fort Sill, Oklahoma, did, at Oklahoma City, Oklahoma, on or about 25 June 1943, with intent to defraud, wrongfully and unlawfully make and utter to The Oklahoma Biltmore Hotel, a certain check in words and figures as follows, to-wit:

COUNTER CHECK

NO. _____ June 25, 1943

Bank The National Bank

City Pittsburg State Kansas

Pay to the order of The Oklahoma Biltmore Hotel $10.00

Ten and no/100 - - - - - - - - - - - - -

For value received I claim that the above amount is on deposit in said Bank in my name subject to this check and is assigned to payee or holder hereof.

signature Herman E. Stephan
U.S.Army - 0-1168092

and by means thereof did fraudulently obtain from The Oklahome Biltmore Hotel $10.00 lawful money of the United States of the value of $10.00, he, the said Second Lieutenant Herman E. Stephan, then well knowing that he did not have and not intending that he should have sufficient funds in The National Bank, Pittsburg, Kansas, for the payment of said check.

Specification 2: Same form as Specification 1; but alleging check dated 26 June 1943, for $15, made and uttered to the same payee, and the fraudulent obtaining of $15.

Specification 3: Same form as Specification 1; but alleging check dated 28 June 1943, for $10, made and uttered to the same payee, and the fraudulent obtaining of $10.

Specification 4: Same form as Specification 1; but alleging check dated 29 June 1943, for $15, made and uttered to the same payee, and the fraudulent obtaining of $15.

Specification 5: In that Second Lieutenant Herman E. Stephan, Field Artillery, Department of Air Training, Field Artillery School, Fort Sill, Oklahoma, did, at Fort Worth, Texas, on or about 1 July 1943, with intent to defraud, wrongfully and unlawfully make and utter to The Blackstone, a hotel, a certain check in words and figures as follows, to-wit:

On demand pay Fort Worth, Texas, July 1, 1943.
to the order of The BLACKSTONE $15.00

Fifteen - - - - - - - - - and - - - - - - - 00 Dollars
with exchange

As maker and/or endorser I hereby agree in case this check is returned from the bank unpaid to pay protest fees, if any, and a reasonable investigation charge, and in addition, if placed in attorney's hands for collection, to pay a reasonable attorney's fee, all exemption laws of the State of Texas being hereby waived in the enforcement of the above obligation this check being payable where the owner and holder of same reside.

To National Bank
Name of Bank or Trust Co.
Pittsburg, Kan.
City or town and State

Herman E. Stephan

Address 2d Lt - 0-1168092

and by reason thereof did fraudulently obtain from The Blackstone, a hotel, $15.00 lawful money of the United States of the value of $15.00, he, the said Second Lieutenant Herman E. Stephan, then well knowing that he did not have and not intending that he should have sufficient funds in the National Bank, Pittsburg, Kansas, for the payment of said check.

Specification 6: Same form as Specification 5; but alleging check dated 30 June 1943, for $20, made and uttered to the same payee, and the fraudulent obtaining of $20.

Specification 7: In that Second Lieutenant Herman E. Stephan, Field Artillery, Department of Air Training, Field Artillery School, Fort Sill, Oklahoma, did, at Jacksonville, Florida, on or about 1 August 1943, with intent to defraud, wrongfully and unlawfully make and utter to Hotel George Washington, a certain check in words and figures as follows, to-wit:

Pay to the order of Hotel George Washington — Jacksonville, Florida, Aug. 1, 1943.
Dollars: Cents
$25 : 00

100% Air Conditioned . . Optional Use
Twenty - Five - - - - - - - and - - - - - - - 00 Dollars.
With Exchange Value Received and Charge to Account of

To First National Bank
Pittsburgh, Penna.

I hereby represent that the amount drawn for in this draft is on deposit with the drawee to my credit, free from any claim and acknowledge that this amount has been paid to me upon presentation of such facts.

Lt Herman E. Stephan

and by means thereof did fraudulently obtain from Hotel George Washington $25.00 lawful money of the United States of the value of $25.00, he, the said Second Lieutenant Herman E. Stephan, then well knowing that he did not have and not intending that he should have any account with the First National Bank, Pittsburgh, Pennsylvania, for the payment of said check.

Specification 8: Same form as Specification 7; but alleging check dated 30 July 1943, for $25, made and uttered to the same payee, and the fraudulent obtaining of $25.

Specification 9: Same form as Specification 7; but alleging check dated 27 July 1943, for $25, made and uttered to the same payee, and the fraudulent obtaining of $25.

He pleaded guilty to and was found guilty of all Charges and Specifications. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for three years. The reviewing authority approved the sentence and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. The record of trial was forwarded for action under the 48th Article of War.

3. Evidence for the prosecution:

a. Charge 1: The morning report of the Air Training Student Officers Pool, Field Artillery School, Fort Sill, Oklahoma, to which accused belonged, showed him from duty to absent without leave as of 24 June 1943. An extract copy of the prison morning report, Military Police Company, First Service Command, Service Unit, Boston, Massachusetts, showed accused from absent without leave to confinement as of 24 August 1943. According to Captain Robert A. Pike, in charge of officers' personnel at the Field Artillery School, accused had not been granted leave during the period of his absence (R. 13-15; Exs. 1 and 2).

b. Charge II: It was stipulated by a written stipulation signed by the trial judge advocate, defense counsel and accused, that accused made, signed and delivered the checks described in Specifications 1 to 9, Charge II and received full face value in cash therefor; that presentment for payment was made with respect to each of said checks; that all checks described in the Specifications of Charge II were dishonored by the banks upon which drawn upon presentment for payment; that the reason for dishonor, with respect to the checks

described in Specifications 1 to 6, inclusive, was "insufficient funds", and with respect to the checks described in Specifications 7 to 9, inclusive, was "no account" (R. 15-17; Ex. 3).

The checks drawn by accused, as stated, were as follows: 25 June 1943 to The Oklahoma Biltmore Hotel in the sum of $10 (Chg. II, Spec. 1); 26 June 1943 to The Oklahoma Biltmore Hotel in the sum of $15 (Chg. II, Spec. 2); 28 June 1943 to The Oklahoma Biltmore Hotel in the sum of $10 (Chg. II, Spec. 3); 29 June 1943 to The Oklahoma Biltmore Hotel in the sum of $15 (Chg. II, Spec. 4); 1 July 1943 to The Blackstone in the sum of $15 (Chg. II, Spec. 5); 30 June 1943 to The Blackstone in the sum of $20 (Chg. II, Spec. 6); 1 August 1943 to the Hotel George Washington in the sum of $25 (Chg. II, Spec. 7); 30 July 1943 to the Hotel George Washington in the sum of $25 (Chg. II, Spec. 8); 27 July 1943 to the Hotel George Washington in the sum of $25 (Chg. II, Spec. 9). (R. 15-17; Exs. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12).

4. No evidence was offered by the defense. The accused elected to remain silent (R. 18-19).

5. a. As to Charge I the evidence shows and the plea of guilty admits that accused was absent without leave from 24 June 1943 to 24 August 1943.

b. As to Specifications 1-9, Charge II, the evidence and stipulation show and the plea of guilty admits that accused made and uttered nine checks as alleged in the aggregate amount of $160 and received full face values in cash therefor, and that in six instances accused drew the checks on a bank in which he had insufficient funds to pay them, and in three instances on a bank in which he had no account. The drawing and uttering of the checks under the conditions shown was fraudulent, and the evidence clearly warrants the conclusion that in each instance accused knew the checks would not be paid on presentation.

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 11 June 1941; appointed temporary second lieutenant, Army of the United States from Officer Candidate School and active duty, 11 August 1942.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the

sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 61st or 96th Article of War.

Samuel M. Lower, Judge Advocate

F J Lotterhos, Judge Advocate

Norman D. Latting, Judge Advocate

1st Ind.

War Department, J.A.G.O., 16 NOV 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 Herman E. Stephan (0-1168092), Field Artillery.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. The accused was absent without leave for about two months, and made and uttered with intent to defraud 6 checks aggregating in amount $85, all drawn on a bank in which he had insufficient funds, and 3 checks aggregating in amount $75, all drawn on a bank in which he had no checking account. I recommend that the sentence to dismissal, total forfeitures and confinement at hard labor for three years be confirmed and carried into execution.

3. The following letters written by accused in his own behalf have been carefully considered: letter dated 7 October 1943 (see record of trial, page 23); letter dated 9 October 1943 to the Commanding General, Eighth Service Command; letter dated 20 October 1943, "Reference General Court Martial"; and letter dated 3 November 1943 to "Mr. Samuel I. Rosenman".

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 carrying into effect the recommendation made above.

T. H. Green,
Brigadier General, U. S. Army,
Acting The Judge Advocate General.

6 Incls.
Incl.1-Record of trial.
Incl.2-Dft.ltr. for sig. S/W.
Incl.3-Form of action.
Incl.4-Ltr. to CG, 8th S.G., 9 Oct. 1943.
Incl.5-Ltr. fr. Lt. Stephan, 20 Oct. 1943.
Incl.6-Ltr. to "Mr. Rosenman," 3 Nov. 1943.

(Sentence confirmed but confinement reduced to one year. G.C.M.O. 24, 13 Jan 1944)

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

SPJGN
CM 242246

29 OCT 1943

UNITED STATES v. First Lieutenant HOLLIS P. FOWLER (0-568182), Air Corps.	ARMY AIR FORCES EASTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Buckingham Army Air Field, Fort Myers, Florida, 10 September 1943. Dismissal.

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

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

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

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

Specification 1: In that First Lieutenant Hollis P. Fowler, Air Corps, 328th Base Headquarters and Air Base Squadron, Army Air Forces Flexible Gunnery School, Buckingham Army Air Field, Fort Myers, Florida, did, at Fort Myers, Florida, on or about 28 July 1943, commit the crime of sodomy by feloniously and against the order of nature have carnal connection with Second Lieutenant Maurice S. Bower, Air Corps, a member of the male sex, by taking Lieutenant Bower's penis in his mouth.

Specification 2: In that First Lieutenant Hollis P. Fowler, Air Corps, 328th Base Headquarters and Air Base Squadron, Army Air Forces Flexible Gunnery School, Buckingham Army Air Field, Fort Myers, Florida, did, at Fort Myers, Florida, on or about 28 July 1943 commit the crime of sodomy by feloniously and against the order of nature have carnal connection by rectum with Second Lieutenant Maurice S. Bower, Air Corps, a member of the male sex.

Specification 3: In that First Lieutenant Hollis P. Fowler, Air Corps, 328th Base Headquarters and Air Base Squadron, Army Air Forces Flexible Gunnery School, Buckingham Army

Air Field, Fort Myers, Florida, did, at Fort Myers, Florida, on or about 28 July 1943, commit the crime of sodomy by feloniously and against the order of nature have carnal connection with Second Lieutenant Maurice S. Bower, Air Corps, a member of the male sex, by permitting Lieutenant Bower to have carnal connection by mouth with him on that date.

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

Specification 1: In that First Lieutenant Hollis P. Fowler, Air Corps, 328th Base Headquarters and Air Base Squadron, Army Air Forces Flexible Gunnery School, Buckingham Army Air Field, Fort Myers, Florida, did, at or near Fort Myers, Florida, on or about 8 July 1943, wrongfully solicit the opportunity of committing the crime against nature by wrongfully offering and seeking to have carnal connection against the order of nature with Sergeant Daniel F. Potter, a male person.

Specification 2: In that First Lieutenant Hollis P. Fowler, Air Corps, 328th Base Headquarters and Air Base Squadron, Army Air Forces Flexible Gunnery School, Buckingham Army Air Field, Fort Myers, Florida, did, at or near Fort Myers, Florida, on or about 28 July 1943, wrongfully solicit the opportunity of committing the crime against nature by wrongfully offering and seeking to have carnal connection against the order of nature with Sergeant Daniel F. Potter, a male person.

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

3. The evidence for the prosecution shows that on or about 8 July 1943 the accused suggested sodomy to Sergeant Daniel F. Potter, inviting him to go to the "BOQ". Upon the sergeant's refusal, the accused, later in the day, by telephone arranged for the reluctant sergeant to meet him in the Bradford Hotel, Fort Myers, Florida, at about 2300 o'clock that night. When the sergeant entered the hotel room, he found the accused undressed and in a state of sexual excitement. The accused embraced him, attempted to kiss him and suggested acts of perversion, which the sergeant declined and soon left upon the pretext of another engagement (R. 10-12).

On 28 July 1943, at about 2245 o'clock the accused, Second Lieutenant Maurice S. Bower, Air Corps, and the sergeant assembled by prearrangement, initiated by the accused, in Room 343 of the Bradford Hotel. The sergeant's suspicions having been aroused by the matters related in the preceding paragraph, which he had reported to other officers, he likewise reported the arrangements for 28 July 1943, resulting in three officers placing themselves near the door of the room shortly after the sergeant's entrance. Upon entering the room, the sergeant found the accused and Lieutenant Bower scantily clad. The conversation immediately turned to homosexuality and the officers related their various experiences about indulging in such acts. The sergeant was induced to remove all of his clothing and the accused, returning naked from a shower, with Lieutenant Bower, who was then also naked, pushed the two single beds in the room together. The two officers, while lying on the beds, solicited and entreated the sergeant to engage with them in acts of sodomy which he refused to do for various reasons. The accused and Lieutenant Bower, nevertheless engaged in an act of perversion, by the former inserting his penis in the latter's rectum. Subsequent thereto, the sergeant was further solicited to engage in such acts. Then the accused "took Lieutenant Bower's penis in his mouth." Further solicitation of the sergeant then ensued during which Lieutenant Bower "played" with the sergeant's privates before he could push him away. Then the accused and Lieutenant Bower engaged in another act, this time Lieutenant Bower taking the accused's penis in the former's mouth. These acts were all witnessed by the sergeant who was able to see clearly although the lights were intermittently on and off. When the accused was for a second time inserting his penis in Lieutenant Bower's rectum, the sergeant threw open the door and two of the awaiting officers rushed into the room but not soon enough to find the two officers in the act of sexual perversion, although they were still in the bed together, naked. The third officer, who had gone to the hotel lobby for a few minutes, appeared shortly thereafter and the three officers with the sergeant departed after the accused and Lieutenant Bower had been directed to report to a superior officer the following morning (R. 12-23, 23-25, 25-28).

The accused, after proper warning, prior to trial had given the investigating officer two sworn statements in which the accused denied both the solicitation of the sergeant on the two occasions involved and the indulgence in acts of perversion with Lieutenant Bower but otherwise corroborated the sergeant's testimony in material parts. Although the statements were not admitted into evidence, the investigating officer testified about the material admissions contained therein among which, relative to the events in the hotel room on 28 July 1943, was "each and all of us did do a very limited amount of fumbling around with our hands" (R. 6-10).

4. The evidence for the defense shows that one of the accused's superior officers had recommended his return to civilian life by resignation from the service because the accused had an efficiency rating of "superior" and had "great potential production capacity." The affidavit of one of the three officers who entered the room was admitted into evidence by stipulation. It relates that the accused had been under suspicion of homosexual acts since 20 July 1943 and recites the arrangements made for the three officers' appearance in the hotel room on 28 July 1943 (R. 28, 33-34, and Ex. "1").

The accused, after having been advised of his rights as a witness, elected to testify. He denied any solicitation of Sergeant Potter at any time on 8 July 1943 to commit sodomy, but admitted the sergeant's brief appearance, at his "off hand" suggestion, in the hotel room on such date. He denied that the meeting in the hotel room on the night of 28 July 1943 was by his prearrangement. The sergeant repeatedly turned the conversation toward homosexuality and repeatedly requested the two officers to engage in homosexual acts between them which they refused to do. The single beds in the room were pushed together for "comfort's sake" and upon the sergeant again requesting the two officers to indulge in acts of perversion the accused got mad and "reached over to Lieutenant Bower and told him that Lieutenant Bower wouldn't do anything because he didn't have an erection, which was true." At this moment the sergeant threw open the door and the other officers entered the room, told the accused and Lieutenant Bower to report to the commanding officer the next morning, and shortly departed with the sergeant. Neither the accused nor Lieutenant Bower had committed an act of sodomy that night. Upon cross examination, he admitted talking about homosexuality with the sergeant on 8 July 1943 but denied soliciting him to engage in such acts. He likewise admitted that on 28 July 1943 all three were naked in the hotel room, claiming that he customarily so slept and that he handled Lieutenant Bower's private part, saying, "I just gave it a pat." Prior to trial he had submitted his resignation (R. 28-33, 34).

Lieutenant Bower testified that on the night of 28 July 1943 no homosexual act was committed by either himself or the accused and disavowed his former written statement to the contrary, attributing the falsity of the prior statement to his effort to avoid trial (R. 35-37).

5. Specifications 1, 2 and 3, Charge I, allege that the accused on or about 28 July 1943 at Fort Myers, Florida, "feloniously and against the order of nature" committed three separate acts of sodomy with Second Lieutenant Bower. The three acts alleged are the performance of such an act per os upon each other and once by the accused upon Lieutenant Bower by rectum. The offenses alleged are defined by the Manual for Courts-Martial as follows:

"Sodomy consists of sexual connection with any brute animal, or in sexual connection, by rectum or by mouth, by a man with a human being. Penetration alone is sufficient and both parties may be liable as principals" (M.C.M., 1928, par. 149k).

The testimony of an eye witness to the acts alleged is clear and convincing. It is fortified by the circumstances described as prevailing in the hotel room upon the entrance of the other three officers and corroborated in certain parts by the testimony of Lieutenant Bower and admissions contained in the accused's testimony. Since the arrangements for the meeting in the hotel room were made by the accused and Lieutenant Bower, they were not entrapped because mere preparation to detect the perpetration of a crime is not entrapment if the crime is conceived by the accused and not suggested by the police agent (CM 227195 (1942) Bull, JAG 1942, Vol. I, Sec. 395 (35), page 360). The evidence establishes beyond a reasonable doubt the commission of the offenses alleged and amply supports the findings of guilty of Specifications 1, 2 and 3, Charge I, and of Charge I.

6. Specifications 1 and 2, Charge II, allege that the accused at Fort Myers, Florida, on or about 8 July 1943 and again on or about 28 July 1943 wrongfully solicited and offered to commit the crime of sodomy with another male person. The alleged offenses are charged as violations of Article of War 96. The evidence is conclusive that the accused on the first occasion solicited the sergeant to engage in acts of perversion with him, and that on the second he disported himself with Lieutenant Bower, both nude and upon a large bed, before an enlisted man who had disrobed at their request, that they engaged in talk about homosexuality with the enlisted man and that the accused then solicited and sought to entice the enlisted man to engage in perverted practices with the accused. Such conduct is patently prejudicial of good order and military discipline. The evidence, therefore, beyond a reasonable doubt supports the findings of guilty of Charge II and its Specifications.

7. The accused is about 25 years of age. The War Department records show that he had enlisted service from 4 February 1942 until 9 December 1942 when he was commissioned a second lieutenant with active duty as an officer from the latter date and that he was promoted to first lieutenant on 3 July 1943.

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 of all Charges and Specifications and the sentence, and to warrant confirmation thereof. Dismissal is authorized upon a conviction of a violation of Articles of War 93 or 96.

Abner E. Lipscomb, Judge Advocate

Gabriel H. Goldberg, Judge Advocate

Benjamin R. Sleeper, Judge Advocate

SPJGN
CM 242246

1st Ind.

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

4 - NOV 1943

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 Hollis P. Fowler (0-568182), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. I recommend that the sentence of 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 foregoing recommendation, should such action meet with approval.

T. H. Green,
Brigadier General, U. S. Army,
Acting The Judge Advocate General.

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

(Resigned)

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

SPJGN
CM 242253

29 OCT 1943

UNITED STATES	ARMY AIR FORCES EASTERN FLYING TRAINING COMMAND
v.	Trial by G. C. M., convened at Buckingham Army Air Field, Fort Myers, Florida, 4 September 1943. Dismissal, total forfeitures and confinement for five (5) years.
Second Lieutenant MAURICE S. BOWER (0-567396), Air Corps.	

OPINION of the BOARD OF REVIEW
LIPSCOMB, GOLDEN 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 above-named and submits this, its opinion, to The Judge Advocate General.

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

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

Specification 1: In that Second Lieutenant Maurice S. Bower, AC, Headquarters and Headquarters Squadron 38th Flexible Gunnery Training Group, Army Air Forces Flexible Gunnery School, Buckingham Army Air Field, Fort Myers, Florida, did, at Fort Myers, Florida, on or about 28 July 1943 commit the crime of sodomy by feloniously and against the order of nature have carnal connection with First Lieutenant Hollis P. Fowler, Air Corps, by permitting Lieutenant Fowler to take Lieutenant Bower's penus in his mouth.

Specification 2: In that Second Lieutenant Maurice S. Bower, AC, Headquarters and Headquarters Squadron, 38th Flexible Gunnery Training Group, Army Air Forces Flexible Gunnery School, Buckingham Army Air Field, Fort Myers, Florida, did, at Fort Myers, Florida, on or about 28 July 1943, commit the crime of sodomy by feloniously and against the order of nature have carnal connection with First Lieutenant Hollis P. Fowler, Air Corps, by permitting Lieutenant Hollis P. Fowler, Air Corps, to have carnal connection with the said Lieutenant Maurice S. Bower by rectum.

Specification 3: In that Second Lieutenant Maurice S. Bower, Air Corps, Headquarters and Headquarters Squadron, 38th Flexible Gunnery Training Group, Army Air Forces Flexible Gunnery School, Buckingham Army Air Field, Fort Myers, Florida, did, at Fort Myers, Florida, on or about 28 July 1943, commit the crime of sodomy by feloniously and against the order of nature have carnal connection with First Lieutenant Hollis P. Fowler, Air Corps, a member of the male sex, by taking the penus of Lieutenant Fowler in his mouth.

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

Specification: In that Second Lieutenant Maurice S. Bower, Air Corps, Headquarters and Headquarters Squadron, 38th Flexible Gunnery Training Group, Army Air Forces Flexible Gunnery School, Buckingham Army Air Field, Fort Myers, Florida, did, at Fort Myers, Florida, on or about 28 July 1943, wrongfully solicit the opportunity of committing the crime against nature by wrongfully offering and seeking to have carnal connection against the order of nature with Sergeant Daniel F. Potter, a male person.

He pleaded not guilty to and was found guilty of all Charges and Specifications. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for five years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that the accused, First Lieutenant Hollis P. Fowler, Air Corps, and Sergeant Daniel F. Potter, 38th Flexible Gunnery Training Group, Army Air Forces Flexible Gunnery School, on 28 July 1943, at about 2245 o'clock assembled by prearrangement, initiated by Lieutenant Fowler, in Room 343 of the Bradford Hotel, Fort Myers, Florida. Sergeant Potter's suspicions as to the purpose of the meeting had theretofore been aroused by First Lieutenant Fowler's previous actions which he had reported to other officers resulting in three officers placing themselves near the door of the room shortly after the sergeant's entrance. Upon entering the room, the sergeant found the accused and Lieutenant Fowler scantily clad. The conversation immediately turned to homosexuality and the officers related their various experiences about indulging in such acts. The sergeant was induced to remove all of his clothing and the accused, returning naked from a shower, with Lieutenant Fowler, who was then also naked, pushed the two single beds in the room together. The two officers, while lying on the beds, solicited and entreated the sergeant to engage with them in acts of

sodomy which he refused to do for various reasons. The accused and Lieutenant Fowler, nevertheless, engaged in an act of perversion by the latter inserting his penis in the former's rectum. Subsequent thereto, the sergeant was further solicited to engage in such acts. Then Lieutenant Fowler "took Lt. Bower's penus in his mouth". Further solicitation of the sergeant then ensued during which the accused "played" with the sergeant's privates before he could push him away. Then the accused and Lieutenant Fowler engaged in another act, this time the accused taking Lieutenant Fowler's penis in accused's mouth. These acts were all witnessed by the sergeant who was able to see clearly although the lights were intermittently on and off. When Lieutenant Fowler was for a second time inserting his penis in the accused's rectum, the sergeant threw open the door and two of the awaiting officers rushed into the room, but not soon enough to find the two officers in the act of sexual perversion although they were still in the bed together, naked. The third officer, who had gone to the hotel lobby for a few minutes, appeared shortly thereafter and the three officers with the sergeant departed after the accused and Lieutenant Fowler had been directed to report to a superior officer the following morning (R. 9-17, 18-20, 20-22).

Two sworn statements of the accused which had been given, after proper warning, to the investigating officer were identified and introduced into evidence. They contain admissions by the accused to prior acts of perversion which had taken place between him and Lieutenant Fowler during the preceding few months, and a denial of such acts on the occasion in question. The admissions otherwise corroborate the testimony of the sergeant in material parts (R. 6-8; Exs. "A" and "B").

4. The evidence for the defense shows that an officer, who had worked with the accused for three months, was of the opinion that the accused was a faithful and energetic worker whose character was good. The affidavit of one of the three officers who entered the room was admitted into evidence by stipulation. It relates that Lieutenant Fowler had been under suspicion of homosexual acts since 20 July 1943 and recites the arrangements made for the three officers' appearance in the hotel room on 28 July 1943 (R. 22, 28; Ex. "1").

Lieutenant Fowler testified that the accused and the sergeant came to his room without prearrangement, that the sergeant repeatedly brought up the subject of homosexuality and that he asked the two officers to engage in such acts which they refused to do and requested him, the sergeant, to go to bed, whereupon the sergeant threw open the door, admitting the other three officers. He denied the commission of any acts of sodomy with or by the accused on 28 July 1943 and branded as false certain assertions in his prior sworn statement (R. 22-25).

The accused, after having been advised of his rights as a

witness, elected to make an unsworn statement in which he admitted previous conversations with Lieutenant Fowler about homosexuality in which Sergeant Potter had been mentioned. His appearance in the hotel room was not by prearrangement but because of his curiosity about the relations between Lieutenant Fowler and the sergeant, who immediately upon his arrival directed the conversation toward homosexuality and requested the two officers to commit such acts upon each other. The single beds had been pushed together to afford room for all three men to sleep and Lieutenant Fowler did not touch him except once when he, Lieutenant Fowler, "did make a grab for me", whereupon the accused got up from the bed and went over to the door, which the sergeant was opening. Observing the other officers entering the room he jumped back into the bed and put his face in a pillow,highly amused. Any conflicts between his unsworn statement and those given the investigating officer were caused by his "trying to get out of this mess without having a court-martial" by securing a transfer or dismissal (R. 25-27).

5. Specifications 1, 2 and 3, Charge I, allege that the accused, on or about 28 July 1943, at Fort Myers, Florida, "feloniously and against the order of nature" committed three separate acts of sodomy with First Lieutenant Fowler. The three acts alleged are the performance of such an act per os upon each other and once by Lieutenant Fowler upon the accused by rectum. The offenses alleged are defined by the Manual for Courts-Martial as follows:

> "Sodomy consists of sexual connection with any brute animal, or in sexual connection, by rectum or by mouth, by a man with a human being. Penetration alone is sufficient and both parties may be liable as principals." (MCM, 1928, par. 149k)

The testimony of an eyewitness to the acts alleged is clear and convincing. It is fortified by the circumstances described as prevailing in the hotel room upon the entrance of the other three officers and corroborated in certain parts by the testimony of Lieutenant Fowler and admissions contained in the accused's unsworn statement while the accused's aptitude for perversion is admitted in his sworn statement given to the investigating officer. Since the arrangements for the meeting in the hotel room were made by Lieutenant Fowler and the accused, they were not entrapped because mere preparation to detect the perpetration of a crime is not entrapment if the crime is conceived by the accused and not suggested by the police agent (CM 227195 (1942) Bull. JAG, 1942, Vol. I, sec. 395 (35), p. 360). The evidence establishes beyond a reasonable doubt the commission of the offenses alleged and amply supports the findings of guilty of Specifications 1, 2 and 3, Charge I, and of Charge I.

6. The Specification, Charge II, alleges that the accused, at Fort Myers, Florida, on or about 28 July 1943, wrongfully solicited and offered

to commit the crime of sodomy with another male person. The alleged offense is charged as a violation of Article of War 96. The evidence is conclusive that the accused on the occasion in question disported himself with Lieutenant Fowler, both nude and upon a large bed, before an enlisted man who had disrobed at their request, that they engaged in talk about homosexuality with the enlisted man and that the accused solicited and sought to entice the enlisted man to engage in perverted practices with the accused. Such conduct is patently prejudicial of good order and military discipline. The evidence, therefore, beyond a reasonable doubt supports the findings of guilty of Charge II and its Specification.

7. The accused is about 26 years of age. The War Department records show that he had enlisted service from 9 January 1942 until 9 December 1942 when he was commissioned a second lieutenant and that he has been on active duty as an officer from the latter date.

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 of all Charges and Specifications and the sentence, and to warrant confirmation thereof. Dismissal is authorized upon a conviction of a violation of Article of War 93 or 96.

Abner E. Lifscomb, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

(34)

SPJGN
CM 242253

1st Ind.

War Department, J.A.G.O., 4 - NOV 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 Maurice S. Bower (0-567396), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed and carried into execution and that the Eastern Branch, United States Disciplinary Barracks, Beekman, New York, be designated as the place of confinement.

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

T. H. Green,
Brigadier General, U. S. Army,
Acting The Judge Advocate General.

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

(Resigned)

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

SPJGN
CM 242312

5 NOV 1943

UNITED STATES	)	THIRD AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at Myrtle Beach Bombing Range, South Carolina, 13 and 31 August 1943. Dismissal and confinement for three (3) years. Disciplinary Barracks.
First Lieutenant MORTON (NMI) GILBERT (0-568289), Air Corps.	)	

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

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

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

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

Specification: In that 1st Lieutenant Morton (NMI) Gilbert, 573rd Bombardment Squadron 391st Bombardment Group (M) AAF, Myrtle Beach Bombing Range, Myrtle Beach, S. C. did at Myrtle Beach Bombing Range, Myrtle Beach, S. C. on or about July 31, 1943, feloniously take, steal and carry away currency of the value of about Two Hundred One Dollars (201.90) and Ninety Cents, property of the United States, furnished and intended for the Military Service thereof.

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

Specification: In that 1st Lieutenant Morton (NMI) Gilbert, 573rd Bombardment Squadron, 391st Bombardment Group (M), did, at MacDill Field, Tampa, Florida, and at Myrtle Beach Bombing Range, Myrtle Beach, South Carolina, during the period from March 1, 1943, to present, feloniously take, steal and carry away personal property of fellow officers of his squadron, including currency, value about SIX DOLLARS the property of CAPTAIN CHARLES

B. HODGES, JR.; currency, value about 5.00 the property of CAPTAIN CHARLES B. HODGES JR.; currency, value about 2.00 the property of CAPTAIN CHARLES B. HODGES, JR.; currency, value about 6.00 the property of CAPTAIN CHARLES B. HODGES JR.; a PORTABLE radio, property of LIEUTENANT JAMES F. ARMSTRONG, value about $25.00 ; a G. I. watch, property of LT. ROBERT F. LEMMON , value about $50.00 ; and certain articles of clothing to wit: One (1) pair tropical worsted trousers value about TEN DOLLARS ($10.00) the property of LIEUTENANT B. F. WILLIAMS; One (1) tropical worsted shirt, currency value about EIGHT DOLLARS ($8.00), the property of LIEUTENANT B. F. WILLIAMS; One (1) tropical worsted shirt, currency value about EIGHT DOLLARS ($8.00), the property of LIEUTENANT L. V. LANE; One (1) tropical worsted trousers, currency value about TEN DOLLARS ($10.00) the property of LIEUTENANT L. V. LANE.

The accused pleaded not guilty to and was found guilty of the Charges and Specifications thereunder. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for a period of three years. The reviewing authority approved only so much of the finding of guilty of the Specification, Charge II as involves a finding of guilty of the larceny of a portable radio, of some value, the property of Lieutenant James F. Armstrong, and a pair of trousers and a shirt, of some value, the property of Lieutenant B. F. Williams, at the time, place and under the circumstances alleged, approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under Article of War 48.

3a. The evidence for the prosecution concerning the Specification, Charge I, shows that on 31 July 1943, the accused, who was serving as adjutant of the 573rd Bombardment Squadron, was requested by Lieutenant William E. Wooten to guard certain payroll money while he, and several others who had been arranging the money in envelopes, left the organization's orderly room to secure a Coca-Cola. The accused accepted the responsibility and the group in charge of the money went out to procure refreshments. At the same time Sergeant John H. Boles directed Private First Class Jerome Case to guard the money in question. The money had been arranged in envelopes according to the serial numbers of the various bills. During the process of arranging the money, there appeared to be a shortage of $10, necessitating a recheck. During this recheck, Sergeant John H. Boles, who was assisting in the counting of the money remarked in the

presence of the accused that Sergeant Parnell was receiving "a large pay this month". After the group who had been arranging the money left the orderly room the accused took a position in front of the money with his back to it. Private Gase, who was also watching the money decided that the accused had taken responsibility for the money upon himself, and resumed work at his typewriter. While typing, Private Gase's back was toward the accused. After about 5 minutes, the accused asked Private Gase to resume watching the money and then left the orderly room. A short time thereafter, after those in charge of the money had paid about fifteen men, First Lieutenant Edward J. Keehley discovered that the envelope of Sergeant Parnell was missing. The evidence shows that because $10 of the money had been originally misplaced and because during the checking process Sergeant Boles had remarked that Sergeant Parnell was receiving "a large pay for this month", that Lieutenant Keehley definitely remembered that $201.90 had been placed in Sergeant Parnell's envelope. The serial number of the missing bills was also shown by checking the number of the bills of the pay of the technical sergeant who preceded and who followed Sergeant Parnell on the payroll (R. 5-11, 66-67).

On the day following the incident described Lieutenant Keehley explained the loss of the money to Captain Charles B. Hodges, the squadron's intelligence officer, and accompanied by Captain James A. Sullens, they went to the accused's room which was located in a private dwelling. The dwelling in question had been leased by Captain Hodges and the expense of the lease was shared by the eight officers who lived there. The rooms of the dwelling were so arranged that it was customary for Captain Hodges to pass through the room occupied by the accused in going from his own room to the living room. The room and closet used by the accused were searched and the missing money found by Captain Sullens in a blouse owned by the accused which was hanging in his closet. Captain Hodges saw Captain Sullens when the latter discovered the money. Although the evidence shows that a Lieutenant Armstrong shared the accused's room, it was further shown that Lieutenant Armstrong had just moved into the room and did not have a blouse in the closet at that time. The money was taken to the office of the provost marshal and later delivered to Lieutenant Keehley who identified it by the serial numbers thereon as being the money missing from the pay envelope in question. The money was offered in evidence over the objection of the defense that it had been illegally obtained in violation of the Fourth Amendment of the Constitution of the United States. The defense cited section 395 (27) Digest of Opinions of The Judge Advocate General, 1912-1940 edition, in support of its objections (R. 11-14, 11-21, 21-25, 27-29).

b. The evidence for the prosecution concerning the findings of guilty of the Specification, Charge II, which were approved by the reviewing authority, shows that on or about 1 August 1943, Captain Hodges, in company with three other officers searched the quarters of

the accused and found there various articles which were apparently in the possession of the accused. In the closet used by the accused they found a pair of trousers and a shirt which were branded with the initials "B.F.W." which were shown to be the property of Lieutenant B. F. Williams and to have been removed from his possession without his consent sometime during the month of July 1943. Similarly, a General Electric radio, which was shown to be the property of Lieutenant James F. Armstrong and to have been taken from his quarters and custody without his consent in July 1943, was found locked in the accused's "A-3 bag" (Exs. D, E, F; R. 33-37, 44-47, 48-51).

4. The accused, after his rights relative to testifying or remaining silent had been explained to him, testified that on Saturday morning, 31 July 1943, Lieutenant Keehley came to his office to prepare the the payroll and the accused had to get out. While he was still there, however, Lieutenant Keehley mentioned that he was short $10 and that he would have to go through the envelopes again. The accused watched the work on the envelopes for a time and until he heard them say that they had found their error. Lieutenant Keehley asked the accused if he would watch the envelopes while he, Lieutenant Keehley, went out for a "Coke". The accused replied in the negative stating that he was going "over to operations". The accused also heard Sergeant Boles tell "Jerry" to watch the envelopes. Before the accused left the office he told Private Gase to watch the envelopes. When questioned relative to the radio which had been found in his room, the accused said that all he knew about it was "what they say they found". He denied owning a padlock or ever having placed one on his bag. He testified that he was 27 years of age and that before entering the Army he worked for a collection agency. He asserted that he had about $2400 in his father's bank account. When cross-examined by the prosecution as to how the money had gotten into his blouse and as to how the clothing in question had gotten into his room, the accused asserted that he suspected Captain Hodges. He gave as a basis for his suspicion an assertion that he had on a previous occasion told Captain Hodges that he did not like him very much. He also testified that Captain Hodges had been angry with him on one occasion. When asked by a member of the court if he thought Captain Hodges hated him enough to place the missing money in his blouse, the accused replied that he had "formed any sort of opinion" (R. 56-66).

5. The Specification, Charge I, alleges that the accused on or about 31 July 1943, feloniously stole $201.90, property of the United States, furnished and intended for the military service. The evidence shows very clearly that the accused had an opportunity to take the money in question during the time he was supposedly guarding the money. Furthermore the money was found shortly thereafter in the accused's blouse. These facts justify the inference that the money

found in the blouse of the accused was taken by him with the felonious intent to permanently deprive the owner of his property therein. The Judge Advocate General has repeatedly held that the unexplained possession of recently stolen money affords sufficient basis for a finding of guilty of theft (par. 451 (37) Dig. Ops. JAG, 1912-40). The evidence establishes all of the elements of larceny and sustains, beyond a reasonable doubt, the findings of guilty of the Specification, Charge I and Charge I.

6. The Specification, Charge II, alleges that the accused did, "between 1 March 1943, and the present" (the date of the filing of the charges, 1 August 1943), feloniously, take, steal and carry away various items of money and property from five different officers, including a pair of trousers of the value of $10 and one shirt of the value of $8, the property of Lieutenant B. F. Williams, and one portable radio of the value of $25, the property of Lieutenant James F. Armstrong. Since the reviewing authority approved only the findings of guilty concerning the two thefts from Lieutenant Williams and Lieutenant Armstrong, the additional allegations are not discussed. The evidence shows that the three items specified were removed from the possession of the officers named during the month of July without their permission or consent and that they were found thereafter on 1 August 1943, in the possession of the accused. These facts give rise to the compelling inference that the shirt, trousers and radio were stolen by the accused as alleged, sustaining, beyond a reasonable doubt, the findings of guilty as approved by the reviewing authority.

Although the above Specification may have been designed to allege one offense involving thefts from five different persons during one transaction, its language does not allege either directly or by reasonable intendment that the various articles were stolen at the same time and from the same place. The Specification appears, therefore, to be multifarious as alleging five offenses in one Specification, and likewise the findings as approved by the reviewing authority are duplicitious. The Manual states, however, 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" (M.C.M., 1928, par. 87b).

Since in the present case it does not appear that the accused was misled by any defect appearing in the Specification in question, or that his substantial rights were injuriously affected thereby, the procedural error

may be regarded as harmless.

7. The defense objected to the introduction of all evidence which was obtained by a search of the accused's room on the ground that it was inadmissible as having been procured in violation of the Fourth Amendment to the United States Constitution. In support of its objection, the defense cited an opinion of The Judge Advocate General which holds that evidence procured by a military policeman without a search warrant from a soldier's private dwelling, which was not on a military reservation, was an invasion of the soldier's constitutional rights which rendered the evidence so obtained inadmissible (par. 395 (27), Dig. Ops. JAG, 1912-40). Obviously, the case relied upon by the defense is based upon the assumption that the provisions of the Fourth Amendment protect the soldier from abusive search and seizure by military authorities in the same manner that it seeks to protect the private citizen from unlawful search and seizure by agents of the Federal Government. Although the factual differences between the present case and the case cited make an examination into the correctness of the above assumption unnecessary, the importance of the evidentiary rule in question requires that it be carefully examined.

Wigmore states that under the rules of the common law, "* * * it has long been established that the admissibility of evidence is not affected by the illegality of the means through which the party has been enabled to obtain the evidence". In referring to evidence illegally obtained, he adds that "the illegality is by no means condoned; it is merely ignored" (Wigmore on Evidence, 3rd Ed., sec. 2183). The theory of this common law rule is that the competency of evidence depends upon its probative value rather than upon the circumstances under which it was procured. The Federal court has, however, in Boyd v. U.S. (1885), 116 U.S. 616, 6 Sup. Ct. 524; Weeks v. U.S. (1914), 232, U.S. 383, 34 Sup. Ct. 341; Silverthorne Lumber Co. v. U.S. 257, U.S. 385, 40 Sup. Ct. 182; and in similar cases promulgated the rule that evidence unlawfully procured through the wrongful search and seizure of an agent of the Federal Government was inadmissible as evidence in a prosecution against the person against whom the wrongful search was directed (see Wigmore on Evidence, sec. 2183 and Wharton's Criminal Evidence, sec. 373 and the cases therein cited). This rule, which has been referred to as the Federal rule, has been held, however, not to prevent the use of evidence procured by an unlawful search by a private individual as distinguished from a Federal law enforcing agent (Bacon v. U.S. 97 Fed. 35; Burdeau v. McDowell, 41 Sup. Ct. 574, 256 U.S. 465, 13 A.L.R. 1159). Furthermore, for the purposes of this rule the state authorities are considered in the Federal courts as strangers and evidence unlawfully procured by them has been held to be admissible (Weeks v. U.S. 232 U.S. 383, 58 L. Ed. 652; Rice v. U.S. 251 F.

778, writ of certiorari denied in 248 U.S. 574). Likewise, it has been held that evidence illegally obtained by Federal law enforcing officers was not inadmissible in a state court under a state constitutional provision similar to the provisions of the Fourth Amendment (State v. Gardner, 77 Mont. 8, 249 P. 574, 52 A.L.R. 454).

Since in the present case, the search of the accused's room was conducted by officers who were not a part of a military law enforcement group, they should, under the precedents of the Federal courts, be regarded as having made the search of the accused's room in their private capacities as contradistinguished from military police officers or military law enforcing officers. Under the precedents, therefore, both of the Federal rule as well as those of the common law, the evidence in question was clearly admissible.

8. The records of the office of The Adjutant General show the accused to be approximately 26 years of age. He was born in Poland and appears to have been naturalized as a citizen of the United States under the name of Morris Gomelinsky on 28 April 1928. He entered the military service on 2 February 1942 and was commissioned a second lieutenant, Army of the United States, on 9 December 1942.

9. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. A sentence of dismissal is authorized upon a conviction of a violation of Article of War 93 or 94.

Abner E. Lipscomb, Judge Advocate

Gabriel H. Golden, Judge Advocate

Benjamin R. Sleeper, Judge Advocate

(42)
SPJGN
CM 242312

1st Ind.

War Department, J.A.G.O., 16 NOV 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 Morton (NMI) Gilbert (0-568289), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings as approved by the reviewing authority, legally sufficient to support the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed and carried into execution and that the Eastern Branch, United States Disciplinary Barracks, Beekman, New York, be designated as the place of confinement.

3. Careful consideration has been given to four letters from the accused; two addressed to Colonel R. E. Kunkel, Judge Advocate General's Department, one to The Judge Advocate General and one to The Adjutant General. Consideration has also been given to two affidavits forwarded by the accused and signed by First Lieutenant Louis J. Lizerman, Air Corps, and Corporal Paul V. Donner.

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

T. H. Green,
Brigadier General, U. S. Army,
Acting The Judge Advocate General.

8 Incls.
Incl.1-Record of trial.
Incl.2-Dft. of ltr. for sig. Sec. of War.
Incl.3-Form of action.
Incl.4-Two ltrs. fr. accused addressed to Colonel R. E. Kunkel.
Incl.5-Ltr. fr. accused addressed to The Judge Advocate General.
Incl.6-Ltr. fr. accused addressed to The Adjutant General.
Incl.7-Affidavit signed by Lt. Lizerman.
Incl.8-Affidavit signed by Cpl. Donner.

(Sentence confirmed. G.C.M.O. 391, 21 Dec 1943)

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

SPJGK
CM 242314

(43)

6 NOV 1943

UNITED STATES	THIRD AIR FORCE
v.	Trial by G.C.M., convened at Columbia Army Air Base, Columbia, South Carolina, 13 September 1943. Dismissal and total forfeitures.
Second Lieutenant AUGUST C. GREBE, Jr. (0-744191), Air Corps.	

OPINION of the BOARD OF REVIEW
LYON, HILL 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 64th Article of War.

Specification: In that 2nd Lieutenant August C. Grebe, Jr., three hundred and seventy eighth Bombardment Squadron (M) AAF, three hundred and ninth Bombardment Group (M) AAF, having received a lawful command from 1st Lt. App J. Lowery, his superior officer, to report at once to Lt. Lowery, did, at Columbia, South Carolina, on or about 25 July 1943, willfully disobey same.

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

Specification: In that 2nd Lieutenant August C. Grebe, Jr., three hundred and seventy eighth Bombardment Squadron (M) AAF, three hundred and ninth Bombardment Group (M) AAF, did, at Columbia, South Carolina on or about 25 July 1943, conduct himself in a manner unbecoming an officer and a gentleman, in that, with intent to secrete himself, he did falsely register at the Wade Hampton Hotel, Columbia, South Carolina under the assumed name of William H. Kenney, 904 W. 28th St., Los Angeles, California.

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

Specification: In that 2nd Lieutenant August C. Grebe, Jr., 378th Bombardment Squadron (M) AAF, 309th Bombardment Group (M) AAF,

did, at Columbia Army Air Base, Columbia, South Carolina, on or about 24 July 1943, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: training as a student bombardier, and did remain absent in desertion until he surrendered himself at Columbia Army Air Base, Columbia, South Carolina on or about 29 July 1943.

Accused pleaded guilty to the Specification of Charge I except the word "command" and the words "wilfully disobey same", substituting therefor respectively the word "order" and the words "did fail to obey the same"; of the excepted words not guilty, of the substituted words guilty, and not guilty of Charge I but guilty of a violation of Article of War 96; not guilty of the Specification of Charge II and not guilty of Charge II; and guilty of the Specification of Charge III except the words "desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: training as a student bombardier, and did remain absent in desertion", substituting therefor the words "remain absent from his organization without proper leave"; of the excepted words not guilty, of the substituted words guilty, and not guilty of Charge III but guilty of a violation of Article of War 61. He was found guilty of Charge I and its Specification; guilty of the Specification of Charge II and not guilty of Charge II but guilty of a violation of Article of War 96; and guilty of the Specification of Charge III except the words "desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: training as a student bombardier, and did remain absent in desertion", substituting therefor the words "without proper leave absent himself from his organization at Columbia Army Air Base"; of the excepted words not guilty, of the substituted words guilty, and not guilty of Charge III but guilty of a violation of Article of War 61. No evidence of previous convictions was introduced. He was sentenced to dismissal and total forfeitures. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence offered by the prosecution showed that accused is a second lieutenant, Air Corps, 378th Bomb Squadron, 309th Bomb Group, stationed at Columbia Army Air Base, Columbia, South Carolina (R.7,31). First Lieutenant App L. Lowery, Air Corps, the Adjutant of the 378th Bomb Squadron, testified that on 24 July 1943 accused was not present for duty with his organization, that he went to accused's barracks, and that accused was not there at that time (R.7,8,35).

Major James M. Huntsman, Air Corps, was the commanding officer of the 378th Bomb Squadron and he identified an extract copy of the morning report of that organization, authenticated by him, which contained entries showing accused "duty to AWOL 2330, 23rd, July 29, 1943", and "AWOL to restricted to CAAB, 1200", July 29, 1943. This witness testified that accused's absence

from his organization from 24 to 29 July was known to him by reason of reports he had received and that he did not see accused in his organization from 24 to 28 July inclusive (R.12,13; Ex. D).

It was stipulated that on 24 July 1943 accused registered at the Marmac Hotel, Columbia, South Carolina (R.6). On 25 July, Lieutenant Lowery, after a telephone conversation with the executive officer of the 309th Bomb Group, telephoned the Marmac Hotel, asked for Lieutenant Grebe, and was connected with a person who said that he was Lieutenant Grebe of the 378th Bomb Squadron. Lieutenant Lowery testified as to his conversation with this person: "I told him to report to me immediately. He asked, then, who he was speaking to. I told him 'Lt. Lowery, the Adjutant' and he said that he would report". Lieutenant Lowery also testified that accused did not report to him subsequent to 25 July but that accused reported back to his organization on 29 July. As far as Lieutenant Lowery knew, accused did not have permission to be in town (R.8,9,11).

It was stipulated that on 26 July at 1 a.m. accused registered under the assumed name of "William H. Kenney", giving his address as 904 West 28th Street, Los Angeles, California, at the Wade Hampton Hotel, and at 1 a.m. on 27 July 1943 again registered under the same assumed name at the same hotel (R.6,7).

On 29 July accused reported to Major Huntsman, his commanding officer, and told him that he had previously reported to "Colonel Nedwed". Accused stated to Major Huntsman that Colonel Nedwed had directed accused to report to Major Huntsman. After being advised of his rights by Major Huntsman, accused stated that he had been absent for "possibly 8 days", that he had been at the Marmac Hotel, had checked out and gone to the Wade Hampton where he had registered under the name of "Kinney" (R.13).

Colonel John L. Nedwed, Air Corps, Headquarters, 309th Bomb Group, testified that on the morning of 29 July accused walked into his office and said that he had a problem to discuss, that he had been absent from Colonel Nedwed's command for about 8 days. Colonel Nedwed, after warning accused that anything he told might be used against him, asked what the trouble was. Accused thereupon stated that he was afraid to fly and had not flown since he reported for duty to the 309th Bomb Group. Answering specific questions accused said that he realized the seriousness of an officer going absent without leave and that he had personally received "that order" from Lieutenant Lowery to return to the Base and report to him. Colonel Nedwed asked accused if he was familiar with the procedure for grounding officers, taking them off flying status and reclassifying them, if for any reason they did not want to fly or could not fly, and further asked accused why he did not go through that procedure "rather than going AWOL and staying downtown". To this accused "still maintained that he was afraid to fly and was too proud to admit it" (R.31-33).

Second Lieutenants Nelson E. Gibson and Richard D. Gardner, both of the Air Corps and members of the 378th Bomb Squadron, testified for accused (R.37,46). Both of these officers had trained with accused at Victorville and Carlsbad, New Mexico, before they all came to Columbia Army Air Base for a continuation of their training. They stated that a bad accident had occurred a few days before they left Carlsbad, at which time accused said "he didn't intend to fly after that accident". They felt that accused was going to "ground himself", that he apparently had "lost his nerve". They talked to accused about continuing on as a bombardier and accused came along with them to Columbia Army Air Base. They saw and talked with accused "in town" on 20 July and once or twice thereafter. Accused told them that as soon as he could make up his mind what to do with respect to flying, he was going to return (to his station); that he would "come back when he got things straight in his own mind". After the accident at Carlsbad, accused had one required flight remaining on his training schedule. Accused made this flight "under persuasion by Lieutenants Gibson and Gardner" (R.37-42,46-52).

Accused testified in his own behalf. He said that at Carlsbad, "we went up on our first mission". He continued:

> "The pilot got his orders turned around and we had a longer mission than we intended to do. When we had almost completed his calibration hop that he thought we were supposed to make he found we were supposed to go over a shorter route and cover a shorter distance, and consequently we had to go back and cover that distance, and after that had happened this pilot had been in the air quite awhile and came in for a landing and the plane came in, hit the ground, and bounced up in the air 20, 30 or 40 feet, came down and hit again and then the pilot shifted the throttles and came around the field and made another landing. I had never gone through anything like that before and it worried me. From then on in, each time we came in for a landing, why, I would be worried about them. Finally, just before our last mission there were a couple of friends of mine who were in quite a bad accident. They were pretty well cut up and the pilot and co-pilot were killed. I didn't learn about it until the next morning and when I did learn about it why I said 'this is it, I don't think I can go through with this anymore' and my friends, Lt. Gardner, Lt. Gibson and there were a couple of others, said 'Well you only have one more mission to go, you might as well stick it out.' Well, after so much of that talk, I decided it would be a good thing to leave there and get in bigger ships and maybe I could straighten this thing out. So consequently I did go up on that last mission. It was a night mission and I came back all right. Then we came down here and all of this time I was trying to build myself up so I could take this flying business. When I got down here I knew I had to make some sort of a decision because I guess it was those landings and the crackup my friends were in that started me to thinking

that maybe I wasn't cut out for this flying business" (R.53-54).

Accused explained further that after his arrival at Columbia Army Air Base during the first few days there was an accident where 5 men were killed; that he had progressed in his training so that he had had 9 hours of "bomb trainer" and lacked 1 hour before he "checked out". He said he knew he was reaching a period when he would be called on to fly and to complete that 1 hour, so that on about 20 July he went "in town" and was there, except for a few minutes "on the 24th to get some clothes", until he reported to Colonel Nedwed. Accused told the court that he figured he could not go on as in the past and did not "want to let down the fellows" that he "had gone all the way through cadet training with * * * and see them take it every day and * * * have this fear myself". He said it was just a problem which he wanted to settle and get straight in his own mind so that he could tell Colonel Nedwed. Accused admitted that he had received a telephone call from Lieutenant Lowery at the Marmac Hotel on or about 24 July asking him to report immediately. He said that he still could not "figure it out" and he went over to the Wade Hampton and registered there under the name of "William H. Kinney". When he came to a conclusion that he was not capable of flying any longer, he reported to Colonel Nedwed and told him of this decision. Under questioning by the court, accused said that the death of two of his friends, "when this happened" had almost decided a doubt already in his mind. Asked how he felt "about flying now", he answered, "the same way, sir" (R.52,61).

Colonel Nedwed, recalled by the court, testified that there is a flight evaluation board available to students and younger officers at all times so that if a man is not psychologically fit for flying he can be reclassified to technical duty or administrative duty, or re-rated to service or liaison pilots. The colonel said that if "they do not want to fly or refuse to fly they are immediately grounded by myself or the Company Commander and ordered to report to the flight evaluation board". The colonel added that if a man loses his nerve or becomes nervous, on the first indication of anything wrong, he is sent to the flight surgeon for an interview (R.61,63).

4. With respect to Charge I and its Specification there was direct proof, supported by the admission of accused on the stand that First Lieutenant App J. Lowery, accused's superior officer, told accused on or about 25 July 1943 to report to him immediately. Lieutenant Lowery evidently said, "report to me immediately". This was a lawful command within the meaning of Article of War 64. Accused failed to obey it. Under the circumstances this refusal was "willful".

With respect to Charge II and its Specification, accused registered under an assumed name on 26 July 1943 at the Wade Hampton Hotel. The attendant circumstances disclosed by the evidence indicate that the purpose of accused was to secrete himself, to keep in hiding from his superior officers. The conduct of accused in this respect was a military

offense. The court properly found this conduct in violation of Article of War 96 rather than of Article of War 95 as charged. The Specification alleges the misconduct to have occurred on or about 25 July. The proof points to 26 July. The variance in itself is immaterial.

With respect to Charge III and its Specification, the evidence is clear that accused was absent without leave from his organization from on or about 24 to 29 July 1943. The Specification of this Charge alleges that this absence was for the purpose of avoiding hazardous duty. The court by exceptions and substitutions found accused guilty of violation of Article of War 61 rather than Article of War 58 under which Charge III was laid. The testimony of the commanding officer of accused with respect to accused's initial absence proved the entries of such commanding officer on the morning report to have been hearsay. However, there was substantial independent evidence of the absence of accused from his organization which in turn is supported by the plea of guilty to absence without leave and by accused's own testimony on the stand.

5. Accused is 24 years of age. He was inducted 3 December 1941, Infantry; transferred to Aviation Cadet, Air Corps unassigned 25 August 1942. Discharged for convenience of the Government 7 May 1943; and commissioned second lieutenant, Army of the United States, 8 May 1943. He is single and a high school graduate. He took a one-year pre-law course in Bradley College, then attended University of Southern California for one and one-half years, and finally took a short basic Navy course including a 30-day cruise. He participated in major sports in high school and college. He was employed as an announcer on a Blue network station when he was drafted.

6. Attached to the record is a report dated 13 August 1943 made by a board of officers composed of three Aviation Medical Examiners, entitled, "Physical Examination for Flying". This report estimates the adaptability of accused for military aeronautics as follows: "Unsatisfactory 140. Aeroneurosis, mild constitutional psycopath as evidenced by past history and abnormal nomadism. See attached psychiatric report". The report of this medical board states further with respect to accused: "Physically capable of carrying on full flying duties but definitely not psychologically fit to fly for reason of aeroneurosis with a history of abnormal nomadism". The psychiatric report, among other things says, with reference to accused:

> "He is * * * in good contact with his surroundings, fully cooperative and quite intelligent. * * * Wanted to be grounded but before asking for this, he decided to go into Columbia and think it over for a few days. * * * /He/ has always been unusually well, has had no physical complaints, always atheletically inclined and enjoys going out with a crowd. Has never read many books, made fairly good grades in high school without much effort * * * finally took a short basic Navy course, including a 30 day cruise. * * * he went with a friend to Mexico. * * * took up radio broadcasting * * *.

"Has been arrested once in civilian life two years ago for drunk driving and was given two days in jail and fined $24. Patient has one brother who is considered very stable and serious minded. * * *

"CONCLUSION: No evidence of nervous or mental disease. He is a young reckless and moderately immature young male who should be held responsible for his own actions."

7. The court was legally constituted and had jurisdiction of the person and the subject matter. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. Dismissal is authorized under Articles of War 61, 64 and 96.

Percy G. Gore, Judge Advocate.

Otto Wannemuehl, Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 16 NOV 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 August C. Grebe, Jr. (0-744191), Air Corps.

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

T. H. Green,
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 Ex. action.

(Sentence confirmed. G.C.M.O. 14, 6 Jan 1944)

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

SPJGK
CM 242390

17 NOV 1943

UNITED STATES	)	THIRD ARMY
v.	)	Trial by G. C.M., convened at Camp Shelby, Mississippi, 15 September 1943. To be hanged by the neck until dead.
Private EDWARD L. WOOD (33416525), Company A, 379th Engineer Battalion.	)	

OPINION of the BOARD OF REVIEW
LYON, HILL 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, 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 92nd Article of War.

Specification 1: In that Private Edward L. Wood, Company A, 379th Engineer Battalion, did, at Camp Shelby, Mississippi, on or about 3 August 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Private Edwin J. Sanders, Company B, 379th Engineer Battalion, a human being, by shooting him with a rifle.

Specification 2: In that Private Edward L. Wood, Company A, 379th Engineer Battalion, did, at Camp Shelby, Mississippi, on or about 3 August 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Private Fred W. King, Company B, 379th Engineer Battalion, a human being, by shooting him with a rifle.

He pleaded not guilty to and was found guilty of the Charge and Specifications. No evidence of previous convictions was introduced. He was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence, recommended that it be commuted to "life imprisonment", and forwarded the record of trial for action under Article of War 48.

3. The events related occurred in the 379th Engineer Battalion area,

Camp Shelby, Mississippi. At about 7:30 p.m., 3 August 1943, accused entered the barracks or hutment of Private John D. McCloud, Company A, 379th Engineer Battalion. Accused carried his rifle, and had some ammunition in his hand. He asked witness whether the latter knew him. Witness replied that he did. Accused loaded the rifle. Witness told accused to "get out". Accused left, and witness reported the incident to the Officer of the Day (R.12,13).

Shortly before 9 p.m. accused entered a hutment in which Private Benjamin Bryant, Company A, 379th Engineer Battalion, was sitting. Accused had a rifle in his hand. He asked witness whether the latter had been "messing with" him at the "PX". Witness informed accused that he had not; that he had been on "KP" all day; and that he had not been at the "PX". Accused remarked, "'Well, I'll let you live, otherwise I'd wash you away'" (R.14-17).

First Lieutenant Richard K. Sharpless, Company A, 379th Engineer Battalion, was Acting Duty Officer of Company A (R.18), and First Lieutenant Ardo M. Friend, 379th Engineer Battalion, was Battalion Officer of the Day (R.28). Between 8:30 and 9 p.m. two enlisted men reported to them that accused had his rifle out and that there was some ammunition in his hut (R.18,28). Lieutenants Sharpless and Friend thereupon searched for accused in his hutment and in the Company A area. They found him at about 8:55 p.m., standing on the steps of a hutment located on the company street next to his own (R.13,18,19,20,28,29).

Accused had a .30 caliber rifle in his hands. Lieutenant Sharpless took the rifle from him and opened the bolt. One round of "live" ammunition was ejected. Lieutenant Sharpless picked it up and put it in his pocket. There were no rounds in the magazine or chamber. Lieutenant Sharpless searched accused's pockets, but found no more ammunition. He handed the rifle back to accused, warned him of the danger of carrying a loaded rifle, and asked him why he was doing so. To this accused replied, "'Well, Lieutenant, we're in the South, you know'"(R.19,20,28,29,34).

Asked by Lieutenant Sharpless whether he had any more ammunition, accused answered that he had no more. Lieutenant Sharpless then ordered accused to return to his hutment, put up his rifle, and go to bed. Accused said that he would do so (R.20,29). Lieutenant Sharpless smelled the odor of beer on accused's breath, but neither he nor Lieutenant Friend noticed anything abnormal about him (R.25,27,33).

After accused had gone toward his hutment, Lieutenants Sharpless and Friend decided to get Sergeant Alexander J. Gabriel, Company A, 379th Engineer Battalion, to follow the matter through and see that accused obeyed the order (R.20,29). Sergeant Gabriel and accused were very good friends, and accused often came to Gabriel with his troubles (R.62).

Pursuant to the orders from the two lieutenants, Sergeant Gabriel went to find accused (R.20,21,29,30,54). Upon returning, Gabriel reported that accused had a rifle, and that although he "talked all right", he (Gabriel) "couldn't get near him" (R.30). Lieutenants Sharpless and Friend decided to go back to "look into it". It was then about 9:05 p.m. (R.21,30). As they and Gabriel started, all three heard a shot (R.21, 30,54).

About 9 p.m. Private First Class Ben Silver and Privates Clifford C. Foster, Adolphus Gay, and Edwin J. Sanders, all of Company B, 379th Engineer Battalion, were in their hutment (R.35,36,39,45). Accused entered, bearing a rifle. He asked whether "this" were Company A, and was informed that it was Company B (R.36,37,40,45,46,49). He pulled several rounds of ammunition from his pocket and began to load the rifle, despite a warning from Foster that he would "'get in trouble with a rifle and ammunition'" (R.40,41,42,46,47,49). The cartridge which accused was loading dropped to the floor, and Foster picked it up. It was a "30-30" (R.40,41,43,46,47,48). About this time Private James A. Johnson, of Company B, arrived at the hutment. Having been shown the cartridge dropped by accused and picked up by Foster, Johnson told Foster that he should have searched accused and taken away any other ammunition (R.50). Accused said, "'Yes, I've more'" (R.50), and "'I'll kill every one in here'" (R.40,41,46). Then he left the hutment (R.36,37,40,41,46,50), and Johnson "could hear the rifle reverse" (R.50). None of the witnesses actually saw accused load the rifle, but they believed that he loaded it after he got outside. He was "fumbling" with the bolt when he left (R. 41, 42,47,48,49).

Foster turned out the light and shut the door, and all the occupants of the hutment "took cover" on the floor (R.36-38,40,41,43,44,46-48,50). Within two or three seconds a shot was fired and Sanders was hit (R.36, 38,41-43,46-48,51). Evidently the bullet came through the wall a couple of feet from the door (R.43,44,46,48). Sanders said that he had been shot in the stomach (R.36,41,47,51). Accused shouted, "'Drop it, drop it'" (R.51). The occupants lay still. Accused shouted at Foster to "come on out" (R.51,52). Foster crawled out by another door and called the guard (R.51). At this time the area was in darkness (R.21,30).

After the shot, Lieutenants Sharpless and Friend went to the hutment and saw the body of Sanders (R.21,30). Thereafter they went out to search for accused, and apparently separated. During his search, Lieutenant Friend saw a soldier on the steps of accused's hutment and called to him to throw down the rifle which he carried. Lieutenant Friend could not definitely identify the man, who immediately "ducked" into one of the huts (R.31,33). In a hutment only a short distance from the place where Sanders was killed, and adjacent to accused's hutment, Lieutenant Sharpless heard accused's voice (R.21,22,23,25; Pros. Ex. 2). Witness crouched between two nearby hutments and was joined by several enlisted men. Shortly thereafter a

man, carrying a rifle, came out of the hutment from which witness had heard accused's voice. From the man's "short stocky build", witness judged him to be the accused. The man walked away and disappeared (R.22, 26).

After the shot, Sergeant Gabriel rushed toward the place from which the sound had come, and as he neared the spot, he saw accused walking very slowly along the company street. Accused had a rifle with him, and when witness called "'Wood'", accused pointed the rifle at him, although he lowered it subsequently. Accused said, "'Who is that, Sergeant Gabriel? Don't come out here, I'm in trouble'" (R.54). Witness asked accused to turn over the rifle and give himself up, but accused refused to do so (R.55). Witness was aware that accused had drunk some beer during the afternoon, and considered him "under the influence" of liquor. However, accused did not stagger, but "walked like a man that was very, very tired" (R.64,65). Accused went around the corner of one of the hutments, and Sergeant Gabriel then heard another shot (R.55,56). Other witnesses also heard this second shot (R.21,31,51). Although Sergeant Gabriel did not know that accused fired the shot, it came from the vicinity where accused was standing (R.55,56). Apparently this shot did no damage.

Shortly thereafter, Sergeant Gabriel entered the hutment in which "Corporal Delahoussaye" lived, and in which a number of the men had gathered and were talking (R.56,57). All of a sudden Sergeant Gabriel heard accused's voice calling his name. Accused also said,"'I'll shoot anybody that comes through that door'". Gabriel finally spied accused in the corner of an adjacent hutment. Gabriel asked accused to give himself up, but accused again refused, saying that he was "in too deep" (R.57). After further conversation, accused agreed to let Gabriel "come over". When Gabriel arrived, he made another attempt to persuade accused to give himself up, but accused said, "'No, I'm in too deep'" (R.58). Accused arose and started for the door, telling Gabriel to "move around". Accused looked out of the door, saw someone, and said, "'I ought to kill that son-of-a-bitch'". Gabriel asked him who it was and he answered, "'That's that little yellow guy that said he was going to kick the so and so out of me'". According to Gabriel, accused referred to Corporal Delahoussaye. After looking out for awhile, accused left (R.58).

First Lieutenant Luke J. Vortman, Company B, 379th Engineer Battalion, was Duty Officer on the evening of 3 August. He learned of the shooting of Sanders and assisted in placing a guard around the area. Thereafter he saw Corporal Delahoussaye, who was unarmed, pursuing a stocky man, slightly under medium height, dressed in "fatigues", and armed with a rifle. They were running toward the Company B mess hall. The man told Delahoussaye that he should halt or have his head blown off. Shortly thereafter the man with the rifle fired a shot (R.68-72). Other witnesses also heard this shot (R.22,31,51,58). Near one of the Company B barracks,

Lieutenant Vortman found Private Fred W. King, Company B, 379th Engineer Battalion, lying on the ground, a bullet wound through his arm and body. King said, "'I've been shot'" (R.71).

About 10 p.m., Privates Paul S. Taylor and William A. Taylor, both of Company B, 379th Engineer Battalion, were returning from the "PX" when they saw accused "coming along at a dog trot", carrying a .30 caliber Army rifle. Accused was dressed in fatigues. A conversation ensued, during which the witnesses asked accused where he was going with a rifle at that time of night (R.73,74,77,78). According to Private William Taylor, accused said he had just killed a man, whereas according to Private Paul Taylor, accused said he had just "plugged a couple of fellows" (R.75,77, 78). The witnesses believed that accused was "kidding" and asked him how he knew that he had "killed a guy" (R.74,77). Private William Taylor testified that accused answered, "'Because I saw him fall'" (R.74). Private Paul Taylor was not certain whether accused said "him" or "them" (R.77,78).

The witnesses took accused into one of the hutments. Accused seemed to be "kind of a tired man, as though he had been running", but did not act strangely (R.74,78,79). There appeared to be no ammunition in the rifle, but accused had two cartridges in his hand (R.74,78). After they had returned the rifle to accused, he left and "doubled back like he was going through the woods" (R.76).

At about 1:30 a.m., 4 August, Corporal Clarence Allen and Private Van D. Ferguson, both of Company C, 379th Engineer Battalion, were on guard detail and saw accused on one of the streets in the battalion area. Accused had on "green fatigues" and carried a .30 caliber rifle. He stopped and asked, "'Did I shoot anybody in that hut?'", and inquired as to "how was the man he shot". He also asked whether he had killed the "boy" whom he shot behind the Company B day room. The witnesses told accused that the person had been carried to the hospital. It is not clear whether they referred to Sanders or King. Accused stated that he "wouldn't have shot the man if he hadn't been trying to take his rifle". Accused also "wanted to let us know he had his gun and had something in it and he would shoot it and wouldn't let anybody take his gun away from him". He took a handful of ammunition from his pocket. He said that he had been drinking and intended to give himself up (R.79-82).

During the night Sergeant Gabriel was awakened by accused's voice, asking if he could come in. Sergeant Gabriel admitted him. Accused said that he had been drunk,wanted to sleep, and intended to give himself up. He handed his .30 caliber rifle to Gabriel. There was no ammunition in the rifle or on accused. Gabriel could smell stale liquor on accused's breath, but testified that there was nothing unusual about his speech. However, he acted "very, very tired. Everything that he did was slow and deliberate. He wasn't panicky or anything like that". Accused and Gabriel went to

battalion headquarters (R.59-61,65).

Gabriel testified that accused often complained of severe pains in his head. He testified also that accused had always been a good soldier (R.62,63).

Lieutenant Friend saw accused around 2 a.m., 4 August, when accused gave himself up. Accused behaved in a normal manner and "seemed very calm". He gave no indication of being under the influence of alcoholic beverages (R.32-34).

At 1 a.m., 4 August, First Lieutenant Albert Samuel Koenig, Jr., Medical Corps, Station Hospital, Camp Shelby, Mississippi, performed an autopsy on Sanders. He found that death was caused by hemorrhage resulting from a wound inflicted by a .30 caliber rifle bullet which entered the abdomen and coursed through various vital organs (R.6-8,10).

At 9 a.m. Lieutenant Koenig performed an autopsy on King. Death was caused by hemorrhage resulting from a bullet wound which pierced the right arm, right thorax, and various internal organs. The bullet did not remain in the body, and Lieutenant Koenig could not name the kind of bullet which had been used (R.8,10,11).

Before the trial a board of medical officers was appointed under the provisions of paragraph 35c, Manual for Courts-Martial (1928), to examine into the mental condition of accused. The report of the Board was not introduced in evidence, but Captain James B. Craig, Medical Corps, Station Hospital, Camp Shelby, Mississippi, the psychiatrist and recorder of the Board, testified concerning the findings of the Board and had the report with him at the trial. Captain Craig stated that the Board found that accused was sane at the time the offenses were committed and at the time of the Board's report and that he was capable of realizing right from wrong and of controlling his actions. The Board found further that accused was "probably under the influence of intoxicating beverages in view of the history obtained". The psychiatric diagnosis was: "Constitutional psychopathic state, inadequate personality and criminalism" (R.65-67).

For the defense, Private Thomas J. Wilson, Company A, 379th Engineer Battalion, testified that he was with accused during the afternoon of 3 August. From about 4:30 to 7:30 or 8:00 p.m. they consumed through their joint efforts about three and one-half cases of beer in and near the "PX". Accused told witness that he had been drinking some whiskey previously. There were no arguments, fights, or difficulties at any time, and accused was "just as jolly and happy as a man could be" and apparently not "under the influence of beer". Accused wore his "fatigues" (R.83-86).

Private Samuel Moran, Company A, 379th Engineer Battalion, drank some beer with Wilson and accused at about 7 p.m. There were no arguments or difficulties. Accused was not drunk, but was "feeling pretty good" and was "pretty high" (R.87-89).

First Lieutenant Clarence W. Griggs, Chaplain, 379th Engineer Battalion, talked to accused at the stockade during the morning of 4 August. He found accused apparently under the influence of alcoholic liquor and "completely dazed in that his talk was completely incoherent, his language and his action" (R.90-91).

First Sergeant James H. Turner, Company A, 379th Engineer Battalion, testified that accused was a "good soldier", never "kicked" or "grumbled", and never caused any trouble. He testified further that accused had often reported to witness that he had a "severe headache", and that on occasions he had been sent to the dispensary "for his head" (R.89-90).

Accused made an unsworn statement, in substance as follows: During the afternoon of 3 August he bought two pints of whiskey, which he and some unidentified soldier consumed together. Then he drank beer, as testified to by Wilson and Moran. He remembered nothing from then until after his incarceration in the stockade (R.92-93).

4. To recapitulate, the evidence shows that subsequent to an afternoon of drinking, accused appeared at several hutments in a threatening mood and carrying a .30 caliber rifle and some ammunition; and that almost immediately after he had left the Sanders hutment, where he had threatened to kill everyone, a witness heard his rifle reverse, whereupon a shot was fired through the wall, resulting in the death of Sanders. Thereafter accused was seen in various parts of the area, still carrying the rifle and still in a threatening mood. He admitted to Sergeant Gabriel that he was "in too deep" to give himself up. He spoke in a threatening manner about Corporal Delahoussaye, and later a witness saw a soldier resembling accused in build and dress running in front of Delahoussaye, who was unarmed, and threatening to blow his head off unless Delahoussaye abandoned the pursuit. Shortly thereafter the soldier fired a shot, which resulted in the death of King. Later in the night accused admitted having shot two men. Eventually he gave himself up.

There can be no real doubt that accused killed both Sanders and King. So far as appears from the evidence, there was no legal justification, excuse, or provocation for the killings. In the absence thereof, a homicide is murder (MCM, 1928, par. 148a). Accused's claim of drunken amnesia is not supported by the testimony. Although accused may have been under the influence of liquor, he appears to have been entirely conscious of his actions. That liquor voluntarily consumed whets a man's appetite for evil and produces an ugly and homicidal mood, is not and should not be a defense. Accused was properly convicted of murder on both Specifications.

5. The Charge Sheet shows that accused is 35 years of age and was inducted into the military service on 22 December 1942.

6. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of accused were committed. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence. The death penalty is authorized by Article of War 92.

Judge Advocate.

Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 22 NOV 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 Edward L. Wood (33416525), Company A, 379th Engineer Battalion.

2. The accused was found guilty of two murders in violation of Article of War 92. He was sentenced to be hanged by the neck until dead. The reviewing authority (the Commanding General, Third Army), approved the sentence but recommended that the confirming authority commute the sentence to life imprisonment.

3. 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. Were it not for the recommendation of the Commanding General, Third Army, I would be inclined to recommend not only that the sentence be confirmed but that it be carried into execution. However, in view of his recommendation, which is based upon his conclusion that military discipline and justice would be served by recommending commutation to life imprisonment, 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 life. I recommend further that the sentence as thus modified be carried into execution and that the United States Penitentiary, Atlanta, Georgia, be designated as the place of confinement.

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 Ex. action.

(Sentence confirmed but commuted to dishonorable discharge, total forfeitures, and confinement for life. G.C.M.O. 1, 3 Jan 1944)

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

SPJGH
CM 242395

1 JAN 1944

UNITED STATES v. Lieutenant Colonel ROBERT L. ADAMS (0-209068), Infantry.	FORT BENNING, GEORGIA Trial by G.C.M., convened at Fort Benning, Georgia, 13 and 14 September 1943. Dismissal, total forfeitures and confinement at hard labor for five (5) years.

OPINION of the BOARD OF REVIEW
DRIVER, LOTTERHOS and CLEMENTS, Judge Advocates.

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

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

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

Specification 1: In that Lieutenant Colonel Robert L. Adams, Infantry, then Captain, Infantry, for the purpose of obtaining the approval, allowance and payment of a claim against the United States, by presenting same to Major H. V. Brown, finance officer at Fort Benjamin Harrison, Indiana, an officer of the United States duly authorized to approve, allow and pay such claims, did, at Fort Benjamin Harrison, Indiana, on or about December 31, 1940, make and use a certain paper writing, to-wit: a War Department Form Number 336 (Pay and Allowance Account), which said paper writing as he, the said Lieutenant Colonel Robert L. Adams then knew, contained statements that he had a lawful wife, to wit: Frances T. Adams, residing at 2147 Saint James Avenue, Cincinnati, Ohio, and was entitled to subsistence and rental allowances for the month of December, 1940, in the amounts of twenty-one dollars ($21.60) and sixty cents and forty-five dollars ($45.33) and thirty-three cents respectively, which statements were false and fraudulent in that the said Lieutenant Colonel Robert L. Adams was, during the period for which said allowances were claimed, unmarried and was entitled only to subsistence and rental allowances of ten dollars ($10.80) and eighty cents and thirty-four ($34.00) dollars respectively, and which statements were then known by the said Lieutenant Colonel Robert L. Adams to be false and fraudulent.

Specification 2: Similar to Specification 1 except that time alleged is on or about 31 January 1941, and amounts stated as due are $37.20 and $80 when accused was entitled only to $18.60 and $60 respectively.

Specification 3: Similar to Specification 1 except that time alleged is on or about 28 February 1941, and amounts stated as due are $33.60 and $80 when accused was entitled only to $16.80 and $60 respectively.

Specification 4: Similar to Specification 2 except that time alleged is on or about 31 March 1941.

Specification 5: Similar to Specification 1 except that time alleged is on or about 30 April 1941, and amounts stated as due are $36 and $80 when accused was entitled only to $18 and $60 respectively.

Specification 6: Similar to Specification 2 except that time alleged is on or about 31 May 1941.

Specification 7: Similar to Specification 5 except that time alleged is on or about 30 June 1941.

Specification 8: Similar to Specification 1 except that time alleged is on or about 31 July 1941, and amounts stated as due are $49.20 and $92.66 when accused was entitled only to $18.60 and $60 respectively.

Specification 9: Similar to Specification 1 except that time alleged is on or about 31 August 1941, and amounts stated as due are $55.80 and $100 when accused was entitled only to $18.60 and $60 respectively.

Specification 10: Similar to Specification 1 except that time alleged is on or about 30 September 1941, and amounts stated as due are $54 and $100 when accused was entitled only to $18 and $60 respectively.

Specification 11: Similar to Specification 9 except that time alleged is on or about 31 October 1941.

Specification 12: Similar to Specification 10 except that time alleged is on or about 30 November 1941.

Specification 13: Similar to Specification 9 except that time alleged is on or about 31 December 1941.

Specification 14: In that Lieutenant Colonel Robert L. Adams, Infantry, then Major, Infantry, for the purpose of obtaining the approval, allowance and payment of a claim against the United States, by presenting same to Lieutenant Colonel J. H. McFall, finance officer at Fort Benning, Georgia, an officer of the United States duly authorized to approve, allow and pay such claims, did, at Fort Benning, Georgia, on or about January 31, 1942, make and use a certain paper writing, to-wit: a War Department Form Number 336 (Pay and Allowance Account), which said paper writing as he, the said Lieutenant Colonel Robert L. Adams, then knew, contained statements that he had a lawful wife, to-wit: Frances T. Adams, residing at 2147 Saint James Avenue, Cincinnati, Ohio, and was entitled to subsistence and rental allowances for the month of January, 1942, in the amounts of fifty-five dollars and eighty cents ($55.80) and one hundred dollars ($100.00) respectively, which statements were false and fraudulent in that the said Lieutenant Colonel Robert L. Adams was, during the period for which said allowances were claimed, unmarried, and was entitled only to subsistence and rental allowances of eighteen dollars and sixty cents ($18.60) and sixty ($60.00) dollars respectively, and which statements were then known by the said Lieutenant Colonel Robert L. Adams to be false and fraudulent.

Specification 15: Similar to Specification 14 except that time alleged is on or about 28 February 1942, and amounts stated as due are $50.40 and $100 when accused was entitled only to $16.80 and $60 respectively.

Specification 16: Similar to Specification 14 except that time alleged is on or about 31 March 1942.

Specification 17: Similar to Specification 14 except that time alleged is on or about 30 April 1942, and amounts stated as due are $54 and $100 when accused was entitled only to $18 and $60 respectively.

Specification 18: Similar to Specification 14 except that time alleged is on or about 31 May 1942.

Specification 19: Similar to Specification 14 except that time alleged is on or about 30 June 1942, and amounts stated as due are $54 and $100 when accused was entitled only to $21 and $90 respectively.

Specification 20: Similar to Specification 14 except that time alleged is on or about 31 July 1942, and amounts stated as due are $65.10 and $105 when accused was entitled only to $21.70 and $90 respectively.

Specification 21: Similar to Specification 20 except that time alleged is on or about 31 August 1942.

Specification 22: Similar to Specification 14 except that time alleged is on or about 30 September 1942, and amounts stated as due are $63 and $105 when accused was entitled only to $21 and $30 respectively.

Specification 23: Similar to Specification 14 except that time alleged is on or about 31 October 1942, no claim was made for rental allowance, amount stated as due as subsistence allowance is $65.10 when accused was entitled to $21.70 only, and statement was made that his wife resided at Fort Benning, Georgia.

Specification 24: Similar to Specification 23 except that time alleged is on or about 30 November 1942, and amount stated as due is $63 when accused was entitled to $21 only.

Specification 25: Similar to Specification 23 except that time alleged is on or about 31 December 1942.

Specification 26: Similar to Specification 23 except that time alleged is on or about 31 January 1943.

Specification 27: Similar to Specification 23 except that time alleged is on or about 28 February 1943, and amount stated as due is $58.80 when accused was entitled to $19.60 only.

Specification 28: Similar to Specification 23 except that time alleged is on or about 31 March 1943.

Specification 29: Similar to Specification 24 except that time alleged is on or about 30 April 1943.

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

Specifications 1-4: (Nolle Prosequi Entered).

Specifications 5-24: Same as Specifications 10-29, Charge I, respectively.

Specifications 25-28: (Nolle Prosequi Entered).

Specification 29: In that Lieutenant Colonel Robert L. Adams, Infantry, then Major, Infantry, did, at Fort Benjamin Harrison, Indiana, on or about September 30, 1941, with intent to deceive Lieutenant Colonel H. V. Brown, finance officer at Fort Benjamin Harrison, Indiana, officially report to the said Lieutenant Colonel H. V. Brown that he had a lawful wife, to-wit: Francis T. Adams, residing at 2147 Saint James Avenue, Cincinnati, Ohio, which report was known by the said Lieutenant Colonel Robert L. Adams to be untrue, in that he had no lawful wife residing at said address.

Specification 30: Similar to Specification 29 except that time alleged is on or about 31 October 1941.

Specification 31: Similar to Specification 29 except that time alleged is on or about 30 November 1941.

Specification 32: Similar to Specification 29 except that time alleged is on or about 31 December 1941.

Specification 33: In that Lieutenant Colonel Robert L. Adams, Infantry, then Major, Infantry, did, at Fort Benning, Georgia, on or about January 31, 1942, with intent to deceive Lieutenant Colonel J. H. McFall, finance officer at Fort Benning, Georgia, officially report to the said Lieutenant Colonel J. H. McFall that he had a lawful wife, to-wit: Frances T. Adams, residing at 2147 Saint James Avenue, Cincinnati, Ohio, which report was known by the said Lieutenant Colonel Robert L. Adams to be untrue, in that he had no lawful wife residing at said address.

Specification 34: Similar to Specification 33 except that time alleged is on or about 28 February 1942.

Specification 35: Similar to Specification 33 except that time alleged is on or about 31 March 1942.

Specification 36: Similar to Specification 33 except that time alleged is on or about 30 April 1942.

Specification 37: Similar to Specification 33 except that time alleged is on or about 31 May 1942.

Specification 38: Similar to Specification 33 except that time alleged is on or about 30 June 1942.

Specification 39: Similar to Specification 33 except that time alleged is on or about 31 July 1942.

Specification 40: Similar to Specification 33 except that time alleged is on or about 31 August 1942.

Specification 41: Similar to Specification 33 except that time alleged is on or about 30 September 1942.

Specification 42: In that Lieutenant Colonel Robert L. Adams, Infantry, then Major, Infantry, did, at Fort Benning, Georgia, on or about October 31, 1942, with intent to deceive Colonel J. H. McFall, finance officer at Fort Benning, Georgia, officially report to the said Colonel J. H. McFall that he had a lawful wife, to-wit: Francis T. Adams, residing at Fort Benning, Georgia, which report was known by the said Lieutenant Colonel Robert L. Adams to be untrue, in that he had no lawful wife residing at said address.

Specification 43: Similar to Specification 42 except that time alleged is on or about 30 November 1942.

Specification 44: Similar to Specification 42 except that time alleged is on or about 31 December 1942.

Specification 45: Similar to Specification 42 except that time alleged is on or about 31 January 1943.

Specification 46: Similar to Specification 42 except that time alleged is on or about 28 February 1943.

Specification 47: Similar to Specification 42 except that time alleged is on or about 31 March 1943.

Specification 48: Similar to Specification 42 except that time alleged is on or about 30 April 1943.

Specification 49: In that Lieutenant Colonel Robert L. Adams, Infantry, did, at Fort Benning, Georgia, on or about January 1, 1943, with intent to deceive Colonel J. H. McFall, finance officer at Fort Benning, Georgia, officially report to the said Colonel J. H. McFall that he was married; that the date of his marriage was June, 1935; that the name of his lawful wife was Frances Adams; and that his wife resided at Fort Benning, Georgia; which report was known by the said Lieutenant Colonel Robert L. Adams to be untrue, in that he was not married and had no wife residing at Fort Benning, Georgia, or elsewhere.

He pleaded not guilty to and was found guilty of all Specifications and Charges. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for five years. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution:

Twenty-seven duly authenticated photostatic copies (Exs. 1-27) of War Department Form No. 336 (Pay and Allowance Account), in the name of accused, covering the months from December 1940 to February 1943, inclusive, were introduced in evidence. It was stipulated that these vouchers were made, prepared and presented by accused to the finance officer whose name appears thereon. The amounts shown on these vouchers respectively as claimed for subsistence and rental allowance were as alleged in the applicable Specifications. The vouchers for months from December 1940 to January 1942, inclusive, showed under the heading of dependents, lawful wife, Frances T. Adams, address, 2147 St. James Avenue, Cincinnati, Ohio (Exs. 1-14). The vouchers for months from February 1942 to September 1942, inclusive, showed as lawful wife, Frances T. Adams, address, St. James Avenue, Cincinnati, Ohio (Exs. 15-22). The vouchers for months from October 1942 to February 1943, inclusive, showed as lawful wife, Frances T. Adams, address, Fort Benning, Georgia (Exs. 23-27). It was stipulated that accused made and presented to Colonel J. H. McFall, Finance Officer, Fort Benning, Georgia, pay vouchers (Form No. 336) for March and April 1943, each containing the statement that accused had a lawful wife, "Francis T. Adams", residing at Fort Benning, Georgia, and claiming a subsistence allowance of $65.10 and $63, respectively (R. 28-29a).

During cross-examination of accused, as a witness for the defense, he identified and there was introduced in evidence, an authenticated photostatic copy of a certificate for longevity pay (Ex. 31), signed by accused, dated 1 January 1943, wherein it was stated that accused was married, that the date of marriage was June 1935, that the name of his wife was Frances Adams, and that she resided at Fort Benning, Georgia. This certificate was referred to in, and attached to, the pay voucher of accused for January 1943 (Ex. 26). He also identified, and there was introduced in evidence, an initial information sheet (Ex. 33) in the handwriting of accused, which was executed about January 1942 at Fort Benning. It showed his home address as 2147 St. James Avenue, Cincinnati, Ohio, and the name of his wife as "Frances Thressa Adams" (R. 63-66).

The prosecution also introduced in evidence an authenticated photostatic copy of an application for discharge by accused (Ex. 28) dated

1 May 1919. Paragraph 4 of the form on which this application was executed, designed to show the date and place of marriage and name and address of wife, was stricken out. During cross-examination of accused, the discharge certificate of accused (Ex. 32), dated in May 1919, was placed in evidence. It showed accused as "Single". An authenticated photostatic copy of an application for appointment as a Reserve officer by accused (Ex. 29), dated 24 October 1924, was admitted in evidence. It stated that accused was "single". There was next introduced an authenticated photostatic copy of a pay voucher signed by accused for part of June 1925 (Ex. 30), which showed accused as not married (R. 29a-31, 65).

Mrs. Ada C. Arstingstall, Germantown, Ohio, the oldest sister of accused, was one of four living sisters and there were four brothers, including accused. In their younger days she was closer to accused than the others because she was nearer to him in age. During the last 20 years she had not seen accused very often. As far as she knew, accused had never married, and remained a single man. When accused returned from the First World War, after his discharge from the Army, she and her father met him in Columbus and accused returned to their home in Kentucky with them. In 1922 accused came to live at the home of Mrs. Arstingstall in Ohio, and remained about a year and a half. On cross-examination she stated that before accused joined the Army during the last war he was going steadily with a girl in their home town. On his return he did not go with her any more, although the girl and her parents went out of their way to be "nice" to him. Accused had stated that he would like to return to France. He had never mentioned a wife. He "kept his business to himself". The Adams family were religious people, and prior to the death of the parents there had never been a divorce in the family (R. 31-41).

Mrs. Lucille M. Menefee, 2147 St. James Avenue, Cincinnati, Ohio, another sister of accused, testified that when she and her husband separated in 1924, accused took her and her son in, and they lived together until about 1931. They did not live at the address stated above, to which she moved about 1936. That address is the Cincinnati home of accused, and whenever he "gets a furlough and comes home, he comes there". So far as Mrs. Menefee knew accused had never been married. On cross-examination she stated that when accused returned from the last war he ignored the girl they thought he would marry. On examination by the court, Mrs. Menefee stated that during the seven years she had resided at 2147 St. James Avenue, no one by the name of Frances T. Adams had lived there. The only person of that name that she knew was her sister. It was "kind of hard" for her to answer whether accused ever told her he had a wife, because when she "called him a bachelor, he said that's all I knew about him" (R. 41-45).

Frances Theresha Adams, Covington, Kentucky, a sister of accused, is divorced and uses her maiden name. She never lived in Cincinnati, but had visited there at 2147 St. James Avenue. She operates a small rooming house in Covington. So far as she knew, accused had never been married. So far as Mr. Ethan A. Adams, Norwood, Ohio, a brother of accused, knew, accused had never been married (R. 46-48).

4. The evidence for the defense:

Accused testified that early in April 1918, he was gassed and was sent to a field hospital at Baccarat, France, where he was a patient until the latter part of the month. During the first week in the hospital he met Frances Petite Dumenchin, when she and some of her friends visited the hospital. The English version of her name was Frances Tina Dumenchin. She was a refugee from Domevere, 15 or 20 kilometres from Baccarat. After meeting her, accused saw Frances Dumenchin nearly every day. On 10 May 1918 they were married by the mayor of Baccarat, named Pinaud, in a civil ceremony, and on the following day by a priest, whose name in English was Father Carpenter. Accused was 21 years of age and his wife was 18. They lived together from 10 May until he left the town on 22 or 23 May. After he left there he saw her on two occasions. She met accused in Brest in April 1919 when his organization was preparing to return to the United States, but did not accompany him to this country because her father had been reported missing in action and she wanted to attempt to locate him. After accused returned to the United States, he wrote his wife one letter that was answered, and another that was returned with a notation "Address Unknown". He also wrote to Mayor Pinaud and Father Carpenter. Shortly after the last letters to these two men were returned, accused made a notation of their names and addresses "on a more or less secret sheet of paper" (Def. Ex. 1), which he placed in a folder with his discharge certificate. This exhibit is an obviously old sheet of paper, with a faded notation in the upper right corner, as follows: Pere Andre Carpentier Rue d'Eglise Baccarat, France Monsieur Jean Pinaud, Hotel d'Ville, Baccarat, France". The letters referred to, along with the footlocker in which they were stored in the summer cottage of Mr. and Mrs. Henry F. Smith, were lost in a flood of the Ohio River in 1937 or 1938. Accused never attempted to get a divorce from his wife, the marriage was not terminated by divorce, and he never received any information as to whether his wife was alive or dead (R. 52-56).

Accused testified further that he did not disclose his marriage to anyone in France, except a "buddy" who witnessed it and was subsequently killed in action, because he should have obtained the permission of his company commander, was "quite young and very susceptible to being teased", and wanted it to be a surprise to his family. When his wife did not come

to this country with him, accused was not sure how his father, a "strict disciplinarian in the way of family ties", would take it. For the first few months he thought his wife would come to this country, and did not mention the marriage. He discontinued his courtship of a girl he had "liked best" before going to France, and did not afterward become engaged to any woman. He attended college at the University of Cincinnati, and became a newspaper writer. When the charges were preferred against him accused attempted, through Coudert Brothers, specialists in obtaining documents from France, to gather proof of his marriage. On pay vouchers subsequent to the first one after the charges were served, accused showed that he was a married man but claimed only "one ration". Through his counsel he talked to the finance officer about the vouchers. Accused has had about 21 years of service in the Army (R. 56-60, 86-87).

On cross-examination, accused admitted that his application for discharge and his application for a Reserve commission contained a statement that he was single. This statement was not true. He identified his signature on a certificate for longevity pay (Ex. 31) but did not remember making it. The statements in it were true except the address of his wife and the date of marriage shown (June 1935). He did not know where this date came from, as he did not "sign the work sheets". Accused stated that he heard from his wife last in July 1919, and had given her an average of about $25 per month while he was in France and Germany. After his marriage he did not change the beneficiary in his Government insurance policy. He had an understanding with his wife before he left France that he would send for her, but never did send for her, and did not contribute to her support after returning to the United States. When accused attended camp in 1925 he knew he was married, but did not make a claim for quarters and rations because he did not know he was "entitled to it". He later found out that he was entitled to the allowances of a married officer. Accused did not know why he did not make a claim for "back money". He could not account for the name "Frances Thressa Adams" in Exhibit 33, unless there was some confusion between his wife's and his sister's name. Accused described the physical appearance of his wife and gave details of the wedding. He could not give the exact date when he first began to draw quarters and subsistence allowances as a married man, but it was "possibly" in 1934 or "probably shortly after a ruling by Washington that officers who were single would not be given rental allowances". He reconciled his earlier statements that he was single, with his later claim for allowances as a married man, by the "secret character" of the marriage (R. 60-73).

On examination by the court, accused admitted that in his income tax returns he claimed exemption as head of a household (because of contributing most of the maintenance for one of his sisters) and not as a married man. Accused recounted many details of his life at Baccarat, France, about the time of his marriage, and subsequently in France and Germany. After his return to the United States he wrote his wife two letters in the summer of

1919, and one was answered. Twice afterward he felt that he could make a trip to France to try to find her, but about the time he had acquired sufficient funds to go, the "depression of 1930-31 hit". He made no effort to obtain documentary proof of his marriage until the charges were preferred. All papers pertaining to his marriage were lost in the Ohio floods (R. 73-83).

Mrs. Ferman A. Badgely, Cincinnati, Ohio, testified that accused had lived in her home "off and on" for about two years, beginning about 1929, and that he had a small trunk which contained World War relics, uniforms, a flag and some papers. The trunk was left in the care of her family, and was subsequently lost in 1937 during a flood of the Ohio River. The trunk had been stored at their place in the country, near the river (R. 92-94).

It was stipulated (Def. Exs. 3 and 4) that Lieutenant Colonel R. H. Crockett would testify that he had known accused since 1927, and that he became acquainted with accused at Reserve officers' meetings which were held in Cincinnati every two weeks. On one of these occasions about 1928 or 1929, when several officers had stopped at a bar after the meeting, accused told Colonel Crockett that he had been married in France but that his wife had never come to this country. Colonel Crockett distinctly recalled the statement, and had himself been secretly married in 1925 without announcing the fact until 1926. He had considered the statement of accused as confidential, and therefore did not repeat it. The only contact which Colonel Crockett had with accused was at these meetings in Cincinnati, and he therefore did not know the general reputation of accused, other than that he had "never heard anything against him". Mrs. B. B. Bryant, Kansas City, Missouri, the wife of Lieutenant Colonel B. B. Bryant, had first known accused at Fort Benning in 1931. She testified that in 1939, her husband had an investigation to make at a "C.C.C." camp where accused was stationed, and she accompanied him there. While her husband was making his inspection, she talked with accused most of the afternoon. At that time he told her that he had been married in France during the World War and that it had ended unhappily. In her opinion the reputation of accused for truth and veracity is good. Mrs. Agnes B. Newman, Indianapolis, Indiana, had known accused since November 1940. On the night that she met him, accused was a guest at a dinner party which she was giving for her daughter. When Mrs. Newman was telling fortunes with cards, for amusement, she asked accused whether he was married and he replied that he was (R. 88-98, 103).

Colonel Warren W. Christian had known accused since May 1942. Accused was under his immediate supervision from July 1942 to May 1943. In his opinion the reputation of accused for truth and veracity is good, and accused has a great present and a high potential value as an officer. The work of accused was performed in an excellent manner. It was stipulated (Def. Ex. 5) that Lieutenant Colonel Burnell V. Bryant would testify

that he had known accused since 1931, that during the time he knew accused at Fort Benning the reputation of accused for truth and veracity was good, and that accused was an excellent officer (R. 99-101, 103).

It was further stipulated (Def. Ex. 2) that Mr. Frederick Coudert, senior member of a firm of international lawyers of over 50 years standing, would testify that on 31 May 1943 he received a letter from accused requesting that a search be made of public records in Baccarat, France, to find his marriage license. Mr. Coudert replied that in normal times the search could be accomplished, but that in view of the German occupation it would be impossible to make the search (R. 103).

5. a. The evidence shows that accused made and presented to proper finance officers his pay vouchers (War Department Form No. 336) for the months from December 1940 to April 1943, inclusive; that each voucher contained the statement under dependents that he had a lawful wife, Frances T. Adams; that the first 14 of these vouchers showed her address as 2147 St. James Avenue, Cincinnati, the next eight showed her address as St. James Avenue, Cincinnati, and the last seven showed it as Fort Benning, Georgia; and that the several vouchers claimed subsistence and rental allowances as alleged in the applicable Specifications. Under date of 1 January 1943 accused executed a certificate for longevity pay, attached to his voucher for that month, in which he stated that he had a wife, Frances Adams, residing at Fort Benning, and that the date of marriage was June 1935.

Accused did not at any time have a wife residing at the addresses shown above. He has a sister named Frances Theresa Adams, who resides in Covington, Kentucky.

For the purpose of showing the falsity of the statements of accused that he was a married man, the prosecution introduced proof that the family of accused had always known him as a single man, and that he had shown his status as unmarried in applying for discharge from the Army in 1919, in applying for a commission in 1924, in pay vouchers prior to about 1934, and in his income tax returns.

Accused testified that he was married in May 1918 in Baccarat, France, to Frances Petite (Tina) Dumenchin; that when he returned to the United States in April 1919 she met him at Brest but did not accompany him to this country because she wanted to locate her father, who was missing in action; and that he had not seen her since. He had expected to have her join him in the United States, wrote her two letters in the summer of 1919, received a reply to one, and the other was returned to him with a notation "Address Unknown". Accused did not disclose his marriage to his family. Later he planned to go to France to try to find his wife, but

was prevented by the "depression". He never heard from his wife again after 1919, never received any information as to whether she was alive or dead, and never attempted to get a divorce from her. After charges were preferred against him, accused attempted to obtain documentary proof of his marriage, but could not do so on account of the occupation of France by the German Army. Accused was corroborated by memoranda in his possession, by proof that a trunk containing his World War relics and papers had been destroyed by a flood, and by proof that on at least three occasions (one about 1928) he had stated that he was married.

In the opinion of the Board of Review the evidence does not show beyond a reasonable doubt that accused was not married in May 1918, nor that he is not at the present time married to Frances Dumenchin.

b. As a basis for payment to officers of subsistence and rental allowances, the term "dependent" includes "at all times and in all places a lawful wife" (37 U.S.C. 8; 37 U.S.C., Sup. II, 104). In Rawlings v. United States (93 Ct. Cl. 231), after quoting this statute, it was stated:

> "This language of the statute seems to say that a lawful wife or an unmarried minor child shall be a statutory dependent, with no questions asked as to the fact of dependency, just as plainly as it says that a mother shall be regarded as a dependent only if in fact she is chiefly supported by the officer. There is nothing else in the statute which indicates that this apparent meaning was not the legislative meaning".

In Robey v. United States (71 Ct. Cl. 561), it was held that where an officer and his wife were separated (though not divorced) through the fault of the officer, who deserted his wife and refused to live with her, he was not entitled to allowances because not "morally" entitled and not within the "spirit" of the statute. This decision was distinguished in the Rawlings case on the ground that in the latter the wife was at fault and refused to live with Rawlings.

It results that normally an officer with a lawful wife is entitled to allowances, whether or not he lives with and contributes to the support of his wife, except that, if it is shown that he caused the separation and is at fault in not contributing to her support, then he cannot claim the status of a married man.

c. Specifications 1-29, Charge 1: These Specifications allege in substance that in certain months accused presented pay vouchers to proper finance officers; that in each he claimed certain allowances to which an officer with dependents is entitled and stated that he had a lawful wife, residing at an address stated; and that these statements

were false and fraudulent to the knowledge of accused in that he was in fact unmarried. The Charge alleges a violation of the 94th Article of War. For the reasons stated above (pars. 5a and b), the Board of Review if of the opinion that the evidence does not sustain the findings of guilty of these Specifications in violation of the 94th Article of War.

The question is presented, however, as to whether the evidence sustains findings of guilty of lesser included offenses. Accused had not seen his wife (if it be assumed that he married in 1918) since 1919, had not heard from her since that year, did not know whether she was alive or dead, and did not know whether she had obtained a divorce from him (except that if she had it was not brought to his notice). In the meantime the part of France in which she lived was overrun by the German Army in 1940. Under these circumstances, accused could not know that he had a lawful wife in December 1940 or afterward, although he might know that he had married in 1918. The presumption of continuance of life is available as an aid to the solution of an issue of fact in proper cases where there is no controlling evidence of life or death, but in the opinion of the Board this presumption cannot be relied on by accused as a justification for his statements that he had a lawful wife in 1940 and afterward.

Accused, in making his claims for allowances, did not state that he was married in 1918 and that although he had not heard anything of or from his wife in over 20 years he considered himself a married man; instead he stated as a positive fact that he had a lawful wife at the time each voucher was executed. In addition, he stated that his wife resided in Cincinnati or at Fort Benning, when he knew that she did not reside at either place and that if she was still alive she probably lived in France.

Although a married officer is normally entitled to allowances merely by reason of the fact that he has a wife, as has been stated, it does not follow that claims therefor will be paid through normal channels and without investigation of the facts in doubtful cases. This is illustrated by the Rawlings case and the Robey case, in which the validity of the claims was finally settled in the Court of Claims. In an opinion by the Assistant Comptroller General (22 Comp. Gen. 1145), where the doctrine of the Rawlings case was recognized in this language, "These statutory provisions generally relieve an officer claiming rental and subsistence allowances on account of a lawful wife of any burden of proof that said lawful wife is in fact dependent on him for her support", it was stated, "But the statutes do not relieve the officer of the responsibility of establishing in the first place that the woman on whose account he claims rental allowances as his wife actually is his lawful wife, where that may appear subject to question". In that case the woman was admittedly alive and the doubt was as to the legality of the marriage; in this case the doubt is with respect to whether the woman is alive and not divorced.

There appears to be no substantial difference between the two situations, so that in either the claimant would have to make a satisfactory showing as to the existence of a lawful wife.

Accused made a positive statement of a material fact, when he actually did not know and could not know whether it was true or false, and he concealed the doubtfulness of the fact by stating a false address for the wife whose existence he assumed. The only reasonable inference to be drawn is that accused wanted his claim to be paid without investigation or contest, and that he feared that if the true facts were shown it would not be so paid.

In the opinion of the Board of Review the record of trial sustains a finding of guilty of the lesser included offenses of submitting fraudulent claims for allowances by stating a material fact as true when actually serious doubt existed as to its truth or falsity and by concealing facts which would put the Government on notice of the doubt existing, in violation of the 96th Article of War.

As to Specifications 1-9, Charge I, the offenses charged were committed more than two years prior to arraignment, and therefore, as violations of the 96th Article of War, these Specifications should not be prosecuted (AW 39).

d. Specifications 5-24, Charge II: These Specifications are the same as Specifications 10-29, Charge I, except that they charge a violation of the 95th Article of War. For the reasons stated above (par. 5c), the Board is of the opinion that the evidence sustains the findings of guilty, in violation of the 95th Article of War, but only with exceptions and substitutions. However, accused was found guilty of the same dishonorable acts, in violation of the 95th Article of War, under Specifications 29-48, Charge II. If the findings of guilty of these Specifications (Specs. 5-24, Chg. II) should be sustained with exceptions and substitutions, the result would be that accused in each instance would be found guilty of a violation of the 95th Article of War twice, under separate Specifications involving the presentation of the same voucher. It is the opinion of the Board of Review, therefore, that the findings of guilty of Specifications 5-24, Charge II should be disapproved.

e. Specifications 29-48, Charge II: These Specifications allege in substance that in certain months accused, with intent to deceive, officially reported to certain finance officers that he had a lawful wife, residing at an address stated, which reports were in each instance known to be untrue in that "he had no lawful wife residing at said address", in violation of the 95th Article of War. In the opinion of the Board of Review, the evidence sustains the findings of guilty.

f. Specification 49, Charge II: In the opinion of the Board the evidence sustains the finding of guilty of this Specification, except the words, "was not married and" and "or elsewhere".

6. Consideration has been given to a brief in behalf of accused attached to the record.

7. The accused is 47 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service, 16 June 1917 to 17 May 1919; appointed second lieutenant, Infantry Reserve, 30 December 1924; accepted 8 January 1925; active duty, 4 June 1925 to 14 June 1925, 16 August 1925 to 30 August 1925 and 11 July 1926 to 25 July 1926; promoted to first lieutenant, Infantry Reserve, 24 January 1928; accepted 31 January 1928; active duty, 8 July 1928 to 21 July 1928, 21 July 1929 to 3 August 1929, 20 July 1930 to 2 August 1930, 17 February 1931 to 23 May 1931 and 2 August 1931 to 15 August 1931; promoted to captain, Infantry Reserve, 5 February 1932; accepted 16 February 1932; active duty, 3 July 1932 to 16 July 1932, 18 April 1933 to 30 September 1936 and 16 November 1936 to 29 November 1936; reappointed captain, 5 February 1937; active duty, 16 July 1937 to 31 July 1937, 9 October 1937 to 31 March 1938, 20 November 1938 to 19 November 1939, 2 January 1940 to 15 January 1940 and from 14 December 1940; promoted to major, Infantry Reserve, 11 July 1941; accepted 12 July 1941; promoted to lieutenant colonel, Army of the United States, 17 October 1942.

8. 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 insufficient to support the findings of guilty of Specifications 1-9, Charge I, and of Specifications 5-24, Charge II; legally sufficient to support only so much of the findings of guilty of Specifications 10-29, Charge I, and of Charge I, as involves a finding of guilty, in each instance, except the words "which statements were false and fraudulent in that the said Lieutenant Colonel Robert L. Adams was, during the period for which said allowances were (or allowance was) claimed, unmarried, and was entitled only to * * *, and which statements were then known by the said Lieutenant Colonel Robert L. Adams to be false and fraudulent", substituting therefor the words "which statements were fraudulent in that the said Lieutenant Colonel Robert L. Adams was in doubt whether he had a lawful wife or was unmarried, was in doubt whether he was entitled to allowances as a married man, and knew that he had no wife residing at the address stated", in violation of the 96th Article of War; legally sufficient to support the findings of guilty of Specifications 29-48, Charge II, of Specification 49, Charge II, except the words "was not married and" and "or elsewhere", and of Charge II; and legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 96th Article of War, and mandatory upon conviction of a violation of the 95th Article of War.

Samuel M. Driver, Judge Advocate

F. J. Lotterhos, Judge Advocate

Judson L. Clements, Judge Advocate

1st Ind.

War Department, J.A.G.O., 16 FEB 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Lieutenant Colonel Robert L. Adams (0-209068), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Specifications 1-9, Charge I, and of Specifications 5-24, Charge II; legally sufficient to support only so much of the findings of guilty of Specifications 10-29, Charge I, and of Charge I, as involves a finding of guilty, in each instance, except the words "which statements were false and fraudulent in that the said Lieutenant Colonel Robert L. Adams was, during the period for which said allowances were (or allowance was) claimed, unmarried, and was entitled only to * * *, and which statements were then known by the said Lieutenant Colonel Robert L. Adams to be false and fraudulent", substituting therefor the words "which statements were fraudulent in that the said Lieutenant Colonel Robert L. Adams was in doubt whether he had a lawful wife or was unmarried, was in doubt whether he was entitled to allowances as a married man, and knew that he had no wife residing at the address stated", in violation of the 96th Article of War; legally sufficient to support the findings of guilty of Specifications 29-48, Charge II, of Specification 49, Charge II, except the words "was not married and" and "or elsewhere", and of Charge II; and legally sufficient to support the sentence and to warrant confirmation of the sentence. (A nolle prosequi was entered as to Specifications 1-4 and 25-28, Charge II.)

3. The accused for 20 consecutive months fraudulently made and presented pay vouchers in which he claimed allowances as a married man and stated the address of his wife, when in fact he was in doubt whether he was married or unmarried and knew that he had no wife residing at the address stated (Specs. 10-29, Chg. I); with intent to deceive, falsely reported in the same vouchers that he had a lawful wife residing at an address designated (Specs. 29-48, Chg. II); and, with intent to deceive, falsely reported in a certificate for longevity pay that he had a lawful wife residing at Fort Benning, Georgia (Spec. 49, Chg. II). He was found guilty of presenting false claims for allowances, in violation of the 94th Article of War, but the record of trial has been found legally sufficient to support findings of guilty, as to these Specifications, only of lesser included offenses, in violation of the 96th Article of War, as it was not shown beyond a reasonable doubt that the claim of accused that he married in France in 1918 was false. In the 20 pay vouchers, accused claimed the status of a married man and listed an address in the United States as his wife's address, based on the contention that he had married secretly in France in 1918. He admitted that he had heard nothing of or from this wife since 1919 at which time she was

still in France. His claim of the allowances of a married man under such circumstances, without disclosing the true facts, indicated a deliberate intent to deceive and was highly dishonorable. I recommend that the sentence to dismissal, total forfeitures, and confinement at hard labor for five years be confirmed, but, in view of all of the circumstances, that the forfeitures and confinement adjudged be remitted, and that the sentence as thus modified be carried into execution.

4. Attention is invited to the following papers accompanying the record; Request for clemency by accused dated 22 September 1943; letters from Mrs. R. L. Arstingstall, Germantown, Ohio, sister of accused, in his behalf, dated 25 October 1943 and 17 January 1944; and letter from Honorable Robert A. Taft, United States Senator, dated 23 December 1943, inclosing letter from Mrs. Lucille Menefee, Cincinnati, Ohio, sister of accused, in his behalf, dated 23 October 1943.

5. 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 carrying into effect the recommendation made above.

Myron C. Cramer.

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

7 Incls.
Incl.1-Record of trial.
Incl.2-Dft. ltr. for sig. S/W.
Incl.3-Form of Action.
Incl.4-Req. for clemency dated 22 Sept. 43.
Incl.5-Ltr. fr. Mrs. Arstingstall, dated 25 Oct.43.
Incl.6-Ltr. fr. Mrs. Arstingstall, dated 17 Jan.44.
Incl.7-Ltr. fr. Hon. Taft, dated 23 Dec. 43, w/incl.

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but execution suspended. G.C.M.O. 261, 6 June 1944)

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

SPJGN
CM 242404

29 OCT 1943

UNITED STATES	II ARMORED CORPS
v.	Trial by G.C.M., convened at Camp Roberts, California, 18 and 21 September 1943. Dishonorable discharge and confinement for life. Penitentiary.
Private JAMES M. BROADAWAY (6924455), 169th Infantry.	

REVIEW by the BOARD OF REVIEW
LIPSCOMB, GOLDEN and SLEEPER, 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 Private James M. Broadaway, Cannon Company, 169th Infantry, did, at Camp Roberts, California, on or about 4 September, 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Kenneth G. Miller, a human being, by stabbing him with a knife.

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, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that on the night of 3 September 1943, the accused and the deceased, with two other enlisted men, were playing poker in a small room assigned to two sergeants - both on furlough - in one of the barracks at Camp Roberts. The game continued after midnight. In the course of it the participants imbibed substantial quantities of wine and whiskey, but none of them were drunk when the deceased, dealing a hand of stud poker, fumbled the cards on the third

to the man opposite, and vice versa, after the accused, playing on the deceased's left, had received his third card in proper sequence. The two who had received each other's cards offered to exchange, but when the accused objected, remarking, "It isn't poker", they decided to call it a misdeal. "We were playing a half dollar limit", one of the players testified, "and we had all bet a half dollar". After the cards were thrown in, he continued,

> "I don't know if Miller" - the deceased - "or Broadaway" - the accused - "dragged their money back out of the pot, but Larkin and I took ours."
>
> * * * * *
>
> "After we called it a misdeal Broadaway jumped up and made the statement 'I'm going out and get my God Damned Knife,' and he opened the door and left the room. * * *."

In about two minutes he returned with a six-inch hunting knife in one hand, a leather scabbard in the other. Sheathing the knife and placing it in his pocket, he resumed his seat; then, telling the deceased he owed $1.50, he took that amount of the deceased's money and put it in the pot. Both rose - according to one witness, the accused first; according to another, simultaneously - the accused, who was left-handed, with the knife in his left hand. When the deceased stood up, he stepped sideways, away from the bed on which the game had been played, bringing his arms to a thrust position. He was empty-handed. The accused held the knife out in front of him, moving it from side to side, advancing on the deceased and shoving him back into a corner of the room. The deceased, as he retreated, walking backwards, appeared to be trying to defend himself. One witness testified, "I thought at one time he was going to make a grab for the knife but he never did". The deceased stepped on the shoe rack in the corner against the wall, breaking a board - and the accused struck. One thrust, entering the left costal margin in the mammary line, penetrated the deceased's heart; another, to the upper abdomen, pierced the peritoneum for a distance of 3 centimeters. Upon the examination of the deceased's body, after his death which ensued almost immediately as a result of these wounds, another was observed on his chin, a superficial knife wound measuring 1½ centimeters in length (R. 13, 18-21, 26-30, 53-60, 63-66, 69-72; Exs. 1-2, 4-8, 13-14).

The accused did not appear excited after the assault. He sheathed the knife, forced the door open against the body of the deceased, who had fallen in such a manner as to block it, and remarked to one witness outside in the squad room, "I killed Miller, if he ain't dead he soon will be"; to another, "I've just killed Miller. * * * This is going to finish me". No witness recalled seeing any injury to the accused immediately after the stabbing. Later he entered the latrine, with a cut on the back of his right arm, still carrying the knife, which he washed at the sink. He returned to the orderly room with the sleeve of his jacket rolled up, displaying the cut

on his arm (R. 21, 43-45, 52, 60).

4. The evidence for the defense shows that on 9 July 1943, the deceased and an unidentified soldier engaged in an argument during a "beer bust" held in the company mess hall. The two were being held apart, when the company commander escorted the deceased to his barracks and insisted that he get in bed. On that particular night the accused requested the company commander to have the deceased promoted to the grade of private first class (R. 74-75).

About two months before the killing the deceased was accused of cheating by a sergeant with whom he was playing pinochle. No money was involved. The deceased threatened to whip the sergeant, who "stood up and said, 'Come on'". A month later, when drunk, the deceased, who had been eating garlic, blew his breath in this same sergeant's face. The sergeant, suggesting to others that they put the deceased in the shower, chased him into the latrine, where the deceased remarked that any man that got him would get "the shit knocked out of him". "Well", said the sergeant, "if that's the way you feel about it, we'll call it off". The accused was in the showers at the time. The deceased was five feet nine or ten, and weighed, in this sergeant's opinion, over 180 pounds; the accused, about five feet six, weighting about 140 pounds (R. 76-80).

During the day preceding the fatal poker game, a corporal whose bunk was next to the deceased's returned to the barracks about 11:00 o'clock in the morning and found the accused and the deceased drinking wine from a gallon jug which the corporal had left - nearly full - in his barracks bag. The three of them then finished the remainder of the wine. After supper, the corporal saw the deceased drinking beer in the post exchange, and later in the squad room, again drinking beer. After consuming "these various quantities", the deceased was not drunk, but behaved properly - handled his cards properly in the card game in the squad room before the players adjourned to the sergeant's room where the killing occurred, and appeared sober (R. 81-8

That afternoon the deceased, who was a driver, failed to report to the motor pool for duty. A sergeant reported to the company motor officer that he had excused the deceased to go to the barracks and sleep because he had been drinking. The first sergeant thereafter stated, in the accused's presence, that the deceased had not reported for duty that day and that "the Lieutenant was going to take action" (R. 86-89).

On the morning of 4 September 1943, a medical officer at the station hospital sutured a cut on the accused's right arm, characterized, upon cross-examination, as of a type which could have been self-inflicted (R. 93, 94; Ex. 15).

5. The accused, after his rights as a witness had been properly explained to him, elected to remain silent.

6. The Specification alleges that the accused, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with

premeditation, killed the deceased by stabbing him with a knife. The uncontradicted evidence impressively establishes every element of the offense alleged, disclosing no circumstance which might have the effect of extenuating or reducing the grade of the crime. The testimony adduced by the defense is irrelevant, immaterial and devoid of pertinent probative value. No doubt the accused's drinking aggravated the criminal irascibility which flared so unaccountably at the deceased's misdeal, precipitating a rapid succession of acts by the accused, apparently calculated to culminate, as they did, in his fatal stabbing of the unarmed and retreating deceased.

7. The charge sheet shows that the accused is 24 years of age. He enlisted 30 July 1937, was discharged 4 September 1940, and reenlisted at Baltimore, Maryland 18 November 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 and the sentence and to warrant confirmation thereof. A sentence of death or imprisonment for life is mandatory upon conviction of a violation of Article of War 92.

Abner E. Lipscomb, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

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

SPJGK
CM 242464

30 OCT 1943

UNITED STATES v. First Lieutenant STANLEY ROBBINS (0-462256), Air Corps.	SECOND AIR FORCE Trial by G.C.M., convened at Army Air Base, Topeka, Kansas, 1 October 1943. Dismissal and confinement for one (1) year.

OPINION of the BOARD OF REVIEW
LYON, HILL 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. The accused was tried upon the following Charge and Specification:

CHARGE : Violation of the 93rd Article of War.

Specification : In that 1st Lieutenant STANLEY ROBBINS, 42nd Airdrome Squadron, did, at the Army Air Base, Topeka, Kansas, on or about 23 September 1943, feloniously take, steal, and carry away, two one dollar bills, United States currency, of the value of two dollars, the property of 2nd Lieutenant Robert W. Innis.

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 and to be confined at hard labor for a period of five years. The reviewing authority approved "only so much of the sentence as provides for dismissal from the service, and confinement at hard labor for one (1) year" and forwarded the record of trial for action under Article of War 48. The legal effect of this was to approve the sentence but to remit four years of the confinement imposed.

3. Supplementing the pleas of guilty, the prosecution introduced evidence showing that the accused was quartered with other officers in the "BOQ" at the Army Air Base, Topeka, Kansas. On the evening of 23 September, Second Lieutenant Robert W. Innis, Air Corps, prepared to take

a shower. After removing his clothing he left his trousers, containing a billfold, in his room. The billfold contained a $10 bill and eight $1 bills. Lieutenant Innis had recorded the serial numbers of the bills before leaving for his bath. On returning to his room about 20 minutes later he discovered that two $1 bills had been removed from his billfold (R. 6a, 6b, 6c). While Lieutenant Innis was taking his bath, Second Lieutenants Hollis J. Evans and Harold M. Borden, who had secretly placed themselves on watch at the direction of Major Forrest M. Moore, Base Intelligence Officer, saw the accused enter the room of Lieutenant Innis and pick up a pair of trousers that were on the bed. The accused's back was to the officers mentioned and they could not see the billfold but they could see accused "fumbling" with the trousers. Shortly after accused left the room and after Lieutenant Innis had reported that $2 of his money had been stolen, the accused was accosted by the three officers above mentioned. At first the accused denied any knowledge of the theft but upon being told that he was seen in the room handling the trousers of Lieutenant Innis he admitted his guilt, and returned the money, the numbers of which checked with the serial numbers as recorded by Lieutenant Innis (R. 6c-6i). On the night of the theft, and after he had been fully advised of his rights in the premises, accused signed a voluntary confession which was properly identified by Major Moore and was received in evidence as Prosecution's Exhibit 1 (R. 6i-6k).

4. The accused did not testify and no evidence was introduced by the defense. The undisputed evidence and the confession of accused show beyond a reasonable doubt that accused is guilty of larceny in violation of Article of War 93 as alleged in the Charge and Specification.

It will be noted that the sentence imposed provided for dismissal and confinement but did not include forfeitures. A sentence involving dismissal and confinement should specifically provide for forfeiture of all pay and allowances due or to become due. This omission is immaterial since total forfeitures will become absolute upon the execution of the sentence to dismissal.

5. The accused is 23 years and 6 months of age. He was graduated from high school in 1938, and attended the College of the City of New York four years, but did not graduate. He was commissioned a second lieutenant, Air Corps Reserve, 1 May 1942, and was ordered to active duty 6 June 1942. He was promoted to the grade of first lieutenant 23 June 1943. In recommending accused for promotion, his commanding officer stated that accused's services had been "outstanding in demonstrated ability and efficiency."

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

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

1st Ind.

War Department, J.A.G.O., 2 NOV 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 Stanley Robbins (0-462256), Air Corps.

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

T. H. Green,
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 Ex. action.

(Sentence confirmed but confinement remitted. G.C.M.O. 401, 22 Dec 1943)

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

SPJGN
CM 242536

30 OCT 1943

UNITED STATES v. First Lieutenant WALTER B. KAPPES (0-1289268), Air Corps.	ARMY AIR FORCES WESTERN TECHNICAL TRAINING COMMAND Trial by G.C.M., convened at Army Air Base, Lincoln, Nebraska, 9 October 1943. Dismissal, total forfeitures and confinement for one (1) year.

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

1. The Board of Review has examined the record of trial in the case of the officer above-named 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 First Lieutenant Walter B. Kappes, 616th Training Group, did, at St. Petersburg, Florida, on or about the 1st day of May, 1943, wrongfully, unlawfully, feloniously, and against the order of nature, have unnatural sexual intercourse with Sergeant Billy Mullins, a male person, by taking the penis of the said Sergeant Billy Mullins into his, the said First Lieutenant Walter B. Kappes' mouth, thereby committing the crime of sodomy.

Specification 2: Same form as Specification 1, but alleging sodomy at St. Petersburg, Florida, on or about 7 May 1943, with Sergeant Billy Mullins.

Specification 3: Same form as Specification 1, but alleging sodomy at St. Petersburg, Florida, on or about 20 May 1943, with Sergeant Billy Mullins.

Specification 4: Same form as Specification 1, but alleging sodomy at Lincoln, Nebraska, on or about 17 September 1943, with Corporal Joseph M. Regan.

Specification 5: Same form as Specification 1, but alleging sodomy at St. Petersburg, Florida, on or about 19 May 1943, with Sergeant James A. Vaughn.

Specification 6: Same form as Specification 1, but alleging sodomy at Lincoln, Nebraska, on or about 28 August 1943, with Sergeant James A. Vaughn.

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

Specification 1: In that First Lieutenant Walter B. Kappes, 616th Training Group, did, at St. Petersburg, Florida, on or about May 18, 1943, attempt to commit the crime of sodomy with Staff Sergeant Robert R. Wynn by taking the penis of Staff Sergeant Robert R. Wynn in his hand, trying to place it in his mouth and to thereby have carnal connection per os with the said Staff Sergeant Robert R. Wynn.

Specification 2: In that First Lieutenant Walter B. Kappes, 616th Training Group, did, at Lincoln, Nebraska, on or about August 26, 1943, attempt to commit the crime of sodomy with Corporal William A. Faison by taking the penis of Corporal William A. Faison in his hand, while in bed with the said Corporal William A. Faison.

Specification 3: In that First Lieutenant Walter B. Kappes, 616th Training Group, did, at St. Petersburg, Florida, on or about May 3, 1943, attempt to commit the crime of sodomy with Corporal Francis T. Parker by taking the penis of Corporal Francis T. Parker in his hand, while in bed with the said Corporal Francis T. Parker.

He pleaded not guilty to and was found guilty of all Charges and Specifications. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for one (1) year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that on or about 1 May 1943, 7 May 1943 and 20 May 1943, in the Peninsular Hotel at St. Petersburg, Florida, the accused committed an act of sodomy per os upon Sergeant Billy Mullins who testified about each of the three occasions that the accused "took my pants down, played with my penis until it got hard, put it in his mouth, and sucked it until I had a discharge". Both the accused and the witness were intoxicated but not to the point of not knowing what they

were doing which as to the last mentioned date was corroborated by an officer with whom they had been drinking shortly before the commission of the act. The preceding night, after a squadron party, the accused followed Sergeant James A. Vaughn, with whom he had been drinking at the party, and committed a similar act after forcing the sergeant into a corner in an alley near the hotel (R. 16-18, 19-20, 21-25).

During the above period the accused on 3 May 1943 and 18 May 1943 attempted to commit a similar act upon Corporal Francis T. Parker and Sergeant Robert R. Wynn, respectively, while sleeping in the same bed with each of them. On these two occasions the parties involved had been drinking but the accused obviously knew what he was doing. However, after the accused had fondled the other's privates and was engaged in preliminary motions anticipatory to the act, he was repulsed (R. 7-12, 14-16).

During the summer the accused's organization was transferred to Lincoln, Nebraska, where the accused, after drinking but not becoming intoxicated with Corporal William A. Faison on 26 August 1943, induced him to spend the night with the accused in the servant's room of the fraternity house where the accused was rooming. During the night the corporal was awakened by the accused playing with the penis of the corporal who pushed the accused away and got out of bed. Two nights later, again after a party where everyone was drinking, the accused invited Sergeant James A. Vaughn to spend the night in his room where they slept together and the accused committed another act of sodomy per os upon him. Thereafter, on 17 September 1943, also after a squadron party at the Lincoln Hotel, Corporal Joseph M. Regan, after becoming insensible through intoxication, slept with accused and the next morning at the solicitation of the accused who promised to "fix the pass", overstayed his leave, had several drinks with the accused and went back to bed where the accused committed sodomy per os upon him after which he later arose when he found accused pulling his hand, the corporal's, toward accused's penis. The accused on this occasion possibly was intoxicated (R. 13-14, 18-19, 21-25).

4. The evidence for the defense shows that the accused's immediate superior under whom he had served since February 1943 had found his service of superior character and that two officers who had lived with him since such date had not observed any homosexual tendencies in his actions although he had not, according to their knowledge, associated to any great extent with the opposite sex (R. 25-26, 26-28, 28-29).

The accused, having been advised of his rights as a witness, elected to testify which he did at great length. Prior to entering the service he had been most abstemious, but, being disgusted with his assignment, he began to drink heavily. He regularly associated with the opposite sex and did not make a habit of drinking or associating with enlisted men. He testified about each of the occasions related by the witnesses substantially

as recited by them except concerning the acts or attempted acts of sodomy leaving the impression that, if he committed such acts, he was so intoxicated that he did not know what he was doing (R. 29-42).

5. Specifications 1 through 6, Charge I, allege that the accused on specified dates and at specified places committed six separate acts of sodomy per os with three different persons. The offenses are alleged as violations of Article of War 96. The offense of sodomy is defined by the Manual for Courts-Martial as follows:

> "Sodomy consists of sexual connection with any brute animal, or in sexual connection, by rectum or by mouth, by a man with a human being. Penetration alone is sufficient and both parties may be liable as principals." (MCM, 1928, par. 149k)

The testimony of the three soldiers upon whom the accused practiced the alleged acts, once with one, twice with a second and thrice with a third, over a protracted period of time and at widely separated places, is too clear and persuasively convincing to leave any doubt whatsoever about the commission of the acts. Likewise is their testimony that, although they and the accused had been drinking before the acts, neither they nor the accused were so intoxicated on such occasions as not to know and realize what was taking place. Although it strains human credulity to believe that one, even while intoxicated, would engage in such practices, it is possible that intoxication conceivably could account for one or an initial act of such character. The sustained persistency of the accused's acts, however, eliminates any mitigation which might otherwise be derived from the accused's claimed intoxication and per force impels the conclusion that the accused was not unaccustomed to indulge in acts of perversion but that he is an adept thereto and designedly skilled in the acquisition of his victims. The evidence, therefore, establishes beyond a reasonable doubt the accused's guilt and supports the findings of guilty of Specifications 1 through 6 inclusive, Charge I and of Charge I.

6. Specifications 1, 2 and 3, Charge II, allege that the accused at specified times and places attempted to commit the crime of sodomy with three separate enlisted male persons. The offenses are alleged as violations of Article of War 95. An attempt is defined as "an intended apparent unfinished crime" (Wharton's Criminal Law, Vol. 1, Sec. 212). The alleged acts, although manifestly constituting "conduct unbecoming an officer and a gentleman", are condemned by the following applicable authority as violations of Article of War 95:

> "Demeaning himself by an officer with soldiers or military inferiors.
>
> * * * *

"Offending against good morals, in violation * * * of public decency and propriety." (Winthrop's Military Law and Precedents, 1920 Reprint, pages 716-718)

The testimony of the three witnesses with whom the accused attempted to commit the acts leaves no doubt but that the accused on the described occasions was actively engaged in the preliminary movements usually accompanying an actual completed act of sodomy. The intent of the accused on such occasions is obvious and the actual completion of the crimes were unfinished only because of the acts of the witnesses and not because of any acts of the accused. The claimed intoxication of the accused at the specified times is unavailing as a defense thereto for the reasons above-mentioned. Apparent intoxication may have eased his conscience but it did not deter him from carefully planning and attempting to execute his designs and, in fact, appears to have been part of the plan of his sustained operations. The evidence beyond a reasonable doubt supports the findings of guilty of Specifications 1, 2 and 3, Charge II, and of Charge II.

7. The accused is about 25 years of age. The War Department records show that he had enlisted service from 24 February 1941 until he was commissioned a second lieutenant upon completion of Officer Candidate School on 4 August 1942 since which date he has been on active duty as an officer and that he was promoted to first lieutenant on 3 August 1943.

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 of all Charges and Specifications and the sentence, and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 96 and is mandatory upon conviction of a violation of Article of War 95.

Abner E. Lipscomb, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

(92)
SPJGN
CM 242536

1st Ind.

War Department, J.A.G.O., 4 - NOV 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 Walter B. Kappes (0-1289268), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed and carried into execution amd that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

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

T. H. Green,
Brigadier General, U. S. Army,
Acting The Judge Advocate General.

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

(Resigned)

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

SPJGQ
CM 242553

5 NOV 1943

UNITED STATES	THIRD AIR FORCE
v.	Trial by G.C.M., convened at Drew Field, Tampa, Florida, 19 August and 29 September 1943. Dishonorable discharge and confinement for life. Penitentiary.
Private MANUEL T. FERNANDEZ (32817359), Medical Detachment, 566th Signal Aircraft Warning Battalion.	

REVIEW by the BOARD OF REVIEW
ROUNDS, HEPBURN and FREDERICK, Judge Advocates.

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Manuel T. Fernandez, Medical Detachment, 566th Signal Aircraft Warning Battalion, Drew Field, Florida, did, at Plant City, Florida, on or about 24 July 1943 forcibly and feloniously, against her will, have carnal knowledge of Mrs. Opal Susie Norris.

He pleaded not guilty to and was found guilty of the Specification and the Charge. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Atlanta, Georgia, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. For the prosecution it was shown that on 24 July 1943, accused, in company with Private First Class Lyman R. Plank and Technician 5th Grade Fred Johnston, left Drew Field, Tampa, Florida,

and proceeded by truck to Plant City, Florida, where they visited the Rainbow Grille, had sandwiches and jointly shared a mixture of a half-pint of whiskey and two bottles of "7-Up" (R. 22, 28, 43, 73). Thereafter they proceeded to Hominy Inn where Plank and accused each had a bottle of beer (R. 22,, 23, 25). Upon leaving there they met a civilian, J. W. Long, who was on his way to Sear's Bar-Be-Cue Stand and who took the soldiers along in his Ford coupe (R. 23, 35). On the way they stopped at Loomis' where two of the party drank beer and one drank whiskey, though the drinkers are not identified in the record (R. 35). It was between 9:30 and 10:30 p.m. when the group arrived at Sear's (R. 26, 27, 35, 42, 45).

Here each had about four more "beers" during which time the soldiers were engaged in conversation with two girls (R. 23, 25, 29). Accused "couldn't make any headway" so he quit talking with the girl with whom he was conversing (R. 30). Within about half an hour after arriving at Sear's (R. 26) accused complained of feeling sick (R. 44), went out of doors and sat on the steps (R. 23, 26, 29, 42). Plank saw him go out and sit on the steps for about ten minutes and shortly thereafter when he went to the outdoor rest room, Plank found accused lying in Long's automobile, but, when he made a similar trip ten or fifteen minutes later, Plank found both accused and the automobile gone (R. 23, 26, 29). Johnston saw accused sitting on the steps at about 10:30 p.m. (R. 42). Accused did not appear to be drunk at about 11:00 p.m. (R. 26, 30, 40, 61, 72).

Richard Norris and his wife, Opal Susie, resided in a house near Sear's Bar-Be-Cue Stand. Captain William Hart, Provost Marshal of the Lakeland Army Air Field, testified the house was 50 yards from the stand (R. 31) but Norris said it was around 35-40 feet (R. 19). At the time of the alleged rape Mrs. Norris was 24 years old, the mother of a 10 months old baby boy (R. 4), and again pregnant (R. 74).

On the night of 24 July 1943, at about 10:55 p.m., Mrs. Norris was preparing to nurse her baby after going to bed, her husband having just left to go to work in the shipyard (R. 4, 19). As he was leaving Norris saw a soldier of dark complexion and with black hair standing on the corner within 20-25 feet of the Norris home (R. 20). Mrs. Norris had turned off all the lights in the house but had a flashlight handy when she went to bed. While she was nursing the child someone entered and grabbed her "from the back" (R. 4). Being deaf in her right ear, and since she was lying on her left side, she heard no sound of approach (R. 4, 6, 11). She began screaming, saying, "You're not Richard", referring to her husband. A struggle ensued in which Mrs. Norris, her assailant and the baby fell off the bed. The intruder picked up the child and threw it on the bed and, grabbing Mrs. Norris, threw her toward the foot-end striking her head against the iron bed. At this point she happened to feel his billfold

grabbed it and threw it toward the head-end of the bed. At the moment when she threw it, her assailant grasped her wrist so that the billfold fell on the floor (R. 4, 7). The assailant then had sexual intercourse with Mrs. Norris, without her consent and without using any "rubber" (R. 4, 5, 11). She "fought him", "bit him one time on his neck", "pulled his neck back" and she had "screamed and hollered". He hit her on the nose "so she couldn't scream and holler" (R. 5), tore a 6-inch slit in her nightgown, and forcibly took off her step-ins which had been somewhat torn before the assault (R. 11). A "juke box" in Sear's Bar-Be-Cue Stand had been playing almost constantly during the evening (R. 28, 40, 62).

After the intercourse the man got down on his knees and tried to find the billfold while Mrs. Norris jumped from the bed and ran over to turn on a light by the settee but he took the lamp away from her. He had also taken the flashlight and used it while searching for the billfold, but she could not recall whether he turned it on at any time (R. 4, 7). He did turn his face away from her whenever automobile headlights shone into the room momentarily and it was consequently difficult for her to see him clearly at any time, though she knew "he was dark complexioned and had real dark hair" (R. 6).

Mrs. Norris then tried to get into the kitchen to get a light but he told her not to turn on any light and that he would kill her if she did so (R. 4, 10). She did finally manage to get into the kitchen and turned on a light whereupon accused fled, taking the flashlight with him but leaving the billfold (R. 4). Mrs. Norris thereupon picked up the billfold, dressed herself and taking her baby with her, went immediately to Sear's next door. There she spoke to the two girls in company with Plank and Johnston and immediately thereafter telephoned to the police reporting the crime, after which she proceeded to her sister's home where she arrived at about midnight and where she stayed all night (R. 5, 8, 69, 70, 72). While talking to one of the girls at Sear's she had shown her the billfold in the presence of the two soldiers who were with the girl and she also showed it to her sister that night (R. 54). The sister testified that Mrs. Norris appeared scared and that "she had a knot on the back of her neck" - a "big, swelled up place" which she treated (R. 70).

At about midnight, Plank and Johnston left Sear's and went to Hominy Inn where they parted (R. 23). Plank had last seen accused at about 11:00 p.m. (R. 30). After leaving Johnston, Plank caught a ride on a truck and about two miles from the inn he saw accused walking alone on the highway toward Plant City. Accused got into the truck and when asked by Plank "what went on that night" said he "couldn't remember a thing" (R. 24, 30). Plank later noticed a

flashlight in accused's back pocket upon arrival at their room in Plant City, but, when again asked what had happened, accused said, "he didn't remember a thing only he said he knew he got a flashlight some place but he didn't know where it came from" (R. 24).

In the morning (25 July 1943) Plank, Johnston and accused went down town for sandwiches after which accused left them and Plank and Johnston called upon the girls whom they had met at Sear's the previous evening. While in their company at about 1:00 p.m. in the afternoon, Mr. Norris came along, spoke with them and thereafter they went to the police station "to identify the man" (R. 24, 25). Accused was not at the police station then but they saw him later on the street and told him the police were looking for him, whereupon accused said, "Maybe it would be better if I went up and turned myself in", which he then did (R. 25).

Captain Hart, the Provost Marshal, upon receipt of a report concerning the alleged rape went with a deputy sheriff to the Norris home on 25 July 1943 where they "found footprints at several places around the house seeming to focus at certain windows". One print was rather well preserved (R. 31) and when accused's shoe was placed therein it fitted the print (R. 32). In the police station, on the same day, Captain Hart, after proper warning, interrogated accused who admitted he was at Sear's Bar-Be-Cue Stand on the night of 24 July 1943 with two soldiers; that he became sick, sat in a parked car and then remembered nothing else until he found himself walking down the highway toward Plant City. Upon being asked about the flashlight, accused expressed surprise that he (Captain Hart) knew about it and stated it was with his belongings which he had checked at the U.S.O. (R. 14). The articles were sent for then and there and when brought were examined in accused's presence. The flashlight was extracted in his presence from a hip pocket of accused's trousers which were among the accused's property thus procured, and accused admitted it was the flashlight which he had previously mentioned but could give no explanation of how it came into his possession (R. 15). He also had discovered that morning that his wallet was missing but did not know what had happened to it (R. 15). Upon being shown the wallet which Mrs. Norris had turned over to the police authorities, accused admitted it was his (R. 16). When shown the flashlight, Mr. and Mrs. Norris both identified it by means of a cracked lens and a home made spring which it contained (R. 7, 8, 18) as the same one taken from their bedroom on the night of 24 July 1943. Mrs. Norris also identified the wallet, admitted by accused to be his, as the identical one she found in her bedroom after the assault (R. 9).

J. W. Long testified that he had picked up accused and two other soldiers who were thumbing a ride near the Post Office in Plant City in the early part of the evening on 24 July 1943 and had taken them in his Ford coupe to Sear's Bar-Be-Cue Stand, arriving there at about 10:10 p.m. (R. 34, 35). They drank beer for a while and between 10:30 and 11:00 p.m. he left with a friend by the name of Branch without having noticed whether accused had gone or not (R. 36). Long's car was in front of the door of the barbecue stand and no one was in it when Long and Branch got into the automobile to go home (R. 37). Branch testified that he had gone out to Sear's on the night of 24 July 1943 at about 11:00 p.m. to get his friend Long. A man by the name of Day had brought him out from Plant City and then left Sear's (R. 64) after having a soft drink (R. 65). Branch did not remember seeing accused at Sear's that night. In about 15 minutes after his arrival he and Long left Sear's and went home in Long's car which was empty when they got in (R. 65, 66).

Willie Mae Hedrick testified that she had arrived at Sear's on the night in question at about 10:30 p.m. in company with a friend, Onzelle Williams. She identified accused as one of the soldiers she had seen there that night and who had been talking with her friend Onzelle (R. 71). While she saw him drinking she did not think he was drunk. She saw him go out alone at about 11:00 p.m. and did not see him return. When Mrs. Norris came over to Sear's later that night she went out and spoke to her and went with her to the grocery store to telephone the police (R. 72). Miss Hedrick stayed at Sear's until 11:30 p.m. Although Mrs. Norris said she was "sure" accused was the man who assaulted her and pointed him out in the courtroom when asked to "identify * * * the man who you saw and was brought back to you on the 25th day of July * * *" she admitted that at the time of the assault she couldn't see him very clearly and while she was reasonably certain accused was the man she was not absolutely positive (R. 6); nor was she positive when identifying accused in the presence of the Provost Marshal (R. 17).

4. Accused after an explanation to him by the law member of his rights, elected to be sworn as a witness, under oath. He testified that he did share with Plank and Johnston the whiskey purchased in a cafeteria but, although he had little experience with whiskey and had drunk some only once before in his life, he thoughtthe bottle was a "pint" and not a "half pint" as the others said (R. 74, 75). He had nothing to drink prior to this (R. 75). He also drank a glass of beer at Hominy Inn and had "a few drinks" at Sear's. After a while he "didn't feel so well" so he went outside, sat on the steps and later vomited (R. 46). He then got into Long's car and either fell asleep or went into a stupor, after which he remembered nothing until he got into the truck on the highway to Tampa. He had a flashlight in his pocket. In the earlier part of the evening he had a billfold on his person but he did not know what became of it (R. 46). He had never seen either Mr. or Mrs. Norris before 25 July 1943. After Plank and Johnston had told him of the charge of rape and that the police were looking for him he voluntarily went to the police station (R. 47, 48). He had no idea what time of night it was when he got to Sear's (R. 46) nor when he got into the truck on the Tampa road (R. 41). With regard to the Charge itself, the following interrogation took place:

"Q. What is your direct response to the charge that you did rape Mrs. Norris?
"A. I don't think I am guilty.
"Q. You don't think you did it?
"A. No, sir.
"Q. You have no recollection one way or the other?
"A. No, sir.
"Q. You think you were so drunk you wouldn't have known an act like that?
"A. I don't know." (R. 48)

He did not recall seeing anyone come out of the Norris house nor Mr. Long coming out of the barbecue stand. He did remember seeing and speaking to Plank while he (accused) was lying in Long's car (R. 48).

On cross-examination accused said he knew he was getting into Long's car, and that it was a coupe, but that after speaking to Plank he knew nothing until he "came to" while walking on the Tampa road. Previous to the time when Plank came along in the truck, accused had tried to stop other cars "to get a lift back to town but nobody stopped until the truck came by". He had no idea of the time that elapsed between the time he "went out" in the car (Long's) and the time when he "came to" on the highway but he knew that he and Plank returned to their room before curfew because he saw two military policemen and "they didn't say a word about getting off the street" (R. 49). He admitted that the flashlight shown him at the trial was the one found in his pocket and that the billfold as well as the Social Security card which it contained were his (R. 49, 50).

In examination by the court the following colloquy took place:

"Q. When you regained your senses, did you know that you were headed down the road to town and the hotel?
"A. No, sir.
"Q. But you were trying to catch a ride. Where were you going?
"A. I wanted to find which way I was going, sir." (R. 50)

5. After the prosecution and defense had rested the court announced that an adjournment would be had in the case and directed that accused be examined to determine the question of his sanity by a board of medical officers pursuant to paragraphs 35c and 75a, Manual for Courts-Martial. The trial judge advocate was further directed to make a further investigation and inquiry along indicated

lines with a view to discovering and producing additional evidence (R. 55).

Accordingly a board was appointed and Captain Samuel M. Tarnhower, Medical Corps, testified that, after an examination of accused the board had concluded he was sane, both at the time of their examination and at the time of the commission of the alleged offense (R. 57). The written report was received in evidence and disclosed the following specific findings:

"1. Enlisted man was sane at time of offense.
"2. Enlisted man was sane at the time of our examination.
"3. Based on his statements and those of other persons in the record as to the amount of alcohol taken, which was not excessive, the evidence as to his behavior and apparently mental reactions at the time of the alleged offense, it is our opinion that the enlisted man was mentally capable of distinguishing right from wrong.
"4. Since we feel that this man was not insane, he was, therefore, able to adhere to the right." (Ex. G)

Defense counsel objected to that portion contained in paragraph 3 without avail. The court thereupon proceeded to interrogate the witness as follows:

"Q. Is it possible to say whether a man under the influence of alcohol could have a lapse of memory and he would go about a procedure systematically? In other words, how would a man be affected that had a lapse of memory as a result of —
"A. Well, there is no question that he might do things for which he would have a lapse of memory. I have in mind this particular case where the actions of the individual suggested that he had enough control of his reasoning powers so that one would almost expect that he would have in the same sense his memory or ability to work things out. Almost any type of loss of memory is possible. We felt it was quite improbable that the things that took place could have taken place and still such a blank loss of memory for all the events of that particular period.
"Q. Captain, if a man is in such a drunken condition that he has a lapse of memory, is it probable that he would desire to have sexual relations at that time?

"A. I think it is probable that if he had taken a great deal of alcohol to the point that might usually be associated with a loss of memory. In other words, usually being talked of as being very drunk, it would be unlikely that his sex desires would be sufficient as to have a desire to have intercourse. On the other hand, commonly, moderate small amounts of alcohol most often act as stimulants." (R. 58)

There being no further evidence on the issue of sanity to the President ruled, in the absence of the law member, and without objection by any member, that at the time of the commission of the offense charged and at the time of the trial, accused was not suffering from any mental disease or defect (R. 58).

6. Thus it appears by competent evidence, which is neither denied nor in any manner rebutted, that Mrs. Opal Susie Norris, a wife of the age of twenty-four years, the mother of a ten-month old baby boy and again pregnant at the time of the commission of the offense upon her, was raped while alone with her child in her home, at or near Plant City, Florida, on the night of 24 July 1943.

She testified that after she had retired and was preparing to nurse the baby at her side, someone attacked her from the rear. In the struggle that ensued the child fell or was thrown to the floor, whereupon the assailant picked it up and threw it on the bed. Then, notwithstanding her screams and physical resistance, consisting of fighting, biting and pulling upon his neck, during which Mrs. Norris' nightgown was torn and her step-ins were forcibly removed, the intruder effected sexual intercourse with her. Under the circumstances, there was ample testimony to show that Mrs. Norris resisted to the extent of her ability and that the intercourse was by force and violence and without her consent.

The only questions to be determined are whether there is sufficient evidence in the record to support the finding that accused was the person who committed the offense and, if so, whether he shall be held accountable for his act.

Since the crime was committed at approximately 11:00 p.m., in a dark room lit only by occasional flashes of light from passing automobile lamps, it was difficult for Mrs. Norris to clearly see and distinguish her assailant and, although she remembered clearly that he was of a dark complexion and had very dark hair, she was not absolutely positive in her identification of accused, under oath, at the trial. Her husband also, though he saw a soldier standing with his back toward him within twenty or twenty-five feet of his

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home as he left for work that night shortly prior to the assault upon his wife, was unable to describe him with any greater degree of certainty than to say he was "dark complexioned and had black hair".

It, therefore, becomes necessary to inquire into such circumstantial evidences of fact as serve to connect accused with the crime. In doing so it is observed that accused was at Sear's Bar-Be-Cue Stand, a place next door to the scene of the crime, at or near the time of its commission. Although his companions recalled seeing him in or about Sears' Bar-Be-Cue Stand, which was only fifty yards at the utmost from the Norris home, at about 10:30 or 11:00 on the night in question, no one saw him thereafter until his friend and roommate, Plank, found him walking alone on the highway toward Plant City around midnight.

In addition, according to testimony of the provost marshal who made an investigation at the Norris home in the afternoon following the rape, accused's shoe fitted a rather well preserved footprint in damp, sandy soil found close to a window in the rear of the Norris home.

Thus it has been made to appear that accused was present in the immediate vicinity of the scene of the crime at about the time it was perpetrated and, as will appear later, he was unable to rebut the inference that he did, in fact, prowl about the Norris home just prior to the time of the rape. But there are other, far more cogent and compelling facts which link accused with the commission of the offense with which he stands charged.

When he left town to go to Sear's accused had in his possession a billfold or wallet which he was carrying in his pocket. This wallet contained, among other things, a social security card made out in his name. When he woke up in his room on the morning of 25 July 1943 the wallet was missing, and although he searched for it he did not see it again until it was shown to him by the provost marshal on the afternoon of the following day, at which time he admitted it was his. This was the identical wallet which Mrs. Norris took from the pocket of her assailant and threw out of his reach at the time of the rape upon her and which she picked up from the floor immediately after the man who assaulted her had fled.

Just prior to the assault Mrs. Norris had prepared to go to bed and nurse her baby. She had obtained and conveniently placed a flashlight of peculiar design and unique marks of identification. Not only was the glass lens cracked in a manner definitely known to both Mr. and Mrs. Norris, but the original spring, which held the battery in contact with the bulb, had been broken and replaced with

a homemade spring by Mr. Norris. Both husband and wife testified as to these facts. According to Mrs. Norris her assailant seized the flashlight while in her room and took it with him when he fled.

When accused was in his room after he and his companion, Plank, had returned by truck to Plant City before curfew on the night of 24-25 July 1943, Plank noticed a flashlight in accused's pocket and upon inquiry was told by accused that he did not know where he had gotten it. Later, the trousers, the hip pocket of which contained the flashlight, were, among other things, checked by accused at the U.S.O. This bundle of effects was obtained by the military police authorities and when the flashlight was taken from the hip pocket of accused's trousers, in his presence, he admitted it was the flashlight as to which Plank had inquired and which accused had in his pocket on the early morning of 25 July 1943 without knowing where he had obtained it. At the trial this flashlight was positively identified by the cracked lens and the makeshift spring as the one which was taken from Mrs. Norris' room by the intruder on the night of 24 July 1943.

Confronted with these strong, though circumstantial, evidences of his presence in Mrs. Norris' room on the night of the crime, the only defense offered by accused was a total lapse of memory for that period of time which would necessarily embrace that in which the rape was perpetrated. Having elected to offer this explanation of his mental condition he, of course, was estopped from categorically denying that he committed the offense and therefore could only say, when asked whether he raped Mrs. Norris, "I don't think I'm guilty".

This situation suggested his mental incompetency at the time of the offense. The court properly followed the provisions of the Manual for Courts-Martial, 1928, and caused accused to be examined by a board touching his sanity on the date of the offense, 24 July 1943, and at the time of trial. On the issue thus submitted the board made its report, in which they gave as their considered opinion, that accused was sane at the time of the crime and the trial; that he was mentally capable of distinguishing right from wrong; and that he was able to adhere to the right. Having heard all of the evidence the court was empowered to make its own findings on this question and properly did so, holding that accused was not, either at the time of the commission of the offense or at the trial, suffering from any mental disease or defect. Defense counsel objected to certain matter conceived to be gratuitous information offered by the board in its report, specifically that portion in paragraph 3, as follows:

> "Based on his statements and those of other persons in the record (of trial) as to amounts of alcohol taken, which was not excessive, the evidence as to

> his behavior and apparently mental reactions at the time of the alleged offense, it is our opinion that the enlisted man was mentally capable of distinguishing right from wrong."

Though the medical officers were expert opinion witnesses they were not entitled to find, and should not have stated it as their opinion, that the amount of alcohol taken by accused was not excessive. This was exclusively within the province of the court. However, it cannot be said that this was harmful or constituted a violation of any substantial right of accused.

Where conviction results from circumstantial evidence, the circumstances must not only be consistent with guilt but also must be inconsistent with innocence. The evidence must be such as to exclude every fair and rational hypothesis save that of guilt. It is inconceivable that someone should have taken accused's wallet from his person and after entering the Norris home dropped it on the floor of the room where the crime was committed and also have placed in accused's hip pocket, after the crime was committed, a flashlight taken from the scene of the crime. The chain of facts presented against accused exclude every reasonable hypothesis save that of his guilt and the conclusion that he committed the offense is inescapable.

7. In his action upon this case the reviewing authority included the following:

> "In view of the youth of the accused and other extenuating circumstances appearing in the record, it is recommended that the sentence be mitigated to dishonorable discharge, total forfeitures and confinement at hard labor for ten years and that the place of confinement be changed to the Federal Reformatory, Chillicothe, Ohio."

There are no other recommendations of clemency accompanying the record of trial.

8. Accused is 19 years of age. From information upon the charge sheet and in the record it appears that he was inducted and transferred to the Enlisted Reserve Corps on 26 February 1943. He was called to active duty at Camp Upton, New York, on 5 March 1943.

9. The court was legally constituted and had jurisdiction of accused and the 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 and the sentence. A sentence of death or imprisonment for life is mandatory upon conviction of a violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape, recognized as an offense of a civil nature and so punishable by penitentiary confinement of more than one year by section 2801, Title 22, Code of the District of Columbia.

William A. Rounds, Judge Advocate.

Charles Schlueter, Judge Advocate.

Herbert P. Frederick, Judge Advocate.

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

SPJGQ
CM 242557

1 NOV 1943

UNITED STATES)	ARMY AIR FORCES EASTERN
)	TECHNICAL TRAINING COMMAND
v.)	Trial by G.C.M., convened at
)	Miami Beach, Florida, 28
Second Lieutenant HARRY Q.)	September 1943. Dismissal.
CAUDELL (0-565010), Air)	
Corps.)	

OPINION of the BOARD OF REVIEW
ROUNDS, HEPBURN and FREDERICK, Judge Advocates

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: In that Second Lieutenant Harry Q. Caudell, Air Corps, 411th Training Group, Basic Training Center #4, Army Air Forces Technical Training Command, Miami Beach, Florida, did, at Miami Beach, Florida, on or about February 8, 1943, with intent to defraud, wrongfully and unlawfully make and utter to Chester A. Good, Proprietor of the Lincoln Road Liquor Store, a certain check in words and figures as follows, to wit:

"Mercantile National Bank
of Miami Beach

Check No. _____ Miami Beach, Florida Feb. 8 1943
Pay to the
Order of Cash $30.00
Thirty dollars and no cents - - - - - - - - - - - - - DOLLARS
For _____

H. Q. Caudell
0-565010 "

and by means thereof did fraudulently obtain from the said Chester A. Good, Proprietor of the Lincoln Road Liquor Store, Thirty dollars ($30.00) lawful currency of the United States, he the said Second Lieutenant Harry Q. Caudell, Air Corps, then well knowing that he did not have and not intending that he should have sufficient funds in the Mercantile National Bank of Miami Beach, for the payment of said check.

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

Specification 3: Same form as Specification 1, but alleging check dated March 23, 1943, payable to the order of Miami Beach Exchange, made and uttered to the Miami Beach Exchange, at Miami Beach, Florida, and fraudulently obtaining thereby $30.00.

Specification 4: In that Second Lieutenant Harry Q. Caudell, Air Corps, 411th Training Group, Basic Training Center #4, Army Air Forces Technical Training Command, Miami Beach, Florida, being indebted to Mrs. Martha Besch, of 1569 Michigan Avenue, Miami Beach, Florida, in the sum of one hundred dollars ($100.00) which represents a cash loan, which amount became due and payable on July 1, 1943, did, at Miami Beach, Florida, from July 1, 1943 to August 4, 1943, dishonorably fail and neglect to pay said debt.

Specification 5: (Finding of guilty disapproved by the reviewing authority.)

Specification 6: (Finding of guilty disapproved by the reviewing authority.)

Specification 7: (Finding of guilty disapproved by the reviewing authority.)

Specification 8: (Finding of not guilty.)

He pleaded not guilty to the Charge and its Specifications. He was found not guilty of Specification 8 of the Charge and guilty of the remaining Specifications and of the Charge. No evidence of previous

convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority disapproved the findings of guilty of Specifications 2, 5, 6 and 7, approved the sentence, and forwarded the record of trial for action under Article of War 48.

3. The competent evidence for the prosecution in support of the Charge and Specifications 1, 3 and 4 thereunder, approved by the reviewing authority, may be summarized as follows:

With reference to Specification 1. On 8 February 1943 the accused, at Miami Beach, Florida, obtained from Chester A. Good, Manager of the Lincoln Road Liquor Store, the sum of $30.00 in exchange for a check (Pros. Ex. 1) of the accused's of that sum payable to the order of "Cash" and drawn upon the Mercantile National Bank of Miami Beach. Payment of the check was refused by the drawee bank upon two occasions when it was presented for payment because of insufficient funds deposited therein by the accused (R. 10, 11). At the time the accused cashed the check he had on deposit with the drawee bank $10.55 (Pros. Ex. 5). On 4 May 1943 the accused made payment to Mr. Good, in the same capacity, of $3.00 on account of the obligation, which the latter applied on this check (R. 11).

With reference to Specification 3. On 23 March 1943 the accused, at Miami Beach, Florida, obtained from Store No. 1 of the Miami Beach Post Exchange the sum of $30.00 in exchange for his check (Pros. Ex. 3) in that amount drawn upon the Mercantile National Bank of Miami Beach. Payment was refused by the drawee bank when it was presented because of insufficient funds on deposit (R. 13). On the date he uttered this check accused had on deposit with the drawee bank $.70 (Pros. Ex. 5). The accused was notified of the dishonor of this check and made two installment payments in March and June and final payment in full on 3 September 1943 (R. 15).

With reference to Specification 4. On 29 June 1943 at Miami, Florida, the accused borrowed $100 from Mrs. Martha Besch and gave her his note payable two days after that date (R. 27, 28; Pros. Ex. 7). Mrs. Besch's husband had made the arrangements for the accused to borrow the money to be repaid two days later (R. 31). The accused failed to pay the note when it fell due. Mrs. Besch telephoned him upon four occasions in an effort to obtain payment but was unsuccessful in finding the accused at his home or his headquarters when she called. She left messages for him to telephone her. She heard nothing from him. About 15 July she was able to contact him and the accused promised faithfully to be at Mrs. Besch's office two days later to make payment in full. He failed to appear or to make payment. The obligation remains unpaid (R. 30).

4. The accused's rights as a witness were explained to him and he elected to testify under oath (R. 51). He testified that he is a Choctaw Indian 24 years of age. His education consists of high school and one year in business school. He enlisted in the Air Corps 9 June 1941 and was sent to Miami Beach 6 August 1942 to attend Officers' Candidate School (R. 52). While in OCS he was selected Squadron Commander of his squadron. He was commissioned 28 October 1942. Prior to graduation from OCS, he had never had a checking account in a bank. After opening his bank account he failed to "keep track" of checks written thereon (R. 53). He was married in March 1943. He had met his wife at Miami Beach in December 1942. When he graduated from OCS he had no money. He did not learn until the latter part of March that the two checks (one of which formed the basis of Specification 3) given to the PX had been returned by the bank because of insufficient funds (R. 59). At that time he tried to borrow money with which to cover the checks and finding that he was unable to do so he went to see Colonel Jones, his Commanding Officer, and explained his situation. Colonel Jones referred the matter to Colonel Apt, through whom arrangements were made whereby accused would pay 10 per cent per month on all of his debts. These payments were made for two months (R. 60). He was unable to continue payments thereafter because his wife was hospitalized, increasing his expenses. He borrowed $100.00 from Mrs. Besch in order to pay an indebtedness of that amount to Lieutenant Dix who was being transferred from Miami Beach (R. 61). He had learned that he could not borrow money in Miami unless some one else signed his note. He was expecting a visit from his mother in July and knowing that she would sign a note with him, he expected to borrow some money at that time. When she arrived he learned that he could not borrow the money because his mother did not own property in Florida and because "there is some law down here that a woman cannot enter a transaction of that sort". Consequently, he was unable to pay his debt to Mrs. Besch (R. 62). He admitted that Mrs. Besch called him on a Saturday and he promised to see her the following Monday and bring her the money (R. 63). About a week after he had cashed a check at Mr. Good's store, he passed the place of business one day and was called in and advised that the check had been returned for insufficient funds. He told Mr. Good to hold the check and that he would borrow the money with which to take it up (R. 63). He attempted to pawn his clothes in order to get some money, but was unable to do so. "I didn't keep an account of the amount of checks I have written. I really did never know exactly how much I had in the bank or exactly what checks were outstanding". (R. 64).

He further contended that, at the time he cashed the $30 check at the Miami Beach Post Exchange, he did not then know that he did not have sufficient funds on deposit with the drawee bank as he had not balanced his bank account (R. 74). He had had over "a dozen" checks, other than the two here involved, returned by the same bank because of insufficient funds (R. 76). The accused claimed that since 1 May 1943 he has paid approximately $300 on account of his debts (R. 77). He

had no source of income other than his Army pay (R. 72).

Captain Benjamin Grant testified that he is Army Emergency Relief Officer at Miami Beach Training Base. About February 1943 the accused sought to obtain a loan from the Army Emergency Relief. The accused stated that he had some outstanding obligations he wished to pay "and he manifested quite a bit of concern regarding the situation". The loan was not made because the accused did not or could not procure the approval of the Executive Officer. The accused approached the witness on another occasion "and he ennumerated the extent of his indebtedness at that time * * * the amounts in each case to different organizations, clothing stores and so forth, and also he indicated, which I had every reason to believe was correct, that he had been making a very substantial effort to clear them on his own accord, during the interval * * *. He had made rather substantial payments" (R. 56).

Mrs. Patricia Caudell testified that she and the accused were married 24 March 1943. At the time she understood that the accused was in debt "but did not realize how serious it was". She learned his financial condition the first of May and he and she went to see Colonel Jones. They cut down on their expenses, such as groceries. She cooperated with him in seeing creditors and in trying to establish a method of paying which would satisfy them (R. 80). She tried to borrow money from her parents and friends but was unable to do so. Their household is now being operated on a very strict budget. The accused gives all of his income to her. They have moved and their rent has been reduced substantially. "Our grocery bill has been cut in half the past few months and we don't go out or anything" (R. 81).

It was stipulated that if Major John J. Elliott were present he would testify that the accused was a Training Officer in the 404th Training Group from November 1942 to June 1943. During such period, the accused was under the observation and supervision of the witness, who was Commanding Officer of the 44th Training Wing. The accused "at all times performed his duties in a superior manner and was an outstanding Training Officer." (R. 82, 83).

It was stipulated that if Major Michael J. Pugh were present he would testify that for more than six months he had known the accused and has been familiar with his work. "That accused has at all times performed his duties in a superior manner and was an outstanding Training Officer." (R. 83).

5. With reference to Specifications 1 and 3 of the Charge, it was clearly shown by the prosecution and admitted by the accused that he did make and utter on the dates and at the place specified his two checks for $30 each drawn upon a bank in which at the time there were not sufficient funds of his on deposit with which to make payment, and that he did thereby obtain $60. The accused contended that he had no

intention to defraud because he did not know how much he had on deposit at the time as he never bothered to balance his checking account. His only source of income was his pay as an officer which he received about the first of each month. The copy of the ledger account with his bank showed that during a period of six months including the time involved in the subject case his account was negligible except for a few days after depositing his pay check. It was overdrawn upon numerous occasions. "Over a dozen" of his checks were returned because of insufficient funds. There was ample evidence to support the inference that he must have known there was not sufficient funds in the drawee bank when he cashed the two checks for $30 each. The cashing of a check is in itself a representation that there are sufficient funds on deposit with the drawee bank to provide for payment of the check. For one to do so knowing that such is not the case is obtaining money under false pretenses. The findings of the court are amply supported by the evidence.

With reference to Specification 4, it was clearly shown by the prosecution and admitted by the accused that he borrowed $100 from Mrs. Besch on 29 June 1943 with the distinct understanding that he would repay the loan within two days. Contrary to the promise accused failed to repay the loan. He completely ignored the obligation. At the time he made the loan he was in financial difficulties—indebted to numerous persons including holders of dishonored checks. He used the money to pay a creditor who was leaving the locality. His financial condition was such that it would have been a fair inference that he had no intention to repay the loan when he made it. He received his monthly pay on the day the obligation fell due but made no effort or attempt to pay it. He ignored the numerous messages from Mrs. Besch requesting payments and, two weeks after the note was due, when Mrs. Besch finally talked to him personally by phone, he promised to call at her office two days later and make payment. Again he failed to keep his promises and Mrs. Besch never, from that date to the date of the trial, saw him or heard from him. The failure of the accused to pay this indebtedness was more than a mere failure through misfortune or inability to meet the obligation. It was characterized by dishonorable conduct and evasion which is denounced by Article of War 95.

The mere failure of an officer to keep his promise to pay a debt is not a dishonorable act in violation of Article of War 95 unless the promise to pay is made with a false or deceitful purpose, or unless the failure to pay is characterized by a fraudulent design to evade payment. CM 220760 (1942).

"Accused was found guilty of dishonorable failure and neglect to pay two promissory notes owed by him and failure to keep a promise to pay another note, in violation of Article of War 95. There was evidence that accused was financially unable to meet all his debts, his

income in the Army being much smaller than it had been in civilian life, but that he could have made substantial partial payments on the notes in question. Held: The record is legally sufficient to support the findings of guilty. Failure by accused to meet his obligations to the extent his income permitted was dishonorable." CM 228894. Sec. 453(13), Bulletin, JAG, February 1943.

"Dishonorable neglect to pay debts is a violation of Article of War 95. Neglect on the part of an officer to pay his debts promptly is not of itself sufficient grounds for charges against him. Where the nonpayment amounts to dishonorable conduct, because accompanied by such circumstances as fraud, deceit, or specific promises of payment, it may properly be deemed to constitute an offense. Where the specification alleged that accused, as an officer, failed and neglected to pay debts, and the proof does not show such conduct with reference to the debts as would constitute an offense, although some of the debts had been due for more than seven months, a finding of guilty cannot be sustained." CM 121207. Sec. 453(14), Dig. Ops., JAG, 1912-40.

6. The original record of trial failed to show whether or not the accused was found guilty of the charge. The record was returned to the Trial Judge Advocate for an explanatory certificate. A corrective certificate in proper form executed by the authenticating officers has been inserted in the record stating that the accused was found guilty of the charge at the trial and the failure of the original record to show such fact was the result of inadvertence on the part of the court reporter. This procedure was authorized by paragraph 87b, page 75, MCM, 1928.

The court originally sentenced the accused "to be dismissed the service and to forfeit all pay and allowances due or to become due" (R. 85). Such a sentence is not authorized for a violation of Article of War 95. The sentence of the court upon conviction of a violation of Article of War 95 must be dismissal; nothing less in any event, and, if convicted of that alone, nothing more (par. 103, MCM, 1928). Evidently in recognition of this rule the court met again on 1 October 1943, revoked its former sentence, and sentenced the accused "to be dismissed the service" (R. 86). This procedure was authorized. CM 166782, Sec. 395 (37), Dig. Ops., 1912-40; CM 233806, Sec. 395(37), Bulletin of the JAG, Vol. II, No. 5, May 1943. The severity of the original sentence was not increased; hence there was no violation of Article of War 40. The action of the court, revoking its former sentence and adjudging a legal but lesser and mandatory sentence, was taken on 1 October 1943, prior to the date upon which the record of trial was authenticated and prior to its transmission to the convening authority (R. 85, 86). No irregularity appears in this respect.

The fact that the accused was not present when the court reconvened to reconsider the original sentence does not constitute an error or irregularity. The accused in such case may be present if required by the court, but his presence is otherwise not necessary (par. 83, MCM, 1928). Neither does the fact that Major Olivier, a member of the court who participated in the trial, was absent at the revision proceeding constitute a defect. Since five members who took part in the trial and original judgment were present when the court reconvened, it is immaterial that the number present was less than the original number of the court in the case (p. 457, Winthrop, (Reprint 1920)).

7. The record discloses that this officer is 24 years of age. He graduated from high school and attended a business school for one year. In June 1941 he enlisted in the service and was discharged in October 1942 to accept a commission as second lieutenant on 29 October 1942 in the Army of the United States. He graduated from the Officers' Candidate School at Miami Beach, Florida.

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, and to warrant confirmation of the sentence. A sentence of dismissal is mandatory upon conviction of violation of Article of War 95.

William H. Pounds, Judge Advocate.

Paul Stephen, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 4 NOV 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 Q. Caudell (0-565010), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings as approved by the reviewing authority and the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but that the 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 carry into effect the recommendation hereinabove made, should such action meet with approval.

T. H. Green,
Brigadier General, U.S. Army,
Acting The Judge Advocate General.

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

(Sentence confirmed but execution suspended. G.C.M.O. 376, 19 Nov 1943)

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

(115)

12 NOV 1943

SPJGH
CM 242561

UNITED STATES	)	ARMY AIR FORCES CENTRAL FLYING TRAINING COMMAND
v.	)	
Second Lieutenant JOHN W. MORTON (0-672173), Air Corps.	)	Trial by G.C.M., convened at San Marcos Army Air Field, San Marcos, Texas, 1 October 1943. Dismissal and total forfeitures.

OPINION of the BOARD OF REVIEW
DRIVER, LOTTERHOS and LATTIN, Judge Advocates

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

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

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

Specification 1: In that Second Lieutenant John W. Morton, Air Corps, Army Air Forces Navigation School, San Marcos Army Air Field, San Marcos, Texas, did, at San Antonio, Texas, on or about 29 August 1943, wrongfully strike Miss Claire Fortinberry on the head with a dinner plate or fragments thereof.

Specification 2: In that Second Lieutenant John W. Morton, Air Corps, Army Air Forces Navigation School, San Marcos Army Air Field, San Marcos, Texas, was, at San Antonio, Texas, on or about 29 August 1943 disorderly at or near the Plaza Hotel, San Antonio, Texas, in that he did throw beer bottles from his room in said Plaza Hotel onto or near the public streets and ways of the City of San Antonio, Texas.

Specification 3: In that Second Lieutenant John W. Morton, Air Corps, Army Air Forces Navigation School, San Marcos Army Air Field, San Marcos, Texas, having received a lawful order from Captain Frederick J. Foster, his superior

officer, on or about 14 July 1943, to report to Major Herschel Rubin, Flight Surgeon, the said Captain Frederick J. Foster being in the execution of his office, did, at San Marcos Army Air Field, San Marcos, Texas, on or about 14 July 1943 fail to obey the same.

Specification 4: In that Second Lieutenant John W. Morton, Air Corps, Army Air Forces Navigation School, San Marcos Army Air Field, San Marcos, Texas, did, at or near San Marcos Army Air Field, San Marcos, Texas, on or about 24 July 1943 wrongfully violate paragraph 2, Army Air Forces Regulations No. 25-13, issued by the Commanding General, Army Air Forces, in the execution of his office, reading in part as follows, to wit:

"2. No rated officer, flying officer, aviation cadet, enlisted man, or member of an aircrew or combat crew will be permitted to participate in aerial flights while receiving sulfonamide thereapy or for six days following the last dose of the drug. * * *."

in that said Second Lieutenant John W. Morton, a flying officer, on receiving sulfonamide therapy, did participate in an aerial flight less than six days after receiving the last dose of the drug.

CHARGE II: (Nolle prosequi entered).

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

3. Evidence for the prosecution:

a. Specifications 1 and 2: By written stipulations signed by the trial judge advocate, defense counsel and accused, it was shown that on 27 August 1943, the accused and Second Lieutenant James K. Jordan obtained a room for the week-end at the Plaza Hotel, San Antonio, Texas. The room, No. 1203, was located on the twelfth floor and faced the north side of the building. On Sunday afternoon, 29 August 1943, the accused and Lieutenant Jordan ordered approximately 24 or 26 bottles of beer sent to their room, out of which 10 or 12 bottles were consumed by the accused, and the balance by Jordan and two lady friends. The accused and Jordan

spent a portion of the afternoon throwing empty beer bottles out of the hotel window into the San Antonio River, which runs along the north side of the hotel. The falling beer bottles created a disturbance as they could be seen by the people below. The river was open to and used by the public for the navigation of small boats. The banks of the river and the adjoining streets also were open to public use (R. 6; Ex. C).

Sometime between 7:00 and 8:00 p.m. accused picked up a dinner plate and threw it out of the window. The plate slipped from his hand and curved so that it hit a ledge on the extension of the hotel. Some of the pieces struck Miss Claire Fortinberry, who was standing with a companion, on the South St. Mary's Street Bridge over the San Antonio River just north of the north wall of the Plaza Hotel. She was standing on a public street and in the immediate vicinity of the place where the beer bottles were thrown. Miss Fortinberry heard a "loud report", then felt her knees buckle under her and was "dazed". She was given first aid treatment at a fire station and later taken to the Santa Rosa Hospital, where three stitches were applied to a wound in her scalp. She also received two small cuts on her right shoulder. L. F. Workman, assistant manager of the Plaza Hotel, was informed that a woman had been hit in the head with a plate thrown from a window of the hotel. He picked up the broken pieces of a plate bearing the markings of the Hotel Plaza. A check was made of food orders delivered to the hotel rooms and it was discovered that the plate was missing from a tray sent to room 1203, the room occupied by accused. Reports were received during the afternoon of beer bottles being thrown out of the window of room 1203 (R. 6-7; Exs. C, D, E, F and G).

b. Specifications 3 and 4: The testimony of Captain Frederick J. Foster, Medical Corps, San Marcos Army Air Field, and stipulations signed by the trial judge advocate, defense counsel and accused show that on 14 July 1943, accused reported to the dispensary with a "urethra discharge", which was diagnosed as gonorrhea. Captain Foster filled out the necessary forms and ordered accused to take them to Major Herschel Rubin, the Flight Surgeon. Accused did not report to Major Rubin. On 21 July 1943, accused was receiving sulfonamide therapy and took sulfathiazole orally. On 24 July 1943 he participated in an aerial flight by piloting an AT-7 airplane. On this occasion, the accused took off in the plane, made eight landings, and checked the plane in after flying it for an hour and thirty minutes. This flight was in violation of Army Air Forces Regulations No. 25-13 dated 3 December 1942, which prohibits participation in aerial flights while receiving sulfonamide therapy or for six days following the last dose of the drug. On 26 August 1943, Major Rubin chanced to check the record of accused in the Registrar's Office of the hospital and noticed that he was "carded for record only" with a diagnosis

of "New, Gonorrhea, acute". Major Rubin checked with Captain Foster, and found that accused had failed to report to him as ordered by Captain Foster. As a result accused had not been grounded from flying duty. On 27 August 1943 accused reported to Major Rubin at the latter's request. When asked why he had failed to carry out Captain Foster's orders accused stated he had not reported because "he did not want the nature of his illness entered on his records". Accused was grounded from flying duty the same day pending evidence of cure (R. 7-9; Exs. C, H, I, J).

4. No evidence was offered by the defense. The accused elected to remain silent (R. 10).

5. a. As to Specifications 1 and 2, the written stipulations show and the pleas of guilty admit that on 29 August 1943, the accused threw a number of empty beer bottles and a dinner plate from the window of his hotel room located on the twelfth floor of the Plaza Hotel, San Antonio, Texas. The bottles were thrown into the San Antonio River, which was open to river traffic and was bordered by public streets. The plate thrown by accused slipped from his hand and fragments struck and injured Miss Claire Fortinberry, who was standing on a bridge that crossed the San Antonio River. The actions of accused created a disturbance noticed by people standing on the street below. His conduct in throwing the bottles and the dinner plate from the window was obviously disorderly.

b. Specifications 3 and 4: The evidence and stipulations show and the pleas of guilty admit that on 14 July 1943, Captain Frederick J. Foster, being in the execution of his office, ordered accused to report to the Flight Surgeon, Major Herschel Rubin. Accused did not report as ordered, and gave the excuse that he did not want the nature of his illness (gonorrhea) entered on his records. On 21 July 1943, accused was receiving sulfonamide therapy and took sulfathiazole orally for his illness. On 24 July 1943, he participated in an aerial flight by piloting an airplane, in direct violation of Army Air Forces Regulations prohibiting officers from participating in aerial flights while receiving sulfonamide therapy or for six days following the last dose of the drug.

6. The accused is 23 years of age. The records of the Office of The Adjutant General show his service as follows: Aviation Cadet from 4 July 1942; appointed second lieutenant, Army of the United States, and active duty, 16 February 1943.

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

trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 96th Article of War.

Samuel M. Rivera, Judge Advocate

F. J. Lotterhos, Judge Advocate

Norman D. Cotton, Judge Advocate

1st Ind.

(120)

War Department, J.A.G.O., 16 NOV 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 John W. Morton (O-672173), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. The accused on 14 July 1943, reported to the dispensary suffering from gonorrhea, was ordered by the medical corps captain in charge to report to the flight surgeon and failed to report as ordered (Spec. 3). Although accused was receiving sulfonamide therapy and took sulphathiazole orally on 21 July, he participated in an aerial flight by piloting an airplane on 24 July, in violation of Army Air Forces Regulations prohibiting officers from participating in such flights for six days following the last dose of the drug (Spec. 4). On 29 August, while on leave in San Antonio, Texas, the accused threw a number of beer bottles from the window of his twelfth floor hotel room into the San Antonio River which was open to river traffic and was bordered by public streets (Spec. 2) and also threw out of the window a dinner plate which slipped from his hand, broke against a ledge on the hotel building, and the fragments struck and seriously injured a woman pedestrian (Spec. 1). I recommend that the sentence to dismissal and total forfeitures be confirmed, but that the forfeitures be remitted, and that the sentence as thus modified be carried into execution.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action carrying into effect the recommendation made above.

T. H. Green,
Brigadier General, U. S. Army,
Acting The Judge Advocate General.

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

(Sentence confirmed but forfeitures remitted. G.C.M.O. 5, 6 Jan 1944)

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

SPJGK
CM 242604

19 NOV 1943

UNITED STATES v. Second Lieutenant JAMES H. ROUSH (0-1177169), Field Artillery.	THIRD SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Camp Reynolds, Greenville, Pennsylvania, 4 and 5 October 1943. Dismissal and confinement for five (5) years.

OPINION of the BOARD OF REVIEW
LYON, HILL 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. The accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of Article of War 58.

Specification: In that 2nd Lieutenant James H. Roush, Company A, Tenth Battalion, Third Training Regiment, did, at Shenango Personnel Replacement Depot, Transfer, Pennsylvania, on or about 19 April 1943, desert the service of the United States and did remain absent in desertion until he was apprehended at Chicago, Illinois on or about 6 August 1943.

CHARGE II: (Nolle prossed).

Specification: (Nolle prossed).

CHARGE III: Violation of 94th Article of War.
(Finding of guilty disapproved by reviewing authority).

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

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

Specification 1: In that 2nd Lieutenant James H. Roush, Company A, Tenth Battalion, Third Training Regiment, did, at Youngstown, Ohio, on or about 1 April 1943, with intent to defraud, wrongfully and unlawfully make and utter to Pick-Ohio Hotel, in Youngstown, Ohio, a certain check in words and figures as follows, to wit:

88-214

Denton, Texas, April 1, 1943 No. 10
DENTON COUNTY NATIONAL BANK
of Denton, Texas

Pay to Pick Ohio Hotel or order $ 15.00

Fifteen and no/100 ----------Dollars

Lt James H. Roush
Company A, 10 BN, 3rd/Regt.

S P R D - Greenville, Pa.

and by means thereof did fraudulently obtain from said Pick-Ohio Hotel $15.00, he the said 2nd Lieutenant James H. Roush, then well knowing that he did not have and not intending that he should have sufficient funds in the Denton County National Bank of Denton, Texas for the payment of said check.

Specification 2: Same form as Specification 1, but alleging check dated 1 April 1943, made and uttered to Pick-Ohio Hotel, Youngstown, Ohio, and fraudulently obtaining $10 thereby.

Specification 3: Same form as Specification 1, but alleging check dated 7 April 1943, made and uttered to Pick-Ohio Hotel, Youngstown, Ohio, and fraudulently obtaining $15 thereby.

On being arraigned, accused moved for an inquiry into his mental condition and asked for the appointment of a board to inquire into his sanity. After hearing witnesses called in support of the motion and in opposition thereto, the court denied the motion. Charge II and its Specification were nolle prossed on motion of the prosecution. Accused pleaded not guilty to and was found guilty of all the remaining 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 ten years. The reviewing authority disapproved the findings of guilty of Charge III and its Specification; approved only so much of the sentence as provides for dismissal and confinement for five years, and forwarded the record for action under Article of War 48.

3. Second Lieutenant Guy Babcock, Company "E", Third Training Regiment, Greenville, Pennsylvania, testified that on 5 April 1943 he "took over" the officers' section of the Third Regiment. At that time accused, a second lieutenant, Field Artillery, was attached unassigned to the Third Training Regiment. He was officially carried on the morning reports of headquarters of that regiment. On 19 April, accused was reported as absent to Lieutenant Babcock who personally "made a search for him" and could not find him (R. 22, 23).

Major John C. Beattie, Infantry, was commanding officer of the Third Regiment during the month of April. On 19 April accused was reported absent to Major Beattie and the Major made a check on the officers' quarters but was unable to find accused. He had not given accused permission to leave the post (R. 26, 27).

Captain James T. Bailey at the time of the trial was official custodian of the morning report for Headquarters, Third Regiment, Camp Reynolds. Captain Bailey produced the "official copy of the morning reports for the months of April, July and August, 1943". "Official extracts" from the morning reports, pertaining to accused were offered and received in evidence. Pertinent entries showed that on 22 April 1943 accused was recorded as "dy to AWOL 1000z as of 19 April 43". This entry was initialed by "Bayard H. Hale", who was Adjutant of the Third Regiment in April. A further pertinent entry with respect to accused is "AWOL to abs conf Sixth Serv Comd Chicago Ill as of 6 August 43". This last entry was made under date of 8 August 1943 and was initialed by Captain Bailey (R. 28-30; Exs. 1, 2). On 6 August 1943 First Lieutenant Garfield James Campbell, Military Police, 1689th Service Unit, Chicago, Illinois, saw accused about 12:45 p.m. in the Illinois Central Railroad Station in Chicago. He asked the accused to identify himself, which accused did. Lieutenant Campbell took accused to the MP barracks and there told him that there was information that accused was absent without leave and asked him if he cared to make at that time "a voluntary statement, whatever he said could be used for or against him as evidence in event of any trial", whereupon accused told Lieutenant Campbell that he had been gone "roughly he thought about sixty days". Accused explained his reason for going "AWOL" by saying "'Well, I didn't like the idea of going overseas'". After accused made his statement he was confined in the lockup until an official from his organization called for him about four days later (R. 32, 33).

Mr. Henry D. Whitcombe, Assistant Manager of the Pick-Ohio Hotel at Youngstown, Ohio, testified that in March or April a "Lieutenant Roush", whom he failed to identify in the courtroom, identified himself to the witness by his officer's identification card. Mr. Whitcombe testified further that this "Lieutenant Roush" cashed, through him, three checks which he identified on the witness stand and which were introduced in evidence. The maker of these checks was "Lt. James H.

Roush", described on two of the checks as "Co. A., 10 BN. 3RD Regt SPRD Greenville, Pa". On the face of the check bearing the earliest date appears the number "O-1177169". The witness testified that the "officer's number" appearing on the officer's identification card presented by Lieutenant Roush was the same as the number on the face of the check and, further, that the picture on this identification card "agreed" with the person who cashed the checks. The Army Serial Number of accused is O-1177169 (Charge Sheet). The checks were dated 1 April, 1 April, and 7 April, and were for $10, $15, and $15, respectively, all drawn on Denton County National Bank of Denton, Texas. The checks were drawn to the order of the Pick-Ohio Hotel. Mr. Whitcombe testified that he deposited these checks in the account of the hotel and that they were returned marked "insufficient funds". The hotel has never been reimbursed (R. 34-35; Exs. 10, 11, 12).

Sergeant Daniel F. Duggan of the Finance Department of Camp Reynolds, saw accused sign his name "James H. Roush" at the bottom of a voucher which was marked in evidence "Exhibit No. 9, Page 2-1" (R. 36, 37; Ex. 9, p. 2-1).

Clarence N. Hough, bank teller of Greenville, Pennsylvania, testified that he had been a teller at The First National Bank in that city about twenty years; that it had been his business to identify and verify signatures on checks; that in his experience he had detected quite a few forgeries; that he had studied articles and books on the subject of the identification of checks; and that he had previously testified in "cases". This witness described similar characteristics appearing in the formation of some of the letters in the signatures appearing on Exhibits 9, 10, 11 and 12. He testified that the signatures appearing on the three checks and the voucher, Exhibits 9, 10, 11 and 12 were written by the same person (R. 18-22).

The deposition of J. E. Savage, Vice President of the Denton County National Bank of Denton, Texas, the bank on which the checks were drawn, was received in evidence without objection (R. 36; Ex. 13). Mr. Savage testified that Lieutenant James H. Roush had an account with his bank until 7 May 1943, when the account was closed. He testified that on 1 April 1943 this account was overdrawn $5.78 and was overdrawn a similar amount on 7 April 1943. A transcript of this account showed no deposits from 1 April until 7 May 1943, at which time there was deposited the sum of $7.03 which deposit liquidated the then existing debit balance (Ex. 13). Evidence of the prosecution showed that accused presented to the finance office at his station a claim or voucher for $62.20 for travel between 20 and 23 March 1943. On the face of the voucher is a statement of receipt of payment dated 5 April 1943. Sergeant Duggan testified that accused was paid (R. 36-38; Ex. 9, p. 2-1).

Accused made an unsworn statement through counsel in which he denied "emphatically that it was ever his intention to desert the service"; that "During the entire period of his absence he never wore

anything but the service uniform". He claimed with reference to the checks that he -

> "* * * dealt with the bank in Texas; the last statement of his account was received some time prior to the issuance of these checks. He was not certain whether he had overdrawn his account or not. His custom was that when he received a statement as to an overdrawal, he immediately made it good. * * * He never received notice that an overdraft in the sum of these checks had been presented and had no knowledge of them from his bank. If he had, he would have made them good. * * * The checks themselves are not in large amounts. It never was his intention to defraud. There is this bank account in the name of the accused, and there is this statement from the bank which shows that he made up the deficiency when he was apprised of the same. At the most * * * he was guilty of an error in computation as to what he had in the bank account at the time he drew the checks" (R.51).

4. The evidence shows that accused was absent without leave from 19 April 1943 until he was apprehended in Chicago by Lieutenant Campbell of the Military Police on 6 August 1943. The initial absence of accused on 19 April 1943 was shown by an entry on the official morning report to that effect, entered as of that date and initialed by "Bayard H. Hale", the then Adjutant of the Third Regiment. This officer was not called as a witness. It is presumed that entries on a morning report are made by the proper officer (C.M. 233121 Patton). The absence of accused was unauthorized. He was absent for over three months. In addition, there is his admission that he was "AWOL" because he did not wish to go overseas. The court was justified in finding the accused guilty of desertion.

With respect to the case of the three checks, drawn on 1 and 7 April, the proof is clear that they were cashed by accused and that at the time the checks were cashed the account of accused was overdrawn. Undoubtedly accused knew the condition of his account. While monthly statements are not rendered always by banks in the case of inactive accounts, a bank will not ordinarily fail to call a customer's attention to an existing debit balance. It was within the power of accused to show that the bank had not rendered him such a statement. A bank official was available. It was incumbent on accused to explain why he was mistaken as to his balance, if such were the case. There can be no question that accused knew his account was inadequate to meet any of the checks. Nor can there be any doubt that accused did not intend to deposit funds for the payment of these checks, as is further alleged in the Specifications of Charge IV. This intent is properly and justly inferred from the fact that he made no deposits in his account, although during the month of April he received his Army salary and a further sum of $62.20 paid him by the Army on 5 April 1943. These facts unexplained prove guilty knowledge and wrongful intent.

5. The defense counsel made a motion in the nature of a special plea and requested the court to recommend the appointment of a board for the purpose of determining the sanity of the accused charging "lack of mental capacity to understand the nature of the acts charged" (R. 8). The court heard testimony on this motion in behalf of the accused (R. 9, 10, 11, 12, 13, 14, 15), and in behalf of the prosecution (R. 16, 17). After hearing this testimony the court overruled the motion. The action of the court was proper in that having heard evidence on the issue thus raised, it determined as an interlocutory question, that the accused was mentally responsible. A person is presumed to be sane and a mere assertion that the person is insane is not necessarily and of itself enough to impose any burden of inquiry upon the court. (MCM, 1928, par. 63, page 49). The court is empowered to constitute itself the judge of the extent to which the burden of inquiring into the mental condition is imposed upon it. (Dig Ops, JAG, 1912-1940, Sec 395 (36), page 227). Where there is no substantial evidence of insanity the presumption of sanity contemplated in paragraphs 63 and 112, MCM, 1928, is operative, and it is not necessary to introduce in evidence the finding of a medical board appointed at request of the defense counsel in order to enable the court to dispose of the question of the mental condition of the accused. (Dig Ops, JAG, 1912-1940, Sec 395 (36), page 227). The evidence adduced by the witnesses for the accused himself was amply sufficient to sustain the ruling of the court in denying the motion. The testimony introduced by the prosecution in rebuttal of the motion of the accused was overwhelming. The neuropsyciatrist of the Station Hospital, who had the accused under observation for a period of twelve days and who was certainly competent to judge his condition found

> "no evidence of mental disease; he was well oriented; in good contact with his surroundings; he displayed no abnormality of behavior; he demonstrated no delusions or hallucinations" (R. 16).

Thus the court, by the compelling nature of the evidence, properly overruled the motion.

6. Accused is 26 years of age. He is a high school graduate and is married. In private life he was employed as a clerk at $35 per week. He was commissioned second lieutenant, Field Artillery on 4 February 1943. There was prior enlisted service from 4 August 1942 to 3 February 1943.

7. The court was legally constituted and had jurisdiction over the person and the subject matter. There were no errors injuriously affecting the substantial rights of accused committed during the trial.

The record is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of violation of Article of War 95 and penitentiary confinement authorized upon conviction of violation of Article of War 58.

_____, Judge Advocate.

_____, Judge Advocate.

(On leave)_____, Judge Advocate.

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SPJGK
CM 242604 1st Ind..

War Department, J.A.G.O., 8 DEC 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 James H. Roush (O-1177169), Field Artillery.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence as approved by the reviewing authority and to warrant confirmation thereof. I recommend that the sentence be confirmed and carried into execution, and that the Eastern Branch, United States Disciplinary Barracks, Beekman, New York, 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 Ex. action.

(Sentence confirmed. G.C.M.O. 67, 15 Feb 1944)

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

(129)

SPJGN
CM 242605

UNITED STATES	9 NOV 1943 THIRD SERVICE COMMAND ARMY SERVICE FORCES
v.	Trial by G.C.M., convened at Camp Reynolds, Pennsylvania, 27 September 1943. Dismissal.
Second Lieutenant WALTER B. BEAUCHAMP (0-1175941), Field Artillery.	

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

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

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

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

Specification 1: In that 2nd Lieutenant Walter B. Beauchamp, Company "D", Third Training Regiment, did, at Shenango Personnel Replacement Depot, Transfer, Pennsylvania, on or about 21 August 1943, feloniously take, steal and carry away one Colt automatic pistol, calibre .45, of the value of about $26.42, the property of 2nd Lieutenant Schuyler W. Miles, Jr.

Specification 2: In that 2nd Lieutenant Walter B. Beauchamp, Company "D", Third Training Regiment, did, at Shenango Personnel Replacement Depot, Transfer, Pennsylvania, on or about 1 September 1943, feloniously take, steal and carry away two 4/5 quart bottles of Rum, of the value of $8.20 and one Case hunting knife with leather sheath, of the value of about $4.00, the property of 2nd Lieutenant Lloyd W. Swan.

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

Specification 1: In that 2nd Lieutenant Walter B. Beauchamp, Company "D", Third Training Regiment, did, at Shenango Personnel Replacement Depot, Transfer, Pennsylvania, on

or about 1 September 1943, wrongfully and without proper authority have in his possession one Colt automatic pistol, Calibre .45, of the value of about $26.42, the property of 2nd Lt. Schuyler W. Miles, Jr.

Specification 2: In that 2nd Lieutenant Walter B. Beauchamp, Company "D", Third Training Regiment, did, at Shenango Personnel Replacement Depot, Transfer, Pennsylvania, on or about 1 September 1943, wrongfully and without proper authority have in his possession two 4/5 quart bottles of Rum and one Case Hunting knife with leather sheath, the goods and chattels of 2nd Lieutenant Lloyd W. Swan.

He pleaded not guilty to and was found guilty of all Charges and Specifications. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for one year. The reviewing authority approved only so much of the sentence as provides for dismissal from the service and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that Lieutenant Schuyler William Miles, Jr., on 20 August 1943 had a pistol with unique identifying marks which had been given to him by his father, who had used it in the last war. He kept it locked in his foot locker and discovered its absence on the afternoon of 21 August 1943. He reported its loss to his battalion and regimental commanders and on the next day he notified the other officers in the barracks about the missing pistol, soliciting their assistance in securing its return. Before leaving for a new station on 23 August 1943, he asked the accused "to keep a lookout for the gun", telling him if it was returned no charges would be made. The gun was next seen by Lieutenant Lloyd W. Swan on or about 1 September 1943 in the possession of the accused who was cleaning it, but on request permitted Lieutenant Swan to examine it. On that evening Lieutenant Swan missed two 4/5 quarts of rum and a hunting knife and sheath which he suspected the accused of taking. Accordingly he told the accused on the morning of 2 September 1943 that he knew whose pistol it was and that, unless his rum and knife were returned by 0800 o'clock, he would see the Colonel. The accused admitted having the knife which he then returned, but denied having the rum. Later, about 0730 o'clock the accused advised Lieutenant Swan that a bottle of rum was on accused's bed where its owner recovered it. However, the other bottle was not recovered until after a conference with the regimental commander in which the accused denied stealing the rum and knife but insisted he was holding them merely to enforce payment from their owner of his claimed pro rata share of the expenses of a party

upon which the two officers and several others had gone sometime before, with the advance understanding that the accused would pay the expenses and that the others would reimburse him after the party. This arrangement was admitted by Lieutenant Swan as well as nonpayment to the accused. At the conference the accused, after proper warning of his rights, admitted his possession of the pistol, which he claimed to have found upon his bed with a note attached thereto bearing the name of Lieutenant Miles but stated that he had done nothing about it because he "did not believe it the wise thing to do in view of the way he obtained it". The preceding day the accused had been seen with the pistol by two other officers. He had told one that it belonged to a civilian who wanted $35 for it and the other that he had purchased it from a former soldier who had been in the Ordnance Department (R. 8, 11-13, 14-21, 22, 25-27; Ex. "1").

Lieutenant Miles' father identified the pistol which was introduced into evidence and its value was shown to be $26.42. Lieutenant Swan testified that the value of the knife and sheath was about "$3.00 or $4.00" and that of the rum about $8.45. These items were also identified and admitted into evidence (R. 9-11, 27-28).

4. The evidence for the defense was adduced after the court had overruled a motion for findings of not guilty of all Charges and Specifications and consists of the accused's testimony which was elicited after full advice concerning his rights as a witness. He testified that he had a wife and two children, that he and Lieutenant Swan, with two other officers, had had a party sometime before when he had paid all expenses upon an agreement that he would be reimbursed by the others for their share which was $6.30 each and that, although Lieutenant Swan had agreed to pay him, he had received no payment whatsoever and the other officers denied the debt. He admitted taking the knife with its sheath and the rum which he intended to hold to enforce payment from Lieutenant Swan. When Lieutenant Miles missed his pistol the accused had requested a "shakedown" of the barracks but no search was made and thereafter on 31 August 1943, upon lying down upon his bed, he felt something hard which he found to be the pistol with an unsigned typewritten note attached reading "Lieutenant Miles' belonging, please return". On 1 September 1943 he had told Lieutenant Swan that he would send the gun to Lieutenant Miles but, before he was able to do so, the conference in the Colonel's office had occurred. He had destroyed the note and had taken the gun home with him on the night of 1 September 1943 for safekeeping but had brought it back to the post the next day and admitted telling different stories about having it in his possession as he knew that "some one in the barracks, or some one in the surrounding barracks had taken the gun"; and he "didn't want to get any one in trouble" because "it was none of my business except to see he got the gun back" (R. 33-39).

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5. Specifications 1 and 2, Charge I, allege that the accused at Transfer, Pennsylvania, feloniously took, stole and carried away one Colt automatic pistol, caliber .45, of the value of about $26.42, the property of Second Lieutenant Schuyler W. Miles, Jr. and two 4/5 quart bottles of rum and one Case hunting knife with leather sheath of the aggregate value of about $12.20, the property of Second Lieutenant Lloyd W. Swan on 21 August 1943 and 1 September 1943, respectively. The offenses thereby alleged constitute larceny which is defined as follows:

> "Larceny is the taking and carrying away, by trespass, of personal property which the trespasser knows to belong either generally or specially to another, with intent to deprive such owner permanently of his property therein. (Clark.)" (MCM, 1928, par. 148g).

The evidence conclusively shows that the accused, shortly after the owner of the pistol missed it from his locked foot locker and had departed, had it in his possession and told widely varying stories about his possession thereof. This alone is sufficient to raise a presumption that he stole it because, according to his own testimony, his acquisition of it was under circumstances calculated to arouse suspicion, and he knew to whom it belonged (CM 226734 (1942), Bull. JAG, 1942, Vol. I, p. 364). The accused's explanation of his possession of the pistol is unconvincing; and his actions relative thereto after it had been seen in his possession by other officers appear more consistent with guilt than innocence. The loss of the pistol was accompanied by such notoriety that its recovery by a comrade with purer motives and intent would have certainly been immediately proclaimed, and its return expedited. Consequently, the conclusion is inescapable that the accused feloniously acquired the gun and intended to deprive the owner permanently of his property therein. The findings of guilty of Specification 1, Charge I, are, therefore, beyond a reasonable doubt, supported by the evidence.

However, the same is not true of Specification 2, Charge I, because, although the evidence is sufficient to show that the articles described therein were feloniously taken, the testimony of the accused relative to his intent to hold them as security for an alleged debt due him by their owner, who in part corroborates the accused's explanation, prevents it from being established beyond a reasonable doubt that he intended to deprive the owner permanently of his property therein (CM 227743 (1942), Bull. JAG, 1942, Vol. I, p. 364). An essential element of the offense of larceny is, therefore, absent and the evidence for such reason is insufficient to establish beyond a reasonable doubt the offense alleged in Specification 2, Charge I, and to support the finding of guilty thereof.

6. Specifications 1 and 2, Charge II, allege that the accused at Transfer, Pennsylvania, on or about 1 September 1943, "wrongfully and without proper authority" had in his possession certain described articles,

specified and recited as the property of others as in the respective Specifications of Charge I. The offenses are alleged as violations of Article of War 96.

The inclusion of these Specifications is, at least in so far as they relate to the pistol, superfluous because one guilty of larceny, of necessity, at some time has the property so acquired wrongfully and unauthorizedly in his possession. However, no injury to the accused's substantial rights resulted although such practice is not to be commended. The evidence, nevertheless, beyond a reasonable doubt shows that all of the described articles were wrongfully in the accused's possession which under the circumstances shown clearly constituted conduct of a nature to bring discredit upon the military service and action on the part of accused which was prejudicial of good order and military discipline. The evidence, therefore, conclusively supports the findings of guilty of Specifications 1 and 2, Charge II, and of Charge II.

7. The accused is about 31 years of age. The War Department records show that he had enlisted service from about July 1941 until 14 January 1943 when, upon completion of Officers' Candidate School, he was commissioned a second lieutenant and that he has had active duty as an officer from the latter date.

8. The court was legally constituted. 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 Specification 2, Charge I; legally sufficient to support the findings of guilty of Specification 1, Charge I, Charge I and Charge II and its Specifications and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of violations of Articles of War 93 or 96.

Abner E. Lipscomb, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

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SPJGN
CM 242605

1st Ind.

War Department, J.A.G.O., 16 NOV 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 Walter B. Beauchamp (0-1175941), Field Artillery.

2. I concur in the opinion of the Board of Review that the record of trial is not legally sufficient to support the finding that the accused feloniously stole two bottles of rum and a Case hunting knife (Spec. 2, Chg. I), legally sufficient to support the other findings, and the sentence as approved by the reviewing authority, and legally sufficient to warrant confirmation thereof. I recommend that the sentence of 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 foregoing recommendation, should such action meet with approval.

T. H. Green,
Brigadier General, U. S. Army,
Acting The Judge Advocate General.

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

(Finding of guilty of Specification 2, Charge I, disapproved. Sentence confirmed. G.C.M.O. 405, 22 Dec 1943)

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

(135)

SPJGQ
CM 242648

4 NOV 1943

UNITED STATES	SAN ANTONIO AIR SERVICE COMMAND
v.	Trial by G.C.M., convened at Fort Sumner, New Mexico, 29 September 1943. "Dishonorably discharged", total forfeitures and confinement for one (1) year.
Second Lieutenant BILLIE E. BALL (0-573102), Air Corps.	

OPINION of the BOARD OF REVIEW
ROUNDS, HEPBURN and FREDERICK, 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 2nd Lt. Billie E. Ball, 472nd Service Squadron, did, at Army Air Forces Pilot School (Advanced 2-Engine), Ft. Sumner, New Mexico on or about 5th June, 1943, feloniously embezzle by fraudulently converting to his own use sums of money aggregating $695.00, the property of the 328th Sub-Depot Civilian Mess fund, entrusted to him as Officer in charge of said Mess.

The motion of defense counsel to make the Specification more definite and certain by stating that the accused feloniously embezzled by fraudulently converting to his own use the sum of four hundred and ninety-five dollars cash and one check in the sum of two hundred dollars, property of the 328th Sub-Depot Civilian Mess Fund, was denied. The accused then pleaded guilty to the Charge and Specification. The court found him guilty of the Charge and Specification, and sentenced him to be "dishonorably discharged" the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct, for one year. No evidence of previous convictions was submitted. The sentence was approved by the reviewing authority and the record forwarded "for appropriate action, pursuant to the 48th Article of War".

3. The competent evidence produced at the trial by the prosecution shows that the accused was commissioned second lieutenant, Army of the United States, on 3 March 1943, upon his graduation from Officers' Candidate School at Miami Beach, Florida, and assigned to the 472nd Service Squadron at Fort Sumner, New Mexico, where shortly after his arrival he was put in charge of the 328th Sub-Depot Civilian Mess fund (R. 5, 39). Captain H. A. Cresse was the Mess Officer (R. 35). It appears that money was borrowed from numerous civilians with which to open a civilian mess at Fort Sumner and operated by Army personnel under AR 210-2290 (R. 73). Captain Cresse took charge from his predecessor without making an audit. He opened an account with the Fort Sumner Agency of the Citizens Bank of Clovis at Fort Sumner, New Mexico as depository for the receipts from the operation of the mess and permitted the accused to handle all of the collections and disbursements, including the authority to sign Captain Cresse's name to checks. The accused performed these duties from the latter part of March 1943 until about 15 July 1943 (R. 5). Enlisted men would actually collect the receipts from meals served to customers and then turn them over to the accused for deposit. No record was kept of these receipts other than that shown by the deposits made by the accused in the depository bank. In July accused was on ten-day leave and when Captain Cresse endeavored to pay the accounts payable of the mess he discovered there was a considerable deficit and an audit was made disclosing an operating loss or deficit (R. 6) estimated at $2537.66 (Pros. Ex. 4; R. 19). The records were, however, so incomplete that an accurate audit could not be made (R. 12). During this period of operation the accused had never disclosed any operating loss but had assured Captain Cresse that the mess was running along "all right" (R. 5).

When questioned regarding the matter the accused at first denied (Pros. Ex. 18) that he had embezzled any of the funds thus entrusted to him but later admitted that he had used $695 of the fund on 5 June 1943 by depositing that amount in his own personal account with the same bank depository. The deposit consisted of $495 in cash and a check for $200 drawn on the mess fund account payable to the accused. The accused had signed Captain Cresse's name to the check as maker (R. 33; Pros. Ex. 15, 17). He offered to make restitution and repay the sum of $1300 (R. 41).

4. The accused elected to testify under oath and related that he had purchased an automobile on 4 June 1943 for which he had given his check for $1000 as part payment. At the time he had only about $300 in this account at his bank so, on 5 June 1943, he deposited in his personal account, in order to make this check good, $695 belonging to the mess fund. Of this amount $495 was taken from the cash receipts of the mess fund and the remaining $200 was a check drawn on the mess fund deposited with the same bank (R. 67). He claimed he has since made full restitution of the $695 by having deposited his pay check for $301.13 in the mess fund

account on 2 July 1943 (R. 74; Def. Ex. A) and the payment of $393.87 to Captain Cresse in person on 28 September 1943 (R. 74; Def. Ex. B).

5. Embezzlement is the fraudulent appropriation of property by a person to whom it is entrusted or into whose hands it has lawfully come (MCM, 1928, par. 149h, p. 173).

In the subject case it was clearly shown by the prosecution and admitted by the accused that he had been entrusted with funds belonging to the 328th Sub-Depot Civilian Mess. He breached that trust on 5 June 1943 by applying to his own use $695 taken from that mess fund. The accused frankly admitted to his military superiors and on the witness stand that he had converted the amount to his own use. All of the elements of the crime described were present and therefore the findings of the court are amply sustained. The fraudulent intent may be inferred from the facts and circumstances.

6. The War Department records show that the accused was 25 years of age at the time of the commission of the offense. He served one three-year enlistment in the Infantry with honor and reenlisted in 1941. During his second enlistment he served as a first sergeant and master sergeant. He was sent to Officers' Candidate School at Miami Beach, Florida, from which he graduated on 3 March 1943. On that date he was discharged to accept a commission as second lieutenant in the Army of the United States.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. A sentence of dismissal, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year is authorized upon conviction of a violation of Article of War 93.

William A. Pounds, Judge Advocate.

Paul Hedlund, Judge Advocate.

Herbert B. Budnick, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 13 NOV 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 Billie E. Ball (0-573102), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed and carried into execution, and that the Eastern Branch of the United States Disciplinary Barracks, Beekman, New York, 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.

T. H. Green,
Brigadier General, U. S. Army,
Acting The Judge Advocate General.

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

(Sentence confirmed. G.C.M.O. 406, 22 Dec 1943)

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

N.D.

(139)

SPJGH
CM 242704

10 NOV 1943

UNITED STATES	)	CAMP ROBERTS, CALIFORNIA
	)	
v.	)	Trial by G.C.M., convened at Camp Roberts, California, 19 October 1943. Dismissal.
	)	
Second Lieutenant HOWARD L. JOBE (0-1323932), Infantry.	)	

OPINION of the BOARD OF REVIEW
DRIVER, LOTTERHOS and LATTIN, Judge Advocates

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

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

CHARGE: Violation of the 61st Article of War.

Specification: In that Second Lieutenant Howard L. Jobe, attached The IRTC School, Camp Roberts, California, did without proper leave, absent himself from his post and duties at Camp Roberts, California, from about 0600 4 October 1943, to about 0015 10 October 1943.

He pleaded 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. Evidence for the prosecution: An extract copy of the morning report of the Infantry Replacement Training Center School, Camp Roberts, California, to which accused was attached, showed him from duty to absent without leave as of 4 October 1943, and from absent without leave to duty as of 10 October 1943. According to the executive officer of the school accused was not present for duty between those dates and had no authority to be absent (R. 8-10; Ex. B).

4. Evidence for the defense: Captain George R. Ramel, executive officer and adjutant of the school, gave accused a rating of "very satisfactory", about three points below "Excellent", in the numerical rating

used by the school in grading its officer students. In the opinion of Captain Ramel accused was an "officer and a gentleman", and Captain Ramel would be satisfied to have accused in a unit under him (R. 7, 10-12).

Second Lieutenants J. W. Boyd, John R. Kent and Robert W. Coonrod, who knew accused at Fort Benning and served with him in the school at Camp Roberts, testified respectively that his reputation as an officer was "high", "excellent" and "superior". Letters from Major Philip P. Crowell and Captain William E. McKechnie recited that they had been acquainted with accused and his family for a number of years, that he was trustworthy, of excellent character and above average officer material (R. 12-16; Def. Exs. 1 and 2).

Major Ernest C. Peters, commandant of the school, rated the reputation of accused as "generally excellent". Major Peters had had tactical experience with troops since 1931 and was in command of a battalion at Oahu, Territory of Hawaii, and on Guadalcanal. He "would be glad" to have accused serve with him as a second lieutenant in command of one of his platoons (R. 17-18).

Accused elected to remain silent (R. 18).

5. It is shown by the evidence and admitted by the plea of guilty that accused without proper leave absented himself from his post and duties from about 4 October to 10 October 1943.

6. The accused is 31 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from September 1942; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School and active duty 16 August 1943.

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

Samuel M. Drucker, Judge Advocate

H. J. Fotterhos, Judge Advocate

Norman D. Lattin, Judge Advocate

1st Ind.

War Department, J.A.G.O., 15 NOV 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 Howard L. Jobe (0-1323932), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. The accused was absent without leave for about 6 days. It appears from the report of the investigating officer, among the papers accompanying the record of trial, that the accused went to Los Angeles on a week-end pass, drank heavily and returned to his post six days late suffering from extreme nervousness and illness brought on by his over-indulgence. I recommend that the sentence to dismissal be confirmed but, in view of all of the circumstances, 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 carrying into effect the recommendation made above.

T. H. Green,
Brigadier General, U. S. Army,
Acting The Judge Advocate General.

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

(Sentence confirmed but execution suspended. G.C.M.O. 393, 21 Dec 1943)

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

SPJGK
CM 242705

8 - NOV 1943

UNITED STATES	)	ARMY GROUND FORCES REPLACEMENT DEPOT NO. 2
v.	)	Trial by G.C.M., convened at Fort Ord, California, 19 October 1943. Dismissal and total forfeitures.
Second Lieutenant ROBERT J. HESTER (0-1313093), Infantry.	)	

OPINION of the BOARD OF REVIEW
LYON, HILL 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. The accused was tried upon the following Charge and Specification.

CHARGE: Violation of the 61st Article of War.

Specification: In that 2nd Lieutenant Robert J. Hester, Officers School, Army Ground Forces Replacement Depot No. 2, Fort Ord, California, did, without proper leave, absent himself from his organization at Fort Ord, California, from about 1 October 1943 to about 12 October 1943.

Upon arraignment the accused entered a plea in bar of trial upon the ground that disciplinary punishment had been imposed under the provisions of Article of War 104. The plea was not sustained by the court and thereupon the accused pleaded guilty to the Charge and Specification. Later in the trial the accused reiterated his plea of guilty to the Charge but was permitted by the court to withdraw his plea of guilty to the Specification and submit in lieu thereof a plea of not guilty to the Specification. He was found guilty as charged. No evidence of previous convictions was introduced. He was sentenced to dismissal and total forfeitures. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence shows that the accused, a second lieutenant, was a member of Officers School, Army Ground Forces Replacement Depot No. 2, Fort Ord, California. The prosecution introduced in evidence certified extract copies of the morning reports of the organization showing that accused was absent without leave from the school from 1 October 1943 to

12 October 1943 (R.10-14; Exs. 1 and 2).

After being advised by the investigating officer, Lieutenant Colonel Lewis D. Burkhalter, Jr., of his right not to make any statement and that any statement made could be used against him, the accused voluntarily made a sworn statement which was received in evidence as Prosecution's Exhibit No. 3 (R.15-17). Accused's statement discloses that he was absent without leave from 1 October 1943 to 12 October 1943. He stated that he was "down in the dumps" and left his station without any particular destination in mind, and that he finally wound up in Eureka, California, where he visited friends until apprehended by the civilian police 10 October 1943. The accused stated:

> "I would have returned to Fort Ord sooner if I had received money which I expected to get and which I tried to get by two wires to my Mother, on 5th and 9th of October, and one wire to my wife on the 6th of October, and a telephone call to my Mother on the evening of the 8th of October. I received about $10.00 from my Mother on the 8th of October."

Accused stated that after he was "picked up" by a civilian policeman, he communicated by long distance telephone with the assistant adjutant of his organization who authorized his release, after which he voluntarily returned to his station (Ex. 3).

4. For the defense and under a stipulation, there was introduced in evidence copies of telegrams from the accused to his mother dated 5 and 9 October requesting money "to return to camp" (R.17; Def. Exs. B and C).

The accused in testifying confirmed and reiterated the statements contained in his confession (Ex. 3). He stated that he entered the service as a member of the National Guard 25 November 1941, and that he had never been in "any trouble" either as an enlisted man or as an officer (R.19-21).

5. No discussion of the evidence is considered necessary. It clearly appears that the accused was absent without leave from his organization from 1 October 1943 to 12 October 1943, in violation of Article of War 61.

6. The accused upon his arraignment entered a plea in bar of trial (R.6). The plea is based solely upon a communication to the accused "by command of General Lockwood", Commanding General, Army Ground Forces Replacement Depot No. 2, Fort Ord, California (Def. Ex. A), as follows:

> "1. You are placed in arrest for violation of the 61st Article of War because of your unauthorized absence from 1 October 1943, to 12 October 1943. This arrest to continue pending disposition of the charges against you.

"2. The terms of your arrest are that you will confine yourself to an area not over one-quarters ($\frac{1}{4}$) mile from the flag pole on division hill, Army Ground Forces Replacement Depot No. 2, Fort Ord, California, except when actually engaged in prescribed training.

"3. Your attention is directed to the provisions of the 69th Article of War. Any breach of the terms of your arrest as outlined above will be considered a violation of that Article."

It is perfectly obvious that the communication is nothing more than an order of arrest, pending investigation and disposition of the charges, and does not by any stretch of the imagination purport to be in the nature of a punishment of the accused under Article of War 104. The court properly denied the motion.

7. Notwithstanding his plea of guilty to the Charge and Specification, when it appeared during the introduction of the evidence that the entry in the morning report concerning the absence of accused prior to 9 October was possibly based upon hearsay (R.14), the accused changed his plea of guilty to the Specification to a plea of not guilty, but reiterated his plea of guilty to the Charge. Thereafter when the prosecution offered in evidence the confession of accused (Ex. 3), in which the absence without leave was admitted, the defense objected upon the ground that there was no competent proof of the corpus delicti independent of the confession. The court overruled the objection. In view of the fact that accused in his testimony admitted his absence without leave, the question becomes moot.

8. The accused is 22 years and 9 months of age. The records in the Office of The Adjutant General show that accused attended Forrest Avenue High School two years and El Paso High School 1-1/2 years but did not graduate. He enlisted in Company G, 144th Infantry, Texas National Guard, 23 February 1939, which organization became Federalized 25 November 1940. Upon his graduation from the Infantry School, Fort Benning, Georgia, 5 March 1943, accused was commissioned a temporary second lieutenant, Army of the United States.

9. The court was legally constituted and had jurisdiction of the person and the subject matter. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 61.

Amy E. Gore, Judge Advocate.

Wm Trimble, Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 15 NOV 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 Robert J. Hester (O-1313093), 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. I recommend that the sentence be confirmed but that the forfeitures adjudged be remitted and that the sentence as thus modified 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 carry into effect the recommendation hereinabove made, should such action meet with approval.

T. H. Green,
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 Ex. action.

(Sentence confirmed but forfeitures remitted. Execution suspended. G.C.M.O. 395, 21 Dec 1943)

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

SPJGQ
CM 242706

27 NOV 1943

UNITED STATES	FORT ORD, CALIFORNIA
v.	Trial by G.C.M., convened at Fort Ord, California, 14 and 20 October 1943. Dishonorable discharge and confinement for five (5) years. Federal Correctional Institution, Englewood, Colorado.
Private JOHN F. PREZIOSI (20221682), Company A, 593rd Engineer Boat and Shore Regiment.	

HOLDING by the BOARD OF REVIEW
ROUNDS, HEPBURN and FREDERICK, Judge Advocates.

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1. The record of trial in the case of the soldier named above has been examined and for the reasons stated below is held by the Board of Review to be legally sufficient to support only so much of the finding of guilty of the Charge and its Specification as involves a finding of guilty of the lesser included offense of assault with intent to do bodily harm in violation of Article of War 93, and legally sufficient to support only so much of the sentence as involves dishonorable discharge, total forfeitures and confinement at hard labor for one (1) year in a place other than a penitentiary, or Federal correctional institution, or reformatory.

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private John F. Preziosi, Company A, 593rd Engineer Boat and Shore Regiment, Fort Ord, California, did, at Fort Ord, California, on or about 22 September 1943, with intent to commit a felony, to:wit, murder, commit an assault upon Sergeant Jack T. Crutchfield, 756 Field Artillery Battalion, Battery B, Fort Ord, California, by wilfully and feloniously pointing a dangerous weapon, to:wit, a rifle, at him and pulling the trigger thereof.

At the original session of the court accused pleaded not guilty to the Charge and Specification, and was found guilty of the Specification, except the words "murder" and "pointing a dangerous weapon, to: wit, a rifle, at him and pulling the trigger thereof" and substituting therefor, "to do him bodily harm" and "striking at him with a dangerous weapon, to: wit, a rifle", and guilty of the Charge. He was found not guilty of the excepted words. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for the period of five years. Evidence of one previous conviction was considered.

The court was then opened and the President announced the findings and sentence, whereupon the court adjourned 14 October 1943.

Six days later, 20 October 1943, before the record of trial had been either authenticated or submitted to the reviewing authority, the court was reconvened by the President, revoked its former findings and sentence, and found the accused guilty of the Specification except the words "commit a felony, to: wit, murder", and substituting therefor, "do him bodily harm". Of the excepted words - not guilty; of the substituted words - guilty. The court again imposed a sentence identical in terms with that originally imposed, namely, of dishonorable discharge, total forfeitures and confinement at hard labor for a period of five years.

3. Without necessarily holding that the offense of which the accused was, by exceptions and substitutions, convicted at the original session is not a lesser included offense of the Specification upon which he was arraigned and tried, it seems sufficient to say that it is clear from the record that the accused was not sufficiently advised of the nature of any such allegations against him as to warrant the finding of such a lesser offense. The record of trial shows that both the prosecution and the defense proceeded throughout the trial upon the theory that the accused was on trial for an attempt to commit murder by willfully and feloniously pointing a dangerous weapon, to: wit, a rifle, at Sergeant Crutchfield, and pulling the trigger thereof. Accused and his counsel had the right to believe, and the record shows that they did believe, that he was being charged with this specific offense, an attempt to commit murder in the manner alleged. His entire defense was directed at that allegation. Under these circumstances it is not believed that he could be properly and legally convicted without prejudice to his substantial rights of an assault upon his victim with intent to do him bodily harm by swinging a rifle at him in a manner to make the rifle a dangerous weapon.

At the second session the court found accused guilty of committing an assault upon Sergeant Crutchfield at the time and place alleged with intent to do bodily harm by willfully and feloniously pointing a dangerous weapon at him and pulling the trigger thereof. It is established by undisputed evidence that the rifle was not then loaded. Therefore, it could not have been, nor was it, so used as a dangerous weapon in its character as a firearm (Price v. U.S., 156 Fed. Rep. 950; 4 Amer. Juris., par. 36).

The undisputed competent evidence does show that the accused was guilty of an assault upon Sergeant Crutchfield at the time and place alleged with intent to do him bodily harm and it is not material under the circumstances of this case whether he committed the assault by attempting to shoot him with a rifle which happened to be unloaded or by striking at him with the same rifle. Conviction of such an offense, which is lesser and necessarily included in the offense charged, authorizes punishment of dishonorable discharge, total forfeitures and confinement for one year in a place other than a penitentiary or Federal correctional institution.

William A. Rounds, Judge Advocate.

Earle Stephens, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

1st Ind.
29 NOV 1943

War Department, J.A.G.O., - To the Commanding General,
Fort Ord, California.

1. In the case of Private John F. Preziosi (20221682), Company A, 593rd Engineer Boat and Shore Regiment, I concur in the foregoing holding by the Board of Review and for the reasons stated therein recommend that only so much of the finding of guilty of the Charge and its Specification be approved as involves a finding of guilty of the lesser included offense of assault with intent to do bodily harm in violation of Article of War 93, and that only so much of the sentence be approved as involves dishonorable discharge, total forfeitures and confinement at hard labor for one year in a place other than a penitentiary, or Federal correctional institution, or reformatory. Upon compliance with the foregoing recommendation, under the provisions of Article of War 50½, and Executive Order No. 9363, dated July 23, 1943, 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 242706).

James B. Morrisette,
Colonel, J.A.G.D.,
Assistant Judge Advocate General,
In Charge of Military Justice Matters.

NOV 29 43 PM

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SERVICES OF SUPPLY
J. A. G. O.

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

SPJGN
CM 242724

3 NOV 1943

UNITED STATES v. Second Lieutenant KENNETH C. BAEHR (0-684461), Air Corps.	HAMPTON ROADS PORT OF EMBARKATION Trial by G.C.M., convened at Camp Patrick Henry, Virginia, 28 September 1943. Dismissal.

OPINION of the BOARD OF REVIEW
LIPSCOMB, GOLDEN 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 above named and submits this, its opinion, to The Judge Advocate General.

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

CHARGE: Violation of the 96th Article of War.

Specification 1: (Finding of not guilty).

Specification 2: In that Second Lieutenant Kenneth C. Baehr, Air Corps, did, at Camp Patrick Henry, Virginia, on or about 17 September 1943, strike and assault Private Charles A. Hosgood, a sentinel in the execution of his duty, on his face and head and about his body with his fists.

Specification 3: In that Second Lieutenant Kenneth C.

Baehr, Air Corps, was at Camp Patrick Henry, Virginia, on or about 17 September 1943, drunk and disorderly in Camp.

He pleaded not guilty to the Charge and its Specifications and was found not guilty of Specification 1 but guilty of Specifications 2 and 3 and of the Charge. He was sentenced to be dismissed the service. The reviewing authority approved the findings and the sentence and forwarded the record of trial for action under Article of War 48 but recommended that the President commute the sentence to a forfeiture of seventy-five ($75.00) dollars per month for six months.

3. The evidence for the prosecution shows that at about 2300 o'clock on the night of 17 September 1943, the accused was found, drinking beer upon a bench in the WAC area from which male personnel were restricted at Camp Patrick Henry, by a sentry who requested him to leave. The accused at that time talked "a little thick", "did not stand exactly still", "was not exactly steady on his feet", and had the odor of alcohol on his breath, although the sentry did not believe he was drunk, but only slightly intoxicated. After some argument, the accused acceded to the sentry's request but returned shortly with another officer and resumed the argument, but again left after the sentry had explained his orders (R. 3-9).

The sentry was relieved at 0100 o'clock and his successor, upon his first tour, after hearing a noise behind a tree near the board walk upon which he was walking, turned his flashlight toward it. He was immediately "jumped" by two persons who knocked him off of the walk, by blows to the jaw and stomach, to the ground where he grappled with them, holding one, the accused, the other leaving with the sentry's rifle. The corporal of the guard, running to the place in response to the sentry's outcry, found the sentry holding the accused whose only statements were: "What's going on here?" and "I don't understand this". During the scuffle the accused exuded the odor of alcohol but was able to walk. The first sentry identified the accused as the officer he had requested to leave the area a short time before. The accused was taken to the guardhouse by the corporal of the guard where he was interviewed by the officer of the day to whom the accused appeared to have been drinking heavily - his eyes were bloodshot, his conversation was incoherent and his breath was odorous of alcohol. The officer of the day was of the opinion that the accused was "well under the influence of alcohol" (R. 10-14, 14-17, 17-18).

4. The evidence for the defense was adduced after a motion to dismiss the Charge and its Specifications for insufficiency of evidence had been overruled. It shows that the investigating officer had ascertained that accused's general reputation for sobriety, competency and ability was excellent. Four telegrams and one letter, attesting to the accused's good character were admitted into evidence. The accused remained silent (R. 19-20, Exs. "A","E").

5. Specification 2, alleges that the accused on or about 17 September 1943, at Camp Patrick Henry, Virginia, struck and assaulted a named sentinel in the execution of his duty, "on his face and head and about his body with his fists". The offense is alleged as a violation of Article of War 96 and the conduct described is manifestly prejudicial to good order and military discipline.

The evidence is uncontroverted that the accused and another attacked the sentry. The sentry was struck on his jaw and in his stomach but was able to subdue the accused whom he held until aid arrived. During the melee and in the dim light, the sentry was unable to definitely identify the accused as the assailant who actually struck the blows but was able to identify him definitely as one of his attackers in the affray in which the blows were struck. The evidence, therefore, beyond a reasonable doubt establishes the guilt of the accused and supports the findings of guilty of Specification 2 and of the Charge.

6. Specification 3 alleges that the accused on or about 17 September 1943, at Camp Patrick Henry, Virginia, was "drunk and disorderly in Camp". The Manual for Courts-Martial condemns such conduct as being in violation of Article of War 96 (M.C.M., 1928, par. 152a).

The evidence is uncontradicted that on the occasion in question the accused was under the influence of intoxicants. He was first observed drinking a bottle of beer and gave the appearance of being "slightly intoxicated". This appearance continued even after he was taken to the guardhouse where the Officer of the Day found him with bloodshot eyes, smelling of alcohol, unable to speak coherently and definitely giving the impression of being "well under the influence of alcohol, although he did not stagger in his walk". His intoxication was such as sensibly to impair the rational and full exercise of his mental and physical faculties (M.C.M., 1928, par. 145). His attack upon the sentry was disorderly conduct beyond any doubt. The evidence conclusively supports the findings of guilty of Specification 3 and of the Charge.

7. The accused is about 25 years of age. The War Department records show that he had enlisted service from October 1940 until 26 June 1943 when he was commissioned a second lieutenant upon completion of Officer Candidate School, with active duty as an officer from the latter date.

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 of Specifications 2 and 3 and of the Charge and the sentence, and to warrant confirmation thereof. Dismissal is authorized upon a conviction of a violation of Article of War 96.

Abner E. Lipscomb, Judge Advocate.

Gabriel H. Goldberg, Judge Advocate.

Benjamin R. Shecter, Judge Advocate.

SPJGN
CM 242724

1st Ind.

War Department, J.A.G.O., 6 - NOV 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 Kenneth C. Baehr (0-684461), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but commuted to a forfeiture of $75 per month for 6 months and that the sentence as thus modified be ordered executed.

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

T. H. Green,
Brigadier General, U. S. Army,
Acting The Judge Advocate General.

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

(Sentence confirmed but commuted to forfeiture of $75 per month for 6 months. G.C.M.O. 2, 5 Jan 1944)

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

SPJGQ
CM 242725

11 NOV 1943

UNITED STATES	)	HAMPTON ROADS PORT OF EMBARKATION
	)	
v.	)	Trial by G.C.M., convened at Camp Patrick Henry, Virginia, 28 September 1943. Dismissal and total forfeitures.
	)	
Second Lieutenant THAINE H. WALDEN (O-683356), Air Corps.	)	

OPINION of the BOARD OF REVIEW
ROUNDS, HEPBURN and FREDERICK, 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 96th Article of War.

Specification 1: In that Second Lieutenant Thaine H. Walden, Air Corps, having received a lawful order from Private Wallace G. Brown, a sentinel, in the execution of his duty, to leave the restricted area around the Red Cross and WAC Barracks, did, at Camp Patrick Henry, Virginia, on or about 17 September 1943, fail to obey the same.

Specification 2: (Finding of Not Guilty).

Specification 3: In that Second Lieutenant Thaine H. Walden, Air Corps, was, at Camp Patrick Henry, Virginia, on or about 17 September 1943, drunk and disorderly in camp.

Specification 4: In that Second Lieutenant Thaine H. Walden, Air Corps, did, at Camp Patrick Henry, Virginia, on or about 17 September 1943, behave in a disrespectful manner towards Private Charles A. Hosgood, a sentinel then in the execution of his duty, by taking from him and carrying away an army rifle with which said sentinel was then and there armed.

Accused pleaded not guilty to Specifications 1, 2 and 4 of the Charge, guilty to Specification 3, excepting the words "and disorderly" and not guilty to the Charge. Upon motion of defense counsel "that Specification 2 and Specification 4 be dismissed * * *", the President announced "The court accepts the request for dismissal of the 2nd Specification, but denies the request for dismissal of the Specification 4." Accused was found guilty of Specification 1, guilty of Specification 3, except the words "and disorderly", guilty of Specification 4, and guilty of the Charge. No evidence of previous convictions was introduced at the trial. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. For the prosecution it was shown that, at 9 p.m. on 16 September 1943, Private Wallace G. Brown was posted as a sentinel on Post No. 2 at Camp Patrick Henry, Hampton Roads Port of Embarkation, Virginia. The sentry's post covered an area behind, and immediately adjacent to, barracks occupied by Red Cross nurses and WACs, and was designated by special orders as a restricted area for all male persons except certain officers who were assisting the nurses to pack (R. 3, 4, 13). At about 11 p.m. Brown saw accused and another lieutenant, apparently a Lieutenant Baehr (R. 7), sitting on a bench within this restricted area, each drinking a bottle of beer. The sentinel told accused "he was in the restricted area and would have to move somewhere else" and accused and his companion then left (R. 5). However, both returned later in company with another lieutenant, not named, who asked the sentry what was the matter, whereupon the sentry again said that they were in a restricted area and that he could not allow them to remain there. The unidentified officer then stated he did not see why they came over to get him out of bed for that and "ordered" accused and Baehr, who were present during the conversation, to go back to their barracks. He then left but accused and Baehr remained (R. 5, 6). The sentry again ordered them to move out of the area which they finally did (R. 6). At this time accused was noticeably under the influence of liquor (R. 6, 7).

At about one o'clock in the morning of 17 September 1943, Brown was relieved as sentry by Private Charles A. Hosgood on Post No. 2 At the time of the relief Brown told Hosgood of the previous difficulty he had experienced with "some officers" (R. 13) whereupon Hosgood loaded his weapon, a calibre .30 Enfield rifle, Model 1917, No. 1329956, which had been issued to him by the supply sergeant of his company (R. 12). Then, after walking his post for a short while, Hosgood heard a noise when about six paces away from a large tree. It was entirely dark (R. 15) so the sentinel took his flashlight from his pocket and directed the light on the tree where he saw two men in a stooping position. These

two men immediately jumped upon Hosgood with such force that all three were upset (R. 13) and, after being hit on the jaw and in the stomach with a fist, Hosgood was pushed from the platform or boardwalk on which he was walking his post and fell down, striking his arm on a tree stump. During the struggle, one of the assailants, though which one he could not say, took Hosgood's rifle from him. Hosgood was unable to recognize the men at the time nor was he able to tell whether only one or both had struck him during the assault but in the melee he finally managed to subdue and hold one of them, a lieutenant whose name does not appear (R. 6, 14), until help arrived (R. 14).

Brown, the previous sentinel on Post No. 2, after being relieved, was just getting into the guard truck when he heard someone calling for the corporal of the guard. He and the corporal returned to Post No. 2 and found Hosgood on the ground struggling with a lieutenant (unidentified in the record) whom he was holding (R. 6).

The struggle took place within the restricted area (R. 16) and, although not a word was spoken by the assailants, Hosgood detected the odor of liquor on each (R. 15). Brown testified that accused was under the influence of liquor when he had ordered him from the restricted area at about 11 p.m. but was not drunk, though he talked thick, could not stand still and one "could smell the liquor on his breath" (R. 6, 7).

A thorough search was instituted in the area immediately after the corporal of the guard arrived and the unidentified lieutenant was taken into custody but the rifle of the sentinel could not be found (R. 14).

At 6:10 a.m., 17 September 1943, Second Lieutenant J. J. Studenka, Company D, 765th Military Police Battalion, who was officer of the day during the period covering the events in question, "acting on information previously received" (R. 7), went to officers' barracks T-7 where, after inquiry of a Lieutenant Ludwig, he found accused asleep in his bunk, lower, No. 41. Underneath this bunk was a rifle, fully loaded, which, upon check of the serial number, was discovered to be the identical rifle taken from the sentry early that morning (R. 7, 8). No other weapons were seen in the barracks (R. 9). Accused was fully clothed, except for a coat, and had no blanket covering though the night was damp and cold and others were sleeping under blankets. He had an odor of alcohol about him and though he appeared "groggy" was fully alert, was not drunk, and had a clear recollection of what had taken place (R. 8, 9, 10, 11).

Accused, when awakened by the officer of the day, gave his name as "Lieutenant Walden". In conversation with accused Lieutenant Studenka asked accused where he got the rifle to which he replied, "That's the

one I got off the sentry." The officer of the day did not warn accused of his rights or that any statement he might make could be used against him. Accused frankly admitted to him "that the sentry got smart with him and they were going to show him and grabbed the rifle from him and (he) put it in the barracks under his bed" (R. 8). The officer of the day "didn't ask for any statements" and did not question accused (R. 11) except to ask him "where the rifle came from" (R. 10) or "where he got it" (R. 9) and this was in conversation with accused (R. 9, 10). The officer of the day further stated that

> "There wasn't any questioning whatsoever on my part as far as asking where he was, because I am familiar with the Article of War as to his rights. When he was awakened I told him to come on in my custody to the guardhouse, and asked where did he get the rifle. He wanted to know if there was any objection to his putting on his coat. I said, 'None whatsoever', and we got in the jeep and that is where the other conversation took place" (R. 11).

4. Accused's honorable discharge from enlisted service and Navigator's Qualification Report were admitted as evidence of good character (R. 18; Def. Exs. A, B) and Lieutenant Colonel Richard Ward, Jr., who made a special investigation of the "cases of two young officers", during which he became acquainted with accused and spoke with only one person, Lieutenant Ludwig, about him, testified in answer to the question:

> "From your investigation and your knowledge of the background of the defendant, do you feel that you are familiar enough with the defendant's reputation for sobriety, good conduct, and reliability to state what that reputation is?"

that accused's reputation was excellent (R. 19).

Accused did not take the stand and made no statement.

5. It was clearly established that on 16 and 17 September 1943, certain area in the vicinity of barracks occupied by female members of the Red Cross and members of the Women's Army Corps at Camp Patrick Henry, Hampton Roads Port of Embarkation, Virginia, was restricted and unauthorized presence thereon forbidden to all officers and enlisted men. In order to provide compliance with this order of restriction, the sentry on the post, within which the area lay, had special orders in regard thereto.

On the night of 16 September the sentry on duty at this post had experienced difficulty with accused and his companion, another lieutenant, and had ordered them from the restricted area where he found them, sitting on a bench drinking beer at 11 p.m. They left but sometime later returned with another lieutenant who, after listening to the sentry's story "ordered" accused and his companion to go back to

their barracks. Although this lieutenant left at once, accused and his companion did not do so until the sentry again ordered them off, when they finally left. The evidence of their reentry into the restricted area, shortly after having been told of the restriction by the sentry on duty and ordered to leave and their obviously apparent purpose, upon their return, of disputing the propriety of the sentry's actions, conclusively establishes a failure on the part of accused to obey the lawful order of a duly posted sentinel in the execution of his duty and legally sustains the finding of guilty upon Specification 1.

The court found accused guilty of Specification 3 in which he is charged with being drunk and disorderly in camp, excepting, however, the words "and disorderly". Accused had pleaded guilty to the Specification, with the same exception and this plea and the testimony of the sentry first on duty at Post No. 2 on the night in question amply support the finding of guilt as to this offense.

When, within a short time after the two lieutenants had been ordered from the restricted area for a second time, the sentry then on duty was set upon by two men, he succeeded in subduing one of them and when taken into custody he was discovered to be Lieutenant Baehr, accused's companion in the earlier episode with the previous guard. The other assailant had fled and although a thorough search for the sentry's rifle was made immediately in the area, it could not be found. Within three or four hours thereafter, the officer of the day, acting upon information he had received from members of his guard, went to accused's quarters and found him fully dressed but asleep on his bunk with an odor of alcohol noticeable upon him. Underneath his bunk was the rifle with which the sentry had been armed and accused frankly admitted that he grabbed the rifle from the sentry to teach him a lesson because he "got smart" and that he had brought the rifle to his barracks and put it under his bunk. With these statements, which were properly admissible as admissions against interest, the picture is complete and there remains no reasonable doubt that accused did, as alleged, take the rifle away from a sentry then in the performance of his duty. Thus the evidence is legally sufficient to support the finding of guilty of Specification 4.

6. At the conclusion of the prosecution's case defense counsel moved "that Specification 2 and Specification 4 be dismissed * * *". Thereupon the president, who was likewise the law member, announced that "The court accepts the request for dismissal of the 2nd Specification, but denies the request for dismissal of Specification 4." It is not shown whether any member objected and, if so, whether the court voted on the matter.

It is provided:

"That if any such ruling be made by the law member of the court upon any interlocutory question other than an

objection to the admissibility of evidence offered during the trial and any member object to the ruling the court shall likewise be cleared and closed and the question decided by a majority vote * * *" (MCM, 1928, par. 51a).

The action of the law member was obviously an attempt to rule upon a motion for findings of "not guilty" and such a motion is an interlocutory question (MCM, 1928, par. 71c). The president and law member failed to prefix his ruling with the words "Subject to objection by any member of the court" and apparently no objection was made. If there had been any objection by any member, the court, in closed session, had the sole power and authority to decide the matter.

However, since it is the rule that if there be any substantial evidence which, together with all reasonable inferences therefrom and all applicable presumptions tends to establish every essential element of an offense charged or included in any Specification to which the motion is directed, the motion as to such Specification will not be granted, it cannot be said, in the light of all the evidence produced by the prosecution, that the failure to grant the motion to dismiss Specification 4 was error however irregular the action of the law member may have been; nor could the granting of the motion as to Specification 2 constitute a violation of accused's substantial rights.

7. Added to the record of trial is the following statement signed by Colonel C. J. Wilder, G.S.C., president of the court-martial:

> "In awarding sentence in the case of Second Lieutenant Thaine H. Walden, 0683356, Air Corps, Camp Patrick Henry, Virginia, the Court considered the necessity for awarding adequate sentence, and also considered the possibility that the Reviewing Authority might desire to suspend dismissal to allow the Service to make use of the technical knowledge of this officer."
>
> In his action the reviewing authority included the following:
>
> "It is recommended, however, that the President commute the sentence to a forfeiture of Seventy-five ($75.00) Dollars per month for six (6) months."

8. Accused is 25 years and 10 months of age. Records in the War Department disclose that he was born in Carbondale, Illinois, graduated from high school, is married but has no children. He enlisted in the 124th Cavalry, Texas National Guard on 6 October 1940, was inducted into Federal service 19 November 1940 and became an aviation cadet 1 April 1942. He was commissioned a second lieutenant, Air Corps, AUS, on 24 June 1943.

9. The court was legally constituted and had jurisdiction of accused and the offenses charged. 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 the sentence and to warrant confirmation of the sentence. A sentence of dismissal and total forfeitures is authorized upon conviction of a violation of Article of War 96.

William A. Rounds, Judge Advocate

Paul Stephens, Judge Advocate

Herbert B. Freeman, Judge Advocate

1st Ind.

War Department, J.A.G.O., 12 NOV 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 Thaine H. Walden (0-683356), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but commuted to a forfeiture of $75 per month for 6 months and that the sentence as thus modified be ordered executed.

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

T. H. Green,
Brigadier General, U. S. Army,
Acting The Judge Advocate General.

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

(Sentence confirmed but commuted to forfeiture of $75 per month for 6 months. G.C.M.O. 417, 30 Dec 1943)

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

1 MAR 1944

SPJGH
CM 242734

UNITED STATES v. Major GARLAND F. SMITH (0-371897), Military Intelligence.	)	MILITARY DISTRICT OF WASHINGTON Trial by G.C.M., convened at Fort Myer, Virginia, 14, 15, 16, 17, 18 and 20 September 1943. Dismissal, total forfeitures, fine of $2,500, confinement for two (2) years, and confinement until fine paid but not for more than one (1) additional year.

OPINION of the BOARD OF REVIEW
DRIVER, O'CONNOR and LOTTERHOS, Judge Advocates

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

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

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

Specification 1: (Finding of guilty disapproved by reviewing authority).

Specification 2: In that Major Garland F. Smith, War Department Service Group, Military District of Washington, then First Lieutenant, Military Intelligence Division, G-2, War Department General Staff, having been designated by his superior officers as the agent of the War Department to locate premises in Washington, D. C. for leasing by the United States, suitable for use by the Military Intelligence Division as a field office, did at Washington, D. C., on or about the months of January and February, 1942, while in the execution of and under said agency, submit premises at 2128 Bancroft Place, N. W., Washington, D. C., property of one Nancy H. Curtis, as suitable for such purposes, but did wrongfully, dishonorably, contrary to his duties as an officer, to the discredit of the military service and in breach of his trust, fail to disclose to his superior officers by whom he had been designated as

agent aforesaid, that during the course of negotiations, and while acting as agent aforesaid, he had entered into a contract with the said Nancy H. Curtis to purchase the said property, and in pursuance of which, on or about March 1942, he did in fact purchase the said property on his own personal account and for his own personal benefit.

Specification 3: In that Major Garland F. Smith, War Department Service Group, Military District of Washington, then Second Lieutenant, First Lieutenant, Captain, or Major, Military Intelligence Division, with intent to defraud the United States, did, at Washington, D. C., during the period from on or about September 1941 to on or about May 1942, fraudulently, unlawfully and wrongfully pretend to David G. Erskine, during said period a Major, Lieutenant Colonel and lastly a Colonel, and to Frank M. Hosterman, during said period a Captain and later a Major, that as agent of the United States he had incurred periodic obligations to the La Salle Apartments, Inc., for rent of office space for the use and benefit of the United States in the total sum of $1800, well knowing that said pretenses were false and that the true amount of such expenses and obligations which he had incurred as such agent of the United States amounted to the sum of $1575, and by means of such fraudulent representations, did, during said period at Washington, D. C., fraudulently obtain from the United States the sum of $225.

Specification 4: In that Major Garland F. Smith, War Department Service Group, Military District of Washington, then Second Lieutenant, First Lieutenant, Captain, or Major, Military Intelligence Division, with intent to defraud the United States, did, at Washington, D. C., during the period from on or about September 1941 to on or about December 1942, fraudulently, unlawfully and wrongfully pretend to David G. Erskine, during said period a Major, Lieutenant Colonel and lastly a Colonel, and to Frank M. Hosterman, during said period a Captain and later a Major, that as agent of the United States he had incurred periodic obligations to the Medical Center Garage, for rent of garage space for the use and benefit of the United States in the total sum of $1000, well knowing that said pretenses were false and that the true amount of such expenses and obligations which he had incurred as such agent of the United States amounted to the sum of $716.34, and by means of such fraudulent representations, did, during said period at Washington, D. C., fraudulently obtain from the United States the sum of $283.66.

Specification 5: (Finding of Not guilty).

Specification 6: (Finding of not guilty).

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

Specification: In that Major Garland F. Smith, War Department Service Group, Military District of Washington, then First Lieutenant, Military Intelligence Division, G-2, War Department General Staff, having been designated by his superior officers as the agent of the War Department to locate premises in Washington, D. C., for leasing by the United States, suitable for use by the Military Intelligence Division as a field office, and having submitted premises at 2128 Bancroft Place, N. W., Washington, D. C., property of one Nancy H. Curtis, as suitable for such purposes, did, at Washington, D. C., during the months of January and February, 1942, with intent to defraud, and without disclosing to his said superior officers that he had on or about the 17th and 31st days of January 1942, entered into a contract with Nancy H. Curtis for the purchase of said premises, represent to his said superior officers that the minimum amount for which she would lease the said property was the sum of $6,600 annually, and that since the sum of $4600 annually was the maximum amount which the United States was then legally authorized under Section 278a, Title 40, U.S.C., to pay as rent therefor, he, the said Major Garland F. Smith, then First Lieutenant, would obtain a written lease of said property to the United States from the said Nancy H. Curtis in the said sum of $4600 annually, and would pay her the balance of $2000 additional rent annually from confidential funds of the United States when furnished him for the said purpose, well knowing that said pretenses were false, and that the said promises to pay additional rent to Nancy H. Curtis were made without intention of performance, and that the said rentals instead of being paid to the said Nancy H. Curtis were to be received by him and applied to his own use and benefit pursuant to the said contractual arrangements which he had effected in January 1942 between himself and the said Nancy H. Curtis for the purchase of the said property on his personal account, and pursuant to which he received a deed conveying the said property to him or about 3 March 1942, and by means thereof did, during the rental period of said lease, namely, February 1942 to June 1943, fraudulently obtain from the United States the sum of $2750 at Washington, D.C. and on or about the dates and in the amounts hereafter mentioned, for the purpose of payment as additional rentals aforesaid to the

said Nancy H. Curtis as owner of the said property, which said sum was property of the United States, furnished and intended for the military service thereof, and did knowingly and wilfully apply the said sum to his own use and benefit, as follows:

11 February	1942	$750
4 July	1942	900
8 August	1942	100
2 January	1943	1000
		$2750

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

Specification: In that Major Garland F. Smith, War Department Service Group, Military District of Washington, did, at New Orleans, Louisiana, on or about 15 February 1943, unlawfully sell to Second Lieutenant Charles G. Steinway, Cavalry, and did feloniously embezzle by fraudulently converting to his own use, one caliber .38 Colt Revolver No. 717003, of the value of $24.30, the property of the United States, entrusted to him by the said United States.

He pleaded not guilty to all Specifications and Charges. He was found not guilty of Specifications 5 and 6, Charge I; guilty of the Specification, Charge III, except the words, "of the value of $24.30", substituting therefor the words "of the value of about $24.30"; and guilty of all other Specifications and of the Charges. He was sentenced to dismissal, total forfeitures, a fine of $2,500, confinement at hard labor for two years, and confinement at hard labor until the fine is paid, but for not more than one additional year. The reviewing authority disapproved the finding of guilty of Specification 1, Charge I; approved only so much of the finding of guilty of Specification 3, Charge I, as finds accused guilty of fraudulently obtaining the sum of $200, and only so much of the finding of guilty of Specification 4, Charge I, as finds him guilty of fraudulently obtaining the sum of $271.16; approved the sentence; and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution:

In the summer of 1940, accused was assigned to duty in the office of the counter-intelligence branch at Washington, D.C., when it was first organized, and was placed in the plant intelligence section. Colonel Willard A. Holbrook, Jr. was chief of the domestic intelligence section, and

worked in the same office with accused. Colonel David G. Erskine was assistant executive of the counter-intelligence branch, and as such was custodian of confidential funds allotted to military intelligence for expenses. On 4 March 1942, Lieutenant Colonel Frank M. Hosterman, who had for some time been in the special assignments branch of the counter-intelligence group, succeeded Colonel Erskine as custodian of these funds. The confidential funds referred to were from time to time paid to the custodian by Treasury checks issued by Colonel Robert B. Richards, finance officer of G-2, who subsequently audited the details of the expenditures made by the custodian from the funds. The defense admitted that these funds were Government money. At the beginning, the domestic intelligence section was very small, and occupied only one office, a room about 20 by 40 feet. In the latter part of 1940, as the work expanded, it was decided that an undercover office would be established. Accused was instructed to arrange to rent two rooms in the Insurance Building, using as a cover the name of his former firm, Smith and Company or Smith and Mickey. He was informed that no fees or commissions could be allowed because of the transaction. Accused arranged for the renting of these offices and for the counter-intelligence branch to pay the rent to his firm, which in turn paid the management of the building. Telephone bills and similar expenses were handled in the same way. Accused would supply vouchers of these expenses to his superior officers, and checks for the amount of the expenses would be made out direct to accused. Vouchers were supposed to represent actual expenditures (R. 44-50, 59, 71, 87-88, 135, 144, 156, 161-162, 231, 233-242, 518).

a. Specification 3, Charge I: In the summer of 1941, Colonel Holbrook gave instructions to the chief of the local field office to seek larger quarters, but did not discuss the matter directly with accused. As a result of a request that accused make arrangements for more capacious quarters and that the "front" of his firm continue, he rented space in La Salle Apartments. The lease (Ex. 64) covered apartment 1101, was for a term of 12 months beginning 1 September 1941, was to "Mr. Garland F. Smith" as lessee, and provided for a rental of $175 per month. The bookkeeper for La Salle Apartments testified that accused paid the rental of $175 per month by check. In addition to the rent accused was charged $3.50 per month for telephone service, plus 5 cents for each outgoing call. The amounts paid to La Salle Apartments by accused from September 1941 to May 1942 were as follows: September - $175, October - $179.65, November - $178.50, December - $178.55, January - $178.50, February - $178.55, March - $178.50, April - $178.50, and May - $178.50. Accused represented to Colonel Erskine that the rent was around $200 per month (R. 52-54, 151-152, 315-324, 518, 522).

Accused submitted bills for the rental of the space in La Salle Apartments and the custodian of the confidential funds drew checks to pay

these bills. These checks and supporting papers were introduced in evidence as follows:

Check of Colonel Erskine, custodian, to "Smith and Mickey", dated 20 August 1941, for $249.25, indorsed by payee by accused, and supporting memorandum of items equal to the amount of the check, including rental on suite 1101 for September in the amount of $200, bearing a certificate by Smith and Mickey by accused that he received $249.50 "as reimbursement in full for the above listed expenditures which were incurred in connection with official business " (Ex. 15b).

Check of Colonel Erskine, custodian, to accused, dated 20 September 1941, for $372.43, indorsed by accused, and supporting certificate signed by accused acknowledging receipt of $372.43 for designated items, including rent and apartment services for October in the amount of $203.50 (Ex. 17).

Check of Colonel Erskine, custodian, to accused, dated 22 October 1941, for $373.60, indorsed by accused, and supporting certificate signed by accused, acknowledging receipt of $373.60 for items, including rental and services 1101 La Salle Building for November in the amount of $204.50 (Ex. 16f).

Check of Colonel Erskine, custodian, to accused, dated 19 November 1941, for $303.70, indorsed by accused, and supporting certificate signed by accused, acknowledging receipt of $303.70 for items, including rent and apartment service for December in the amount of $204.50 (Ex. 16g).

Check of Colonel Erskine, custodian, to accused, dated 29 December 1941, for $417.12, indorsed by accused, and supporting certificate signed by accused, acknowledging receipt of $417.12 for items, including rent and apartment service for January in the amount of $204.50 (Ex. 16d).

Check of Colonel Erskine, custodian, to accused, dated 27 January 1942, for $395.58, indorsed by accused, and supporting voucher signed by accused, acknowledging receipt of $395.58 for items, including rent and apartment service for February in the amount of $204.50 (Ex. 16c).

Check of Colonel Erskine, custodian, to accused, dated 26 February 1942, for $486.07 indorsed by accused, and supporting certificate signed by accused, acknowledging receipt of $486.07 for items, including rent for March in the amount of $204.50 (Ex. 16a).

Check of Colonel Hosterman, custodian, to accused, dated 3 April 1942, for $438.76, indorsed by accused, and supporting certificate signed by accused, acknowledging receipt of $438.76 for items, including rent for April in the amount of $204.50 (Ex. 27).

Check of Colonel Hosterman, custodian, to accused, dated 9 May 1942, for $338.80, indorsed by accused, and supporting certificate signed by accused, acknowledging receipt of $338.80 for items, including rent, La Salle Building, for May in the amount of $204.50 (Ex. 29).

After Colonel Hosterman became custodian of the confidential funds, he asked accused for a receipt for all rental on the "La Salle apartment" with the signature of the actual owners of the property, to be placed in the files. Accused delivered to him a receipt dated 7 May 1942 executed by "La Salle Apartments, Inc.", acknowledging that it received "from Garland F. Smith, rental in full for suite 1101, La Salle Apartments, for the period September 1, 1941 to May 31, 1942, inclusive" (Ex. 30), and a receipt dated 7 May 1942 executed by "Smith & Company", acknowledging receipt from "Garland F. Smith" of "rental Suite 1101, September 1, 1941 to May 31, 1942" in the amount of $1,800 and of "service Building and apartment phone services" in the amount of $39.50 (Ex. 31). In the course of an investigation by Major Richard J. Dixon, Inspector General's Department, accused, after being warned of his rights, admitted that he submitted vouchers for rental on the space in La Salle Apartments at $200 per month for a total of $1,800, that he actually paid the landlord $1,575 at the rate of $175 per month, and that he did not inform his superior officer or anyone connected with the Government that he was collecting this extra $25 per month. He stated that he rented the space "as Smith and Company", rented it in his "private capacity", submitted a price of $200 a month, and it was accepted. He considered that the Government subleased from him, but had no "specific contract" that he would "get an overage" (R. 88-89, 93-94, 100-103, 109-117, 123-125, 190-191, 194-195, 198-204, 247-251, 448, 503, 518-522, 529).

b. Specification 4, Charge I: The accused had an account with the Medical Center Garage from 11 September 1941 to 1 December 1942 for parking. The charge per car was $10 for some spaces and $12.50 for others per month. The account of accused for the period referred to was as follows: 11 September 1941 to 11 October - $50; 11 October to 1 November - $33.24; November - $52.50; December - $55.60; January 1942 - $55; February - $55; March - $55; April - $55; May - $55; June - $55; July - $52.50; August - $52.50; September - $32.50; October - $32.50; and November - $25. There were no charges after 1 December. The total amount of the account was $716.34. Accused made payment in full as follows: 12 September 1941, $50; 29 October, $52.50; 5 December, $55; 2 January 1942, $55; 21 February, $60; 25 March, $60; 12 May, $120; 13 June, $60; 8 July,

$61.34; 12 August, $52.50; 14 September, $32.50; 17 November, $32.50; and 8 January 1943, $25. The parking spaces at the Medical Center Garage were rented by accused for use of the counter-intelligence office. During the investigation conducted by Major Dixon, accused admitted that he incurred an obligation to the Medical Center Garage, and that he had authority to incur the debt for the Government, but in an undercover capacity. He stated that he made a personal contract (R. 300-309, 523-524).

Checks on the confidential funds handled by Colonels Erskine and Hosterman including sums paid to accused to reimburse him for the expense of renting parking space from the Medical Center Garage, with supporting papers, were introduced in evidence, as follows:

Check of 11 September 1941 to accused for $90.95, and receipt signed by accused showing that the payment included $62.50 for 5 spaces at "Medical Center parking" from 10 September to 10 October (Ex. 15a).

Check of 20 September to accused, indorsed by him, for $372.43, and receipt signed by accused showing that the payment included $62.50 for "Parking, 5 cars" (Ex. 17).

Check of 22 October to accused, indorsed by him, for $373.60, and receipt signed by accused showing that the payment included $62.50 for "Garage parking, 5 cars" (Ex. 16f).

Check of 19 November to accused, indorsed by him, for $303.70, and receipt signed by accused showing that the payment included $62.50 for "Garage" for December (Ex. 16g).

Check of 29 December to accused, indorsed by him, for $417.12, and receipt signed by accused showing that the payment included $62.50 for "Garage Service (Parking)" for January 1942 (Ex. 16d).

Check of 9 February 1942 to accused, indorsed by him, for $64, and receipt signed by accused showing that the payment included $62.50 for "Garage Parking" (Ex. 16i).

Check of 26 February to accused, indorsed by him, for $486.07, and receipt signed by accused showing that the payment included $62.50 for "Garage facilities" (Ex. 16a).

Check of 3 April to accused, indorsed by him, for $438.76, and receipt signed by accused showing that the payment included $62.50 for "Garage" (Ex. 27).

Check of 9 May to accused, indorsed by him, for $338.80, and receipt signed by accused showing that the payment included $62.50 for "Garage facilities" (Ex. 29).

Check of 5 June to accused, indorsed by him, for $130.59, and receipt signed by accused showing that the payment included $62.50 for "Garage (5 spaces)" (Ex. 32).

Check of 4 July to accused, indorsed by him, for $242.64, and receipt signed by accused showing that the payment included $62.50 for 5 spaces at Medical Center Garage for July (Ex. 35).

Check of 8 August to accused, indorsed by him, for $187.91, and receipt signed by accused showing that the payment included $62.50 for 5 spaces at Medical Center Garage for August (Ex. 37).

Check of 1 September to accused, indorsed by him, for $189.13, and receipt signed by accused showing that the payment included $62.50 for 5 spaces at Medical Center Garage for September (Ex. 39).

Check of 5 October to accused, indorsed by him, for $208.11, and receipt signed by accused showing that the payment included $62.50 for 5 spaces at Medical Center Garage for October (Ex. 41).

Check of 10 November to accused, indorsed by him, for $139, and receipt signed by accused showing that the payment included $62.50 for 5 spaces at Medical Center Garage for November (Ex. 43).

Check of 10 December to accused, indorsed by him, for $140.44, and receipt signed by accused showing that the payment included $62.50 for 5 spaces at Medical Center Garage for December (Ex. 45).

Colonel Hosterman identified a receipt (Ex. 34) dated 4 June 1942, made out on a form in the name of "Smith & Company", signed by accused, and acknowledging receipt from Colonels Erskine and Hosterman of $62.50 per month from September 1941 to June 1942, inclusive, for "spaces in the Medical Center Garage". The receipt was submitted to Colonel Hosterman by accused (R. 98-103, 123-125, 189-191, 194-195, 204-206, 209-221, 249-251).

c. Specification 2, Charge I and Specification, Charge II: Several weeks before 1 January 1942 the counter-intelligence office began to seek larger quarters in Washington. Accused was directed to find suitable quarters to rent, and he spent considerable time attempting to do

so. Several places were located, but no deal was consummated. Mrs. Cornelia P. Jones, a real estate agent, showed several places to accused. Finally she heard of a place for sale at a bargain and contacted the owner through attorneys in New York. This property, located at 2128 Bancroft Place, was owned by Mrs. Nancy Hoyt Curtis, who was anxious to sell it, but did not desire to rent it. Mrs. Jones submitted this property to accused. Possibly the last of 1941, or early in 1942, or about the middle of January, Colonels Erskine and Holbrook inspected the Bancroft Place property, and determined that it was suitable for their purposes. Accused was instructed to arrange negotiations for the rental of the place, "in the normal manner, out in the open". On the occasion when Colonel Erskine inspected and approved the property (which he stated was between the middle of January and the middle of February), accused stated to him that the owner was an eccentric old lady, that it was difficult to approach an understanding with her, and that the rental was about $6,600 per year. Two or three weeks after Mrs. Jones had first shown this property to accused, he made an offer, which Mrs. Curtis accepted. A contract of purchase and sale (Ex. 75) was executed, dated 17 January 1942, whereby accused was to purchase the property for $29,000. Subsequent to this contract, Mrs. Curtis telegraphed Mrs. Jones that the property had been sold through other parties, and, as a result, the agreement of 17 January was abandoned. Later Mrs. Curtis advised Mrs. Jones that the sale through other parties had not been consummated, and that she was anxious to sell. Mrs. Jones communicated with accused again, and, as a result, a contract of purchase and sale (Ex. 52), dated 31 January 1942, was entered into between Mrs. Curtis and accused. This agreement provided for purchase of the property by accused for $29,000, of which $2,500 was to be paid in cash, $22,500 by assumption of a first deed of trust, and the balance, secured by second deed of trust, to be paid on 11 July 1942 (R. 79, 85, 105-108, 380-388, 393-395, 398, 514).

Just prior to 14 February 1942, accused communicated with Mr. Cornelius J. Kelleher, an official of the Public Buildings Administration, with reference to leasing 2128 Bancroft Place for military intelligence purposes. Mr. Kelleher advised accused that the request would have to clear through the Space Office of the War Department, and accused then obtained the necessary papers. When Mr. Kelleher started to prepare the lease, he discovered that the request was for a rental of $6,600 per year, and that on account of the assessed valuation of the property the maximum allowable was $4,600. He advised accused of this fact, and that it would be necessary to obtain a proposal from the owner or agent so that he could draw the lease at $4,600. Accused subsequently delivered to him two documents approving a rental of $4,600. One of the documents was a letter (Ex. 57), dated 11 February 1942, from S. Preston Smith, an attorney and the brother of accused, stating that "my client has consented

to the leasing of the building at 2128 Bancroft Place * * * at the rate of $4600 annually". The letter referred to "The owner", but did not mention the name of the client or owner. Accused prepared this letter and his brother signed it. Mrs. Curtis, the owner, had not authorized the brother of accused to represent her, but had told accused "to go ahead and put the deal through and to take care of her interest". The other document (Ex. 56), dated 12 February 1942, was a letter signed by Brigadier General Raymond E. Lee, stating that the premises at 2128 Bancroft Place were unusually well suited, that the need for the property was urgent, and that he recommended that the lessor's proposal of an annual rental of $4,600 be approved. This letter was based on a "similar memorandum" which accused had prepared. When he received these documents, Mr. Kelleher drew the lease (Ex. 58), which was executed. The lease was dated 14 February 1942, provided that Mrs. Curtis leased the property to the Government for a term ending 30 June 1942, at an annual rental of $4,600, payable semi-annually in advance, and contained an option for the lessee to renew from year to year (R. 276-289, 419-423, 426-427).

Accused called at the office of Colonel Holbrook and advised him that he had made arrangements through the Public Buildings Authority to rent the property, that the rent would be $6,600 per year, which was $2,000 more than Public Buildings Authority could pay, that the person he was dealing with was difficult, that the only way to make up the rent to the amount the lessor desired was to increase the rent from confidential funds, and that a "certain down payment" was required to hold the property until Public Buildings Authority would start their negotiations. Based on these statements, Colonel Holbrook advised Colonel Erskine that they would rent the building "by contributing a certain amount of confidential funds to bring the rent up to the required amount". Accused also advised Colonel Erskine that it was necessary to make an advance payment of rent to hold the house. For this purpose, Colonel Erskine delivered to accused a check (Ex. 16j), dated 11 February 1942, for $750, drawn on the confidential funds of which Colonel Erskine was custodian, and payable to accused. Accused signed a receipt for this sum, dated 11 February. This $750 represented the proportional part of a half-year's rent, and was used by accused as part payment on the purchase of the property (R. 79-83, 103-104, 113, 126-127, 139-140, 514-515).

There was introduced in evidence a deed (Ex. 50) dated 3 March 1942, from Nancy Hoyt Curtis to accused, conveying the property, subject to a deed of trust for $22,500. There was also introduced a deed of trust (Ex. 77), dated 13 March 1942, from accused to Mrs. Curtis, on this property, to secure payment of $4,000 due on 20 July 1942. In March 1942 the Public Buildings Administration received a photostat of a certified copy of the deed (Ex. 50) through the mail, and as a result noted on the

lease that "Garland Fielding Smith" was the owner. The lease was renewed prior to 30 June 1942 by sending a notice of renewal (Ex. 61) dated 15 May 1942 to "Mr. Garland Fielding Smith". Notice of the renewal was acknowledged by accused in a letter (Ex. 62) dated 6 June 1942, addressed to the Public Buildings Administration, on stationery of Smith and Company, signed by "Garland Fielding Smith". The following checks, drawn on the confidential funds, signed by Colonel Hosterman, custodian, payable to accused, and supported by receipts signed by accused stating that he had expended the respective sums, were introduced in evidence: check of 4 July 1942 for $900 (Ex. 19); check of 8 August 1942 for $100 (Ex. 20); and check of 2 January 1943 for $1,000 (Ex. 21). When accused requested the first of these checks, Colonel Hosterman asked for details of the expenditure, and accused advised him that it was in connection with the rental of 2128 Bancroft Place. As to the $100 check, accused advised Colonel Hosterman that the $900 check should have been for $1,000 as semi-annual rent. As to the $1,000 payment, accused inclosed a voucher in that amount in a letter (Ex. 22) to Colonel Hosterman and referred to it as "semi-annual payment on 2128 Bancroft". Accused admitted receiving this $2,000, which he used in paying for the property (R. 163-171, 272-274, 290-293, 298, 408-409, 514).

It was the understanding of Colonel Richards, the finance officer, that the $2,000 per annum paid out of confidential funds was the entire rental and he was not aware of the Public Buildings Administration lease until a recent date. He did not learn that accused owned the property until about March 1943. Accused did not inform Colonel Erskine that he had acquired an interest in the property, and Colonel Erskine did not learn until about March 1943 that the property was not owned by Mrs. Curtis. In making payments to accused for rental on the property, Colonel Hosterman did not know that any part of the money was for the use and benefit of accused. On 8 March 1943, he wrote to accused, stated that the finance officer had suspended his voucher dated 2 January for $1,000 because he wanted additional information, and requested accused to furnish detailed information as a matter of record. After some correspondence, accused advised Colonel Hosterman, in a letter (Ex. 26) dated 30 March 1943, that accused was the owner of the property (R. 127, 171-184, 255-256, 260-261, 516).

d. Specification, Charge III: At some time in 1942 accused was assigned to duty with the Office of Civilian Defense in Washington. Under date of 30 July 1942 he executed a request to Mr. David L. Knox of the Office of Civilian Defense for the purchase of 30 Colt revolvers. There was introduced in evidence an invoice (Ex. 76) from the Colt Company to Defense Supplies Corporation dated 8 September 1942, showing shipment of 30 revolvers to the Provost Marshal General's Training Center, Fort Oglethorpe, Georgia. One of these revolvers was No. 717003. Later accused drew five revolvers from the Provost Marshal General's School at Fort Oglethorpe, and

signed a memorandum receipt for them, dated 15 October 1942. About 21 December 1942 the duty of accused with the Office of Civilian Defense terminated, and he subsequently was on duty in New Orleans, Louisiana. About the middle of January 1943 Second Lieutenant Charles F. G. Steinway, who was on duty in the district intelligence office at New Orleans, met accused who was executive officer there. About the middle of February 1943, Lieutenant Steinway was in the apartment of accused one evening and they examined some revolvers which accused had. As Lieutenant Steinway wanted to own a gun, he asked accused to sell him one of them. Accused did not want to do so, but Lieutenant Steinway finally prevailed on him to sell one of the revolvers. Accused then sold to Lieutenant Steinway, for $33, a revolver, with box, cleaning brush and some ammunition. This revolver, Colt No. 717003, was introduced in evidence (Ex. 71). In a letter dated 12 March 1943 (Ex. 81) accused replied to a request of the Office of Civilian Defense for return of revolver No. 717003 or payment of its value, by stating that he was not in a position to account for it, and that he would immediately reimburse the Government. Exhibits 82 and 83 for identification show that accused forwarded a check to reimburse the Government for the revolver at a value of $24.30 (R. 344-351, 402-405, 410-414, 437-444, 450-451, 459-463, 467-470).

4. Mr. Fred C. Crowe testified for the defense that he was a former employee of the firm of Smith and Mickey. In the latter part of 1941 he was working part time (some evenings) at the office in La Salle Apartments. He kept some records for accused and answered the telephone and personal inquiries. He was jointly employed by Robert L. Mickey and Company and by Smith and Mickey. He received $25 per week from the former and from $5 to $10 per week from the latter (R. 607-611, 630, 653).

It was stipulated that if a qualified real estate expert were called and sworn he would testify that about February 1942 the fair and reasonable rental value to the Government of the property at 2128 Bancroft Place was between $500 and $600 per month. It was further stipulated that from October 1940 to 1 October 1941, the property was rented for $200 per month (R. 661).

Accused elected to make an unsworn statement to the court, which was substantially as follows:

He was commissioned in 1938 as a Reserve officer. In 1940, after interviews by intelligence officers, he was called to active duty, largely because of his general knowledge of the spread and nature of industry in the United States, gained through his business of manufacturers' representative. When it became necessary to establish an undercover office in Washington, D.C., accused was asked to find an existing firm which could serve as a "front". His own firm was selected, because from the nature of

the firm's business the movement of men from the office would not arouse suspicion. Accused was given "general and very vague instructions and authority" to undertake the necessary steps. In October 1940 the undercover office was established by the rental of two offices in the Insurance Building. This office eventually expanded to five rooms. In the interest of secrecy, it was necessary for the "old firm" of accused to continue. Later when additional space was required, the office was moved to the La Salle Apartments. Every contract was the contract of accused, he was personally obligated and paid when the time for payment came, and if the Government had failed to pay him he would still have had to pay (R. 662-666).

In September 1941 the move to La Salle Apartments was made. The space was one-third larger than that in the Insurance Building, but represented, at the price which accused quoted to the Government, a reduction of $7.50 per month. "We considered it the appropriate way to underwrite the costs which we had to bear, to quote to the Government and treat the Government as a subcontractor. We followed that procedure in only two respects: that with regard to the garage facilities and that with regard to the space, the quarters". Accused and his firm were obligated rather than the Government. When the office was moved from La Salle Apartments, accused would have had to pay the rent for the balance of the lease, except that on account of the demand for space the owners released him. In the opinion of accused the "charges to G-2 did not meet the costs" borne by his firm (R. 666-669).

About November 1941, when more space was needed, it was decided that a complete building meeting certain requirements should be obtained. Accused was designated to find a place, and made a thorough search without results. The pressure for getting a new location became extreme. Colonels Erskine and Holbrook, another officer and accused discussed the possibility of several officers going in together to purchase a piece of property, but that plan "fell through" because it was difficult to bring the group together. Accused looked at places for sale in the hope that he could prevail on the owners to rent. In the course of his search, accused looked at the property at 2128 Bancroft Place, thought it would meet the requirements, and submitted it to his superior officers. Accused was informed by Mrs. Jones, the agent, "emphatically that the owner would not rent the premises". The owner was "pressed for funds" and would sell at an "unusually attractive figure". Accused conferred a number of times by telephone with Mrs. Curtis, the owner. The reason steps were taken as early as 17 January to get the property was that "Military Intelligence" wanted to move in immediately. When Mrs. Curtis stated that the property was sold elsewhere, additional properties were sought. When she advised that the property was available, the proposition was taken up again (R. 669-673).

The orders of accused were to locate property for lease. He located the Bancroft Place property "as a leasable property". In order to determine the value of the lease he called the Public Buildings Administration and asked for a statement of the average prices paid by that agency for rental in the District of Columbia. He was quoted two prices: $1.50 to $1.60 per square foot per year where the lessor furnished service, and 95 cents to $1.10 per square foot where he did not. The net usable office space in this property was about 6,000 square feet. On the basis of the net area he quoted a price of $550 a month or $6,600 a year. "Military Intelligence Service" found this extremely reasonable. Since accused was the officer who had been handling the transaction, steps were taken to consummate it. Accordingly accused requested the Public Buildings Administration to rent the property for the War Department. At this time it was discovered that there was a limitation on the amount of rent that could be paid. The problem was placed before Colonels Holbrook and Erskine, and subsequently Colonel Richards. The latter solved the problem by stating that the difference in rent would be paid by "Military Intelligence Service" (R. 672-675).

It was necessary to submit a rental of $4,600 a year. Accused had been personally authorized by Mrs. Curtis to take all necessary steps to consummate the transaction. She was an eccentric lady, in ill health, and wanted to be relieved of all details. By means of "this sale" Mrs. Curtis was able to get $2,500 in cash and about $4,000 from the notes. The $2,500 paid her by accused was paid "as rental or purchase, however you may wish to take it". She received about $1,738 in a check from Public Buildings Administration and the balance to make up $2,500 by a check from accused. He knew of no way to acquire suitable property at the time "other than the way we took". Accused had no knowledge that he was doing wrong. He "understood completely" that that was the "best service" he could render (R. 675-677).

"Almost following" the move to Bancroft Place, the transfer of title to accused was well known to the Public Buildings Administration and "definitely well known by certain members of the Military Intelligence Service". In May or June 1942 the ownership of accused was known to "Military Intelligence Service" by virtue of the fact that accused was asked if the owner would authorize certain renovations in the property and he replied "Yes, I would". The officer in charge of the field office (Lieutenant Colonel Francis C. Brennecke) "knew well" that accused owned the property. There was no attempt to conceal his ownership. Accused was "never asked in detail" whether he owned the property. The whole relationship was "nebulous and vague" because military intelligence wanted it that way. In order to fulfill the order to secure property for lease, accused finally took title to the property himself, and thereby assumed a rather heavy obligation. In fact after the Government gave up the property on 30 June 1943, it remained vacant. Accused has to pay about $3,000 on the

property on 15 July each year. On 25 February 1942, accused was transferred to the Office of Civilian Defense, but he "continued as a firm to service the front" (R. 677-680).

Accused "conceded" that he had possession of the revolver and that he "expected and did pay" the Government for it (R. 680).

Accused stated that during his active duty he had tried to do the best he could, was called on to do "very unusual things", was personally commended for services rendered, and was not trying to make money (R. 681-682).

5. Mr. Kelleher testified in rebuttal that he first knew that accused was the purchaser of 2128 Bancroft Place when he received a certified copy of the deed in May 1942. He did not "connect" accused and "Garland Fielding Smith". Colonel Erskine testified that to the best of his knowledge and belief there was no discussion with accused of the possibility of several officers purchasing property for the use of military intelligence. The payments on Bancroft Place and La Salle Apartments about which he testified were not supposed to cover anything other than rental and "charges incidental to rental". Colonel Holbrook did not remember any conversation about several officers purchasing property for military intelligence use. Lieutenant Colonel Francis C. Brennecke, who commanded the field office from 21 December 1941, did not, to the best of his recollection, have a conversation with accused in 1942 in which accused told him that he owned 2128 Bancroft Place. He recalled such a conversation early in 1943. It occurred in connection with contemplated changes in the building, requiring permission from the owner. During an investigation by Major Smith W. Brookhart, Jr., accused stated that he thought the first knowledge that any officer in military intelligence had of his ownership of 2128 Bancroft Place was in July or August 1942, during a casual conversation with "Major" Brennecke (R. 683-688, 692-695, 701, 707-710, 717-718).

6. From the summer of 1940 until 25 February 1942, accused was on duty in the counter-intelligence branch of military intelligence at Washington, D. C. On the date referred to, he was transferred to the Office of Civilian Defense, where he served until December 1942, when he was assigned to duty in New Orleans, Louisiana. Among officers superior to accused in the counter-intelligence office at Washington were Colonel Willard A. Holbrook, Jr., chief of the domestic intelligence section, Colonel David G. Erskine, assistant executive of the counter-intelligence branch, Lieutenant Colonel Frank M. Hosterman, special assignments branch, and Colonel Robert B. Richards, finance officer of G-2. Colonel Erskine, and after 4 March 1942 Colonel Hosterman, served as custodian of

confidential funds allotted to military intelligence for expenses. These were Government funds. In the course of his duties, accused rented office space in the Insurance Building in Washington, where an undercover office for counter-intelligence was operated behind the "front" of the former firm of accused, known as Smith and Company. The rent and other expenses of the office were paid by accused, and he was then reimbursed from the confidential funds, on his vouchers showing the expenditures.

a. Specification 3, Charge I: In the summer of 1941 accused was instructed to find larger quarters for the office, under the same "front". He leased space in La Salle Apartments at $175 per month, plus $3.50 and 5 cents for each outgoing call for telephone services. The total amount paid by accused to the La Salle Apartments for rent and telephone services from October 1941 to May 1942, inclusive, was $1,429.20. During the same period (within two years prior to arraignment) he submitted vouchers for rent and services, and received payment therefor from the confidential funds of counter-intelligence, in the total amount of $1,635.00. The resulting overpayment to accused amounted to $205.80. Accused represented to Colonel Erskine that the rent was about $200 per month, and did not inform anyone connected with the Government that he was collecting this extra money. Accused considered that the Government subleased from him, and that this arrangement was an "appropriate way" for him or his firm to underwrite the costs and financial risks of having the lease in his name.

In the opinion of the Board of Review the evidence and resulting inferences show beyond any reasonable doubt that the conduct of accused in submitting vouchers, and receiving payment from Government funds, for rent at $200 per month, when in fact he was paying rent at a rate of $175 per month, was with intent to defraud. He concealed from the officers who had custody of the Government funds the fact that he was receiving $25 extra each month. The record of trial is legally sufficient to support the approved findings of guilty.

b. Specification 4, Charge I: About the time that offices in La Salle Apartments were leased, accused arranged for parking space at the Medical Center Garage for several cars, for the use of the counter-intelligence office. The total amount that accused paid for this space from 14 September 1941 forward was $666.34. During the same period (two years prior to arraignment) he submitted vouchers, and received payment from Government funds, for these spaces in the total amount of $937.50. The resulting overpayment to accused amounted to $271.16. In the opinion of the Board the record of trial sustains the approved findings of guilty.

c. Specification 2, Charge I and Specification, Charge II:

About 1 January 1942 it again became necessary for the counter-intelligence office to seek larger quarters, this time openly and not undercover. Accused was directed to find a suitable location to be rented. It was very difficult to find property of the kind desired available for rent. A real estate agent showed accused a place located at 2128 Bancroft Place, which was owned by an eccentric lady, who was anxious to sell but would not rent it. Accused showed the place to his superior officers, who found it suitable and instructed him to arrange for rental of it. About the same time accused entered into a contract with the owner by which he was to purchase the property. The first contract, dated 17 January 1942, was abandoned at the instance of the owner, but another was later executed under date of 31 January. Accused advised his superiors that the rental would be about $6,600 per year, that an eccentric old lady owned the property, and did not disclose the fact that he was under contract with her to purchase the place. When accused submitted a request to the Public Buildings Administration to lease the property for the War Department at $6,600, it was discovered that the rental limit would be $4,600 per year. It was then decided that the additional $2,000 per year would be paid from the confidential counter-intelligence funds. Accused submitted to Public Buildings Administration a letter prepared by himself and signed by his brother, an attorney, stating that the "owner" and "client" (not named) would lease for $4,600 per year. The brother of accused did not represent the owner, but she had told accused to "put the deal through" and take care of her interest. The lease, dated 14 February, was entered into between the owner and the Government. Accused acquired title to the property by deed dated 3 March 1942.

Accused advised his superior officers prior to execution of the lease that it was necessary to make an advance payment of rent to hold the house. As a result he received a check for $750 (the extra rent to 30 June 1942) drawn on the confidential funds. Subsequently, he received checks from the same source for $2,000 more, for payment of the difference between the contract rent and the amount actually to be paid. The superior officers did not know that accused had become the owner, and thought that they were dealing with the original owner. Accused executed vouchers for the several payments to him. He used the money in purchasing the property.

Accused was acting as a representative of the Government in seeking the property and in arranging to rent it. It is a primary duty of one so engaged to deal fairly and openly with his principal, and not to have a hidden adverse interest. Accused secretly became the party with whom he was dealing on behalf of the Government. In the opinion of the Board of Review the evidence clearly sustains the finding of guilty of Specification 2, Charge I.

Accused obtained Government funds to the extent of $2,750 upon the pretext that the owner of the property, an eccentric old lady, would not lease the property for less than $6,600 annually. In fact, accused was the owner of the property (under contract prior to the lease, and by deed of conveyance subsequently). Whether or not the property was worth an annual rental of $6,600 to the Government, accused received the extra rent of $2,750 by fraudulent means, and under representations that he had paid, or would pay, it to another as required rent. In fact he kept the money for his own use, and applied it in payment for property that he was purchasing. In the opinion of the Board his conduct constituted an offense in violation of the 94th Article of War, as alleged in the Specification, Charge II.

d. Specification, Charge III: About 8 September 1942 Defense Supplies Corporation purchased 30 Colt revolvers, including No. 717003, for the Provost Marshal General's Training Center. About 15 October accused received, and signed a memorandum receipt for, five of these revolvers, including the one specifically designated. In December accused was transferred from the Office of Civilian Defense, where he was on duty at the time he drew these weapons, to the district intelligence office at New Orleans, Louisiana. He took revolver No. 717003 with him to New Orleans, and about the middle of February 1943 sold it to Second Lieutenant Charles F. G. Steinway. Later, when called on to account for this gun, accused agreed to reimburse the Government, based on a value of $24.30.

It was clearly shown that the pistol was intrusted to accused by the Government, and that he was accountable for it. When he undertook to sell, and sold, it to Lieutenant Steinway, he thereby converted it to his own use, for the reason that he treated it as his own property and permanently surrendered possession and apparent ownership to a person not authorized by the Government to receive it. In the opinion of the Board, the accused was guilty of embezzling the revolver, in violation of the 93rd Article of War.

7. Consideration has been given to briefs in behalf of accused which accompany the record. In the briefs it is argued vigorously that the court improperly sustained numerous objections to the testimony of Mr. Crowe, a witness for the defense, and prevented him from disclosing facts (outlined in the briefs) pertinent to Specifications 3 and 4, Charge I. The Board agrees that the prosecution raised technical and in some instances unreasonable objections, and that the court erred at times in sustaining such objections. However, after a careful study of the testimony of this witness, in the light of the statement in the briefs of what he would have testified, the Board of Review is of the opinion that the rulings on objections to his testimony, to the extent that they were erroneous, did not injuriously affect the substantial rights of accused.

8. The accused is 33 years of age. The records of the Office of The Adjutant General show his service as follows: Appointed second lieutenant, Military Intelligence Reserve, 13 September 1938; accepted 23 September 1938; active duty 20 May 1940 to 16 June 1940 and from 5 July 1940; promoted to first lieutenant, Military Intelligence Reserve, 24 September 1941; temporarily promoted to captain, Army of the United States, 25 March 1942, effective as of 1 February 1942; temporarily promoted to major, Army of the United States, 25 September 1942.

9. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the approved findings of guilty and the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 93rd, 94th or 96th Article of War.

Samuel M. Driver, Judge Advocate

Robert W. Simmons, Judge Advocate

J. Lottuhas, Judge Advocate

1st Ind.

War Department, J.A.G.O., 23 MAR 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Major Garland F. Smith (0-371897), Military Intelligence.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the approved findings of guilty and the sentence and to warrant confirmation of the sentence. The accused fraudulently obtained $200 from the United States by falsely pretending that he had incurred periodic obligations for rent of office space at $200 per month when in fact the rent paid was $175 per month (Spec. 3, Chg. I); fraudulently obtained $271.16 from the United States by falsely pretending that he had incurred periodic obligations for garage space in excess of the amount actually paid therefor (Spec. 4, Chg. I); while acting as agent for the War Department in the leasing of office space, wrongfully failed to disclose to his superior officers that he had acquired an interest in the property to be leased (Spec. 2, Chg. I); falsely pretended that in order to lease this property it would be necessary to pay $2,000 annually from confidential funds of the United States, in addition to the regularly contracted rental, without disclosing that such additional rental would be received by him as proposed purchaser of the property, and thereby fraudulently received and misapplied $2,750 of Government funds (Spec., Chg. II);and embezzled a Government revolver of a value of about $24.30 (Spec., Chg. III). The reviewing authority disapproved the finding of guilty of Specification 1, Charge I, and the court found accused not guilty of Specifications 5 and 6, Charge I.

It appears from papers attached to the record that on 6 July 1928 accused pleaded guilty in a District of Columbia court to four charges of petty larceny, based on theft of money from lockers in a boat house, and that he was placed on probation for one year. It further appears from these papers and from a copy of a memorandum report of a special agent, Counter Intelligence Corps, dated 10 January 1944, that on 8 January 1944, under the authority of a search warrant, a safety deposit box of accused was opened; that therein was found a number of pamphlets, writings, documents and directives, marked secret, confidential and restricted, the property of the War Department; and that in December 1942 and January 1943, when accused was relieved from duty with the Office of Civilian Defense, after having been ordered to turn over to his successor all books, pamphlets, papers and other files of that office, accused officially certified that he had done so.

I recommend that the sentence to dismissal, total forfeitures, a fine of $2,500, confinement at hard labor for two years, and confinement at hard labor until the fine is paid, but for not more than one additional year, be confirmed and carried into execution.

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3. Consideration has been given to two briefs filed on behalf of accused by Mr. William Wendell, attorney, Washington, D. C.

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

Myron C. Cramer.

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

6 Incls.
Incl.1-Rec. of trial.
Incl.2-Drft. ltr. for sig.S/W.
Incl.3-Form of Action.
Incl.4-Cpy of Memo. of 10 Jan.44, fr. Counter Intel.Corps.
Incl.5-Brief by Mr. Wendell.
Incl.6-Brief by Mr. Wendell.

(Sentence confirmed. G.C.M.O. 254, 1 June 1944)

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

SPJGN
CM 242791

5 NOV 1943

UNITED STATES	92ND INFANTRY DIVISION
v.	Trial by G.C.M., convened at Fort Huachuca, Arizona, 5 October 1943. Dismissal and total forfeitures.
Second Lieutenant GEORGE A. BETHEL (0-1295235), 370th Infantry.	

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

1. The Board of Review has examined the record of trial in the case of the officer above-named 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 A. Bethel, 370th Infantry, did without proper leave absent himself from his organization at Fort Huachuca, Arizona, from about 0830 27 August 1943 to about 1855 30 August 1943.

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

Specification: In that Second Lieutenant George A. Bethel, 370th Infantry, did at Fort Huachuca, Arizona, on or about 27 August 1943 with intent to deceive 1st Lieutenant Carlton Crouthamel, his commanding officer, officially state to the said Lieutenant Crouthamel that "I am going to report to the Hospital, I am going to be operated on", which statement was known by the said Second Lieutenant Bethel to be untrue in that he did not report to the Hospital until 30 August 1855.

He pleaded not guilty to and was found guilty of all Charges and Specifications. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at

such place as the reviewing authority may direct for three (3) months. The reviewing authority approved only so much of the sentence as provides for dismissal and total forfeitures and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that the accused on the morning of 27 August 1943 exhibited a dispensary card, showing he was to be hospitalized, to his company commander who was told by the accused that "I am going to the hospital, I am going to be operated on" without the exact date of the commencement of hospitalization being indicated but with the accused indicating that he intended to endeavor to secure a "couple of days leave" before the operation. He also showed the card to the company's first sergeant and told him "I am going to the hospital and my ward will be ward 19." The accused, however, was not granted any leave and was not authorized to be absent prior to the operation. On the morning of 30 August 1943 he was observed by his company commander and another officer driving his automobile through one of the post's gates and was not admitted into the hospital until about 1900 o'clock on 30 August 1943 where he underwent a hernia operation on 1 September 1943 and reported back to his organization on 2 October 1943 (R. 6-13, 13-14, 18).

Second Lieutenant Barbara C. McDonald, Army Nurse, who was on duty in Ward 19, saw the accused in the ward visiting another officer a few days before he was admitted on 30 August 1943 but until his admission he was not a patient. The hospital records show that he was not admitted thereto on 27, 28 or 29 August 1943 or at any time prior to about 1900 o'clock on 30 August 1943. The sick book of the accused's company for the days involved was produced at the court's request and showed the accused as being in the hospital except on 28 August 1943 he was shown as absent by the notation of a medical officer (R. 15-18, 19, 20-24; Ex. "A").

4. The defense offered no evidence and the accused, after explanation of his rights as a witness, elected to remain silent (R. 19).

5. The Specification, Charge I, alleges that the accused absented himself without proper leave from his organization at Fort Huachuca, Arizona, from about 0830 o'clock on 27 August 1943 to about 1855 o'clock on 30 August 1943. The elements of this offense and the proof required for conviction thereof are as follows:

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

The evidence is uncontroverted that the accused was neither given leave nor otherwise authorized to be absent from his organization for the period of time elapsing between 0830 o'clock on 27 August 1943 until 1855 o'clock on 30 August 1943 when he was actually admitted into the station

hospital. During this period he did not report to his company and was not in the hospital. His expressed intention of applying for a short leave before undergoing the operation remained unexecuted and the expression of the intention to apply for the desired leave demonstrates that he was fully aware that he was on duty status with his organization until actual admission into the hospital. The evidence, therefore, establishes beyond a reasonable doubt the commission of the alleged offense and supports the findings of guilty of Charge I and its Specification.

6. The Specification, Charge II, alleges that the accused on or about 27 August 1943 at Fort Huachuca, Arizona, with intent to deceive officially stated to his commanding officer that "I am going to report to the Hospital, I am going to be operated on" which statement was known by the accused to be untrue in that he did not report to the hospital until 30 August 1943. The offense of knowingly making a false official statement is properly chargeable as a violation of Article of War 95. (MCM, 1928, par. 151)

The evidence adduced by the prosecution fails to establish beyond a reasonable doubt either the known falsity of the statement or the intention of the accused to deceive his commanding officer thereby. In the same conversation in which the statement was made, the accused indicated his desire for a few days leave before the operation and expressed an intention to apply therefor. The expression of such intention, although unexecuted, certainly conveyed or should have conveyed the knowledge to his commanding officer that the accused did not anticipate immediate admission into the hospital. The intention of the accused to deceive his commanding officer by the statement is, therefore, founded upon an untenable assumption. Furthermore, the evidence shows that the accused said, "I am going to the hospital, I am going to be operated on". The evidence also shows from the testimony of the nurse that on or about 27 August 1943 the accused was seen in Ward 19 of the hospital, although not admitted as a patient until 30 August 1943 and that he was operated upon on 1 September 1943. The statements made were, therefore, true and not false. Furthermore, the Specification alleges that the accused said, "I am going <u>to report</u> to the hospital, I am going to be operated upon". There is a material difference between merely going to the hospital and reporting to the hospital and there is no evidence whatsoever that the accused stated that he was going <u>to report</u> to the hospital. The evidence is, consequently, insufficient to establish the commission of the offense alleged and does not sustain the findings of guilty of Charge II and its Specification.

7. The accused is approximately 32 years of age. The War Department records show that he had enlisted service from 1 April 1941 until 2 October 1942 when he was commissioned a second lieutenant and that he has been on active duty as an officer since the latter date.

8. The court was legally constituted. For the reasons stated the Board of Review is of the opinion that the record of trial is not legally sufficient to support the findings of guilty of Charge II and its Specification; legally sufficient to support the findings of guilty of Charge I and its Specification and the sentence, and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 61.

Abner E. Lipscomb, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

SPJGN
CM 242791

1st Ind.

War Department, J.A.G.O., 15 NOV 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 A. Bethel (0-1295235), 370th Infantry.

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 making a false official statement, in violation of Article of War 95 (the Spec., Chg. II and Chg. II), legally sufficient to support the finding that the accused was absent without leave for three days, in violation of Article of War 61, legally sufficient to support the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but commuted to a reprimand.

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

T. H. Green,
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.

(Findings of guilty of the Specification, Charge II, and Charge II, disapproved. Sentence confirmed but commuted to reprimand. G.C.M.O. 389, 21 Dec 1943)

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

(193)

SPJGK
CM 242812

10 NOV 1943

UNITED STATES	)	SEVENTH SERVICE COMMAND
	)	
v.	)	Trial by G.C.M., convened
	)	at Brookings, South Dakota,
Second Lieutenant EDWIN	)	20 October, 1943. Dismissal.
HERBER (0-1001583), Adjutant	)	
General's Department.	)	

OPINION of the BOARD OF REVIEW
LYON, HILL 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. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 61st Article of War.

Specification: In that Second Lieutenant Edwin Herber, AGD (AUS), Enlisted Branch No. 3, Army Administration Schools, Brookings, South Dakota, did, without proper leave, absent himself from his station at Brookings, South Dakota, from about 17 June, 1943, to about 3 October, 1943.

The accused pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dismissal and total forfeitures. The reviewing authority approved the sentence, remitted the forfeitures, and forwarded the record of trial for action under Article of War 48.

3. The evidence shows the accused was a member of Headquarters, Enlisted Branch No. 3, Army Administration Schools, Brookings, South Dakota (R.6). Without objection there was introduced in evidence an authenticated extract copy of the morning report of accused's organization for the month of June 1943 containing an entry as of 17 June 1943 - "2d Lt. Herber dy to AWOL 1245 EWS". The morning report was identified by Captain Samuel W. Markell, Jr., Quartermaster Corps, and personnel officer of the headquarters, who testified that he was the official custodian of the morning reports (R.5-6). The following stipulation was read into the record:

"It is stipulated and agreed by and between the defendant,

Edwin Herber, and his defense counsel, Wm. T. Bryan, and the trial judge advocate, Joseph R. Eggleston, that if Technician Fifth Grade Robert A. Opperman, MP Section, Headquarters Detachment, Fort Lawton, Washington, were present, he would testify as follows: That the defendant, 2d Lt Edwin Herber, surrendered himself to him, Robert A. Opperman, at the east gate, Fort Lawton, Washington, at 10 O'clock A.M., 3 October 1943, and returned to military control. That Edwin Herber stated to him that he had been absent without leave from the Army Administration Schools, Brookings, South Dakota, since 17 June 1943." (R.9)

The officer who investigated the charges, Major Thomas E. McCarthy, Infantry, identified a written statement which he stated was voluntarily dictated and signed by the accused after he had been fully advised by the investigating officer that he did not have to make a statement and that any statement made could and probably would be used against him (R.7; Ex. B). The accused in the statement admits that he left his organization without authority and that in so doing he was aware of the fact that he was violating the 61st Article of War.

For the defense, the accused through defense counsel made an unsworn statement in pertinent part as follows:

"Lt Herber had had some misfortune in his personal affairs. They were in rather ragged order. Colonel Nevitt was attempting to straighten out these personal affairs and was bringing pressure upon the accused to take care of them. Lt Herber was attempting to straighten them out in his best manner, but the action of Colonel Nevitt caused the Lieutenant to feel that he was in jeopardy and his commission was in jeopardy, and he made the decision to take off and remain away until the matter had calmed down. That he was right in assuming that taking off was correct can be shown by the fact that no charges have been drawn against him regarding his personal affairs although he was in constant jeopardy of having them drawn against him at the time he left. This statement has only been made, as I said before, to give the court an idea of why the offense was committed." (R.10)

4. The undisputed evidence shows beyond a reasonable doubt that the accused was absent without leave from his organization from 17 June 1943 to 3 October 1943 in violation of Article of War 61.

5. The accused is 23 years and 6 months of age. The records in the Office of The Adjutant General show that he was graduated from high school, Alsen, North Dakota, in 1936. He enlisted in the regular Army 25 October 1939 and attained the grade of sergeant. He attended the Adjutant General's Officer Candidate School, Fort Washington, Maryland, from which he was commissioned a temporary second lieutenant, Adjutant General's Department, Army of the United States, 3 February 1943.

6. The court was legally constituted and had jurisdiction of the person and the subject matter. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence as approved by the reviewing authority and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 61.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 15 NOV 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 Edwin Herber (O-1001583), Adjutant General's Department.

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

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

T. H. Green,
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 Ex. action.

(Sentence as approved by reviewing authority confirmed. G.C.M.O. 409, 23 Dec 1943)

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

SPJGQ
CM 242876

4 NOV 1943

UNITED STATES	MILITARY DISTRICT OF WASHINGTON
v.	Trial by G.C.M., convened at Fort Belvoir, Virginia, 13 October 1943. Dismissal.
Captain JOHN F. SUTHERLAND (0-255823), Corps of Engineers.	

OPINION of the BOARD OF REVIEW
ROUNDS, HEPBURN and FREDERICK, 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 Captain John F. Sutherland, C.E., did, without proper leave, absent himself from his duly appointed place of duty in the Office of the Chief of Engineers, War Department, Washington, D. C., from about 0815, 27 July 1943 to about 1700, 27 July 1943.

Specification 2: In that Captain John F. Sutherland, C.E., did, without proper leave, absent himself from his duly appointed place of duty in the Office of the Chief of Engineers, War Department, Washington, D. C., from about 0815, 30 July 1943 to about 1700, 31 July 1943.

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

Specification: In that Captain John F. Sutherland, C.E., War Department, Washington, D. C., having received a lawful order from Major Elmer L. Claussen, C.E., to report to the Office of Major Claussen, the said Major Claussen being in the execution of his office, did, at Washington, D. C., on or about 30 July 1943, fail to obey the same.

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

Specification: In that John F. Sutherland, Captain, C.E., Engineer Officer Replacement Pool, Engineer Replacement Training Center, Fort Belvoir, Virginia, did, without proper leave, absent himself from his duties and station at Fort Belvoir, Virginia, from about 0800 30 August 1943, to about 2330 5 September 1943.

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

Specification: In that Captain John F. Sutherland, Corps of Engineers, Engineer Officer Replacement Pool, did, without proper leave, absent himself from his organization, at Fort Belvoir, Virginia, from about 1300, 17 September 1943, to about 2315, 19 September 1943.

He pleaded guilty to all Charges and Specifications. He was found guilty of all Charges and Specifications. No evidence of any previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. With reference to Charge I, Additional Charge I, and Additional Charge II, and the Specifications thereunder alleging the absence of the accused without proper leave at various times, to which the accused pleaded guilty, there was no evidence offered in support of the Charges other than a stipulation (Pros. Exs. 1, 2) entered into between the prosecution, the defense counsel and the accused that the accused did without proper leave absent himself from his duly appointed place of duty in the Office of the Chief of Engineers, War Department, Washington, D. C., from about 0815 to 1700, 27 July 1943, and 0815, 30 July 1943 to about 1700, 31 July 1943, and did also absent himself from his duties and station at Fort Belvoir, Virginia, from about 0800, 30 August 1943 to about 2330, 5 September 1943, and from about 1300, 17 September 1943 to about 2315, 19 September 1943.

With reference to Charge II and its Specification, to which the accused also pleaded guilty, Major Elmer L. Claussen testified that on 30 July 1943 he was Chief of the Equipment Section, Equipment Branch, Office of Chief of Engineers (R. 10). The accused was a member of that Section and when on duty was supposed to be at his desk located in Major Claussen's office on the fourth floor of the Engineers Building. Accused was absent without leave from his desk and office and Major Claussen on 30 July 1943 saw him on the third floor of the building about to make a telephone call, whereupon Major Claussen as his superior officer and in line of duty ordered accused to come to his, Major Claussen's, office as soon as he had completed the call. Accused stated he would report (R. 10). Accused, however, did not report as ordered (R. 11).

4. Accused, having been advised of his rights, testified solely in extenuation of the alleged AWOL at Fort Belvoir, Virginia; his testimony was to the following effect:

Having served at the Mexican Border in 1916 and in five major engagements in France in the last war, he voluntarily entered on his present duties for patriotic reasons; at the end of the first week of a refresher course at Fort Belvoir, Virginia, he learned that his nephew had been killed and obtained leave to go to the funeral; he returned, completed the refresher course, which was too strenuous for him in view of his age (46 years) and he "cracked up" thus bringing about his present predicament; while on duty in Washington he had contacted General Albert T. Hegenberger, an old acquaintance, who is now commanding officer, 21st Bomb Wing, Topeka, Kansas; General Hegenberger's request for the accused's transfer to his organization is now pending (R. 13-16).

5. The accused is charged with four violations of Article of War 61, having been absent without proper leave from his duties. He pleaded guilty to the Charges and entered into a written stipulation that the facts alleged in the various Specifications under the Charges are true. The better practice would be to offer in evidence certified copies of extracts of the morning reports. However, as the accused pleaded guilty to the Charges, it was not necessary to offer any evidence. The findings of guilty of these Specifications and Charges is therefore supported by the plea of guilty.

The findings of guilty of Charge II and its Specification were supported not only by the plea of guilty but also by the testimony of the officer who gave the accused the order to report. "A neglect to comply with an order through heedlessness, remissness, or forgetfulness is an offense chargeable under Article of War 96" (MCM, 1928, par. 134b, p. 148).

6. The War Department records show accused to be 46 years of age, married, and the father of seven children. He graduated from Deerfield Academy, attended Massachusetts Agricultural College one year; University of Arizona one year, and Fresno Technical School two years. From 24 June 1916 to 8 May 1919 he was on active duty with the 101st Infantry. He practiced engineering and construction specializing in building, road and street construction. For two years prior to his being commissioned captain, Corps of Engineers, AUS, on 16 May 1942, he was Chief Engineering Inspector for the F.H.A. He reported for active duty 1 June 1942 at Bradley Field, Connecticut as Utilities Officer, where he served until 14 December 1942. Transferred to Fort Ethan Allen, Vermont, thence to Port Headquarters, Charleston, South Carolina. Upon his request for reassignment he was transferred 29 June 1943 to the Office, Chief of Engineers, Washington, D. C.

7. The court was legally constituted and had jurisdiction of the

person and subject matter. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 61 or 96.

William A. Rounds, Judge Advocate.

Earle Hepburn, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

1st Ind.

War Department, J.A.G.O. 12 NOV 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 F. Sutherland (0-255823), Corps of Engineers.

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

T. H. Green,
Brigadier General, U. S. Army,
Acting The Judge Advocate General.

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

(Sentence confirmed. G.C.M.O. 398, 22 Dec 1943)

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

ND(203)

20 NOV 1943

SPJGH
CM 242887

UNITED STATES	)	TRINIDAD SECTOR AND BASE COMMAND
	)	
v.	)	Trial by G.C.M., convened at Fort Read, Trinidad, B.W.I., 19 August and 16 September 1943. Dismissal.
	)	
Second Lieutenant WILLIAM H. PRIESS (0-668766), Air Corps.	)	

OPINION of the BOARD OF REVIEW
DRIVER, LOTTERHOS and LATTIN, 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 William H. Priess, Air Corps, 10th Bombardment Squadron, was, at Barbados, B.W.I., on or about the night of 26-27 June 1943, in a public place, to wit: the Ocean View Hotel, Hastings, Barbados, B.W.I., drunk and disorderly while in uniform.

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

Specification: In that Second Lieutenant William H. Priess, Air Corps, 10th Bombardment Squadron, having received a lawful command from Captain R. B. Humphrey, Air Corps, his superior officer, to remain on the auxiliary airdrome, ~~Seawell~~ Field, Christ Church, Barbados, B.W.I., and await transportation to his home station, did at Barbados, B.W.I., on or about 27 June 1943, willfully disobey the same.

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 two years. The reviewing authority approved only so much of the

sentence as provides for dismissal, recommended that the approved sentence be ordered executed, and forwarded the record of trial for action under the 48th Article of War.

3. Evidence for the prosecution:

a. Specification, Charge I: On 27 June 1943 at about 2:00 to 2:30 a.m. when the accused entered the Ocean View Hotel in Barbados, B.W.I. with a woman, Hayden Sobers, a domestic servant who was sitting in the lobby, told him that he could not bring the lady into the hotel. Accused said he was boarding there, could do as he pleased and asked if he could take her upstairs. When Sobers "said no" accused offered him some money which Sobers refused. Accused became enraged, talked in a loud voice, drew a pen knife from his pocket, opened it, pointed it a Sobers and threatened to cut off Sobers' ears. Sobers backed away and the accused followed him through the lobby with the open knife. The manager of the hotel was called and talked to accused, who went upstairs, returned in a short time with a bottle of whiskey and some cigarettes, and left the hotel. Accused was in khaki uniform with no tie. When accused came into the hotel he had his arm around the woman and was in a "rocking condition". For that reason he appeared to Sobers "as though he was under alcoholic beverages". According to Stanley Springer, another domestic servant who was present, accused "seemed as though he were a little intoxicated". Sobers had a stick about six inches long in his hand but made no gesture with it toward accused (R. 13; Exs. 2 and 3).

b. Specification, Charge II: On the morning of 27 June 1943 Captain Richard B. Humphrey, Commanding Officer of Airways Detachment at Seawell Airdrome, Barbados, B.W.I., left word at the Ocean View Hotel for the accused to come to the airport with the naval crews when they came out. Captain Humphrey had previously made arrangement with one of the pilots of a navy plane to take accused to Edinburgh Field, Trinidad. Accused left the hotel without waiting for the Navy crews, arrived at the airfield between 8:00 and 8:30 a.m., and made himself known to Captain Humphrey. Accused was questioned about what happened at the Ocean View Hotel the previous night and gave an account of the incident similar to the report Captain Humphrey had received earlier from the manager of the hotel. Captain Humphrey then ordered accused to remain at the airdrome to await transportation to Trinidad on one of the Navy ships leaving that morning. Accused said he was not going back to Trinidad but would return to the hotel, move to another hotel and stay in Barbados until his leave expired. Captain Humphrey several times

repeated the order that accused stay at the airdrome, and each time accused stated he was going to return to the hotel and stay in Barbados. Accused left the airdrome in a taxi. He returned to Trinidad on the morning of 29 June. Captain Humphrey, as Commanding Officer of the Airways Detachment, was authorized to take any disciplinary action deemed necessary by him to prevent breaches of discipline by Air Corps officers and enlisted men in Barbados, and to terminate any leave or furloughs in case of misbehavior. (R. 5-7, 10-11; Ex. 1).

On cross-examination and examination by the court Captain Humphrey testified that he talked to accused for about fifteen minutes and the latter knew he was commanding officer at Seawell. When accused was first given the order to remain at the airdrome he did not make any specific objection about returning to Trinidad by plane. He wanted to return to the Ocean View Hotel for his clothing. As the Navy plane was to leave at about 9:30 a.m. accused would not have time to obtain his belongings and was informed by Captain Humphrey that his clothing would be forwarded as soon as a plane left for Edinburgh Field. As Air Base Commander, Captain Humphrey had the power to order a passenger aboard Navy aircraft provided the pilot of the plane would take him. Captain Humphrey's principal intention when he issued the order to accused was to send him to Trinidad rather than to restrain him at Seawell Field. It was the impression of Captain Humphrey that accused had been drinking heavily but had apparently recovered to some extent from what might have been a bad "hangover". He was not staggering drunk but was definitely under the influence of alcohol (R. 7-11).

4. For the defense: Captain Joseph Woida, pilot, Captain Harland D. Mauray, flight commander, and Second Lieutenant George Turano, bombardier and bomb sight officer, who had been in the 10th Bombardment Squadron, the organization of accused, testified that he was one of the best bombardiers, was competent, efficient and always a good worker, got along well with the rest of the men, had submitted many ideas for low altitude bombing against submarines, and had submitted an idea for a bomb sight which was being built to test out its merits (R. 13-16).

The accused elected to remain silent (R. 16).

5. a. As to Charge I it was shown that between 2:00 and 2:30 on the morning of 27 June 1943, the accused attempted to bring a woman to his room at the Ocean View Hotel, in Barbados. On being stopped by Sobers, an employee of the hotel, accused first offered him a bribe and, when the money was refused, became enraged, opened a pen knife, and threatened to cut off Sobers' ears. He followed Sobers back into the

lobby of the hotel with the open knife. After the manager of the hotel was called the accused went to his room, returned with a bottle of whiskey and left the hotel. Accused was in a "rocking condition" and appeared to be under the influence of liquor.

The conduct of accused in the hotel was clearly disorderly and the court was justified in inferring from the testimony and the actions of accused that he was drunk.

b. Charge II: The uncontradicted evidence shows that on the morning of 27 June 1943, because of the conduct of accused earlier in the morning at the Ocean View Hotel, Captain Richard B. Humphrey, Commanding Officer of Airways Detachment at Seawell Airdrome, Barbados, B.W.I., gave accused a direct order to remain at the airdrome to await transportation to Trinidad. The order was repeated several times but accused, after announcing his intention to disregard the same, left the airfield in a taxi. Captain Humphrey had been authorized to take any disciplinary action deemed necessary to prevent breaches of discipline by Air Corps officers and enlisted men in Barbados, and to terminate any leave or furlough in case of misbehavior.

c. Although the evidence shows that accused was to some extent under the influence of alcohol at the time the order was given by Captain Humphrey, there is nothing in the record to indicate that he was so intoxicated that he could not understand the order or its meaning. The evidence shows that he was not staggering, that he conversed with Captain Humphrey for about fifteen minutes, and that he gave an account of his conduct, similar to what had been reported by the manager of the hotel.

7. The accused is 23 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 17 February 1941; aviation cadet from 10 April 1942; appointed second lieutenant, Army of the United States, and active duty, 17 December 1942.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 96th or 64th Article of War.

Samuel M. Drewes, Judge Advocate

F. J. Fallucchos, Judge Advocate

Norman D. Lattin, Judge Advocate

1st Ind.

War Department, J.A.G.O., 7 DEC 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 H. Priess (0-668766), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. The accused entered the lobby of a hotel in Barbados, B.W.I., at about 2:00 a.m. in a drunken condition with a woman companion and when informed by a domestic servant that he could not take her upstairs became boisterously unruly, drew a pocket knife and threatened to cut off the servant's ears (Chg. I). About six hours later accused repeatedly, willfully disobeyed the lawful command of a superior officer that he remain at the airdrome and await transportation to his home station (Chg. II). It appears from the review of the staff judge advocate among the papers accompanying the record of trial that new Charges have been preferred against accused for offenses involving gross drunkenness and reckless discharge of small arms on three separate occasions, on the same day, committed subsequent to his trial in the instant case. 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 carrying into effect the recommendation made above.

Myron C. Cramer

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

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

(Sentence confirmed. G.C.M.O. 61, 9 Feb 1944)

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

(209)

SPJGK
CM 242900

12 NOV 1943

UNITED STATES	EIGHTH ARMORED DIVISION
v.	Trial by G.C.M., convened at North Camp Polk, Louisiana, 16 October 1943. Dismissal.
First Lieutenant WILLIAM A. POND (0-281468), Infantry.	

OPINION of the BOARD OF REVIEW
LYON, HILL 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. The accused was tried upon the following Charges and Specifications:

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

Specification 1: In that 1st Lt. William A. Pond, Headquarters 58th Armored Infantry Battalion, was at Leesville, La. on or about 24 September, 1943 in a public place, to wit, Dixie Cab Company, drunk and disorderly while in uniform.

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

Specification: In that 1st Lt. William A. Pond, Headquarters 58th Armored Infantry Battalion, did, without proper leave, absent himself from his organization at North Camp Polk, La. from about 0700 24 September 1943 to about 1400, 24 September, 1943.

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

Specification: In that 1st Lt. William A. Pond, Headquarters, 58th Armored Infantry Battalion, being indebted to the Dixie Cab Company, Leesville, Louisiana, in the sum of $22.10 for cab fare, which amount became due and payable on or about 24 September 1943, did, at Leesville, Louisiana, from on or about 24 September 1943 to on or about 30 September 1943, wrongfully refuse to pay said debt.

To Charge I and its Specification he pleaded in bar of trial upon the ground of prior punishment under Article of War 104. The plea was denied. He then pleaded guilty to Charge II and its Specification and not guilty to the other Charges and Specifications. He was found guilty of all the Charges and Specifications. Evidence was introduced showing one previous conviction for being drunk in uniform in a public place in violation of Article of War 96 and for failing to repair to his place of duty in violation of Article of War 61. He was sentenced to dismissal. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Summary of evidence.

On 24 September 1943 accused was the commanding officer of Company A, 58th Armored Infantry Battalion (R.8; Ex. B). He asked First Lieutenant Calvin O. Bishop, Company A, 58th Armored Infantry Battalion, "to take the Company through the gas chamber", and Lieutenant Bishop did not see him again on that day (Ex. B). Major E. G. Bias, commanding officer of the 58th Armored Infantry Battalion, testified that accused had no authority to be absent on 24 September 1943 (R.8).

At approximately 7:30 a.m., 24 September 1943, Ike J. Bricker, a taxicab driver employed by the Dixie Cab Company, Leesville, Louisiana, picked up accused as a passenger at the company's cab stand at 905 Third Street, Leesville (R.8,9,10). Accused was in uniform (R.11). Although accused was not drunk, Bricker believed that he "had had several drinks" (R.10). They drove around town, back and forth, making several stops (R.9). Accused had a "bottle of something" in a paper sack, and Bricker saw him drink from it (R.11). They went to "Sandy Hill", where Bricker waited for accused for about an hour. Then they came back to town and drove "over town" three or four times. Accused could not "cite" where he wanted to go. He would instruct Bricker to go a certain way and when Bricker complied, would tell him that he was going in the wrong direction and that he should go another way. At length accused "passed out or about passed out". When witness endeavored to sober him up, he became angry. Witness then drove accused back to the cab stand at about 12:20 p.m. (R.9). At that time accused was "definitely drunk" (R.10).

The charges for the trip were $22.10 (R.9; Ex. C). This amount represented the "regular and customary cab fare" (R.9). When Bricker asked accused to pay the bill, the latter said nothing and "didn't seem to know anything that was going on" (R.10,11). Witness got accused out of the cab and called the manager. As instructed by the manager, he then called the Military Police (R.10,11). In the opinion of Bricker, accused "just didn't act like a gentleman". He was "using vulgar language and carrying on". (R.11).

In response to Bricker's call, Sergeant Clyde H. Day, 1880th Service Unit, and a "Sergeant Korzan" went to the Dixie Cab Company stand. Sergeant

Day was in charge of the Military Police sub-station in Leesville. At the cab stand Sergeant Day saw accused, who was in uniform. Since accused was an officer, Day called Captain Charles H. Dameron, Corps of Military Police, Assistant Provost Marshal, Camp Polk, Louisiana, who arrived on the scene a few minutes later (R.12,13).

Both Captain Dameron and Sergeant Day testified that accused was drunk, and the latter described him as "just about passed out". He had an alcoholic odor on his breath. He talked in a loud voice and was profane and incoherent. He was staggering and did not have control of his body. A number of civilians were in the vicinity and many of them stood nearby and watched the activities of accused (R.12-14).

Having been informed that accused refused to pay his taxicab bill, Captain Dameron asked him what the trouble was. Accused did not give a coherent answer. However, when asked whether he had any money, accused replied that he had plenty, and when asked what he was going to do about the bill, he said that he was "not going to do a damn thing about it". Captain Dameron also asked accused whether the bill was unfair or unreasonable. In response to this question, accused told Captain Dameron to "get the hell out of here". In Captain Dameron's opinion, accused did not even understand the amount of the charges, and simply refused to pay anything (R.13,14).

Captain Dameron asked accused to come along with him. Accused told the captain "to let him alone" and said that he "wasn't going any damn place with us". He also said that they were in his regimental area, and he ordered them to get out, adding that he would "take care of anyone" who came into his regimental area. When Captain Dameron attempted to "take" him, accused resisted, and at the patrol car he grabbed the door, as a result of which the two Military Police sergeants were obliged to pull his hands loose and force him into the car. He was taken to the Military Police station, where, at about 2:30 p.m., an officer from his organization appeared for the purpose of taking him back. Just before accused's departure, Captain Dameron offered to pay the taxicab bill, but accused said that he had plenty of money and would pay it (R.12-14). He paid the bill on 30 September, after having been ordered to do so (R.10; Exs. A,D).

For the defense, Majors Donald P. Boyer and Paul L. Fowler, both of the 58th Armored Infantry Battalion, testified that accused was an excellent officer and a very diligent worker, and that he was cheerful, pleasant, and untiring in his efforts. Major Fowler testified further that accused was one of the best leaders whom witness had seen in the Army and that under his command the morale of the company had improved 60 to 70 per cent. In his opinion the men serving under accused "would go with him to the last ditch" (R.15-16). Accused declined to testify or to make an unsworn statement.

4. The evidence and the plea of guilty establish the absence without leave as alleged in the Specification, Charge II. Further, the evidence

clearly shows that accused was drunk and disorderly in uniform in a public place as alleged in the Specification, Charge I. His loud, profane, insubordinate, and belligerent conduct in the presence of a number of civilians was sufficiently disgraceful to characterize his offense as a violation of Article of War 95. The evidence likewise shows that accused refused to pay his taxicab indebtedness, as alleged in the Specification, Charge III. Although he was very drunk at the time, he apparently was conscious of his actions insofar as the indebtedness was concerned, for when asked what he intended to do about it, he replied that he was "not going to do a damn thing about it". Under the circumstances, his wrongful refusal constituted a violation of Article of War 96.

5. As noted, accused entered a plea in bar to Charge I and its Specification, which charged accused with being drunk and disorderly in uniform in a public place in violation of Article of War 95. The plea was based upon prior punishment under Article of War 104 and was denied by the court. Disciplinary punishment under Article of War 104 may be imposed for "minor offenses" only. An offense for which a mandatory punishment is prescribed by the Articles of War is not a "minor offense" (MCM, 1928, par. 105). Violation of Article of War 95 carries the mandatory punishment of dismissal. Consequently, the offense under discussion is not a "minor offense", and accused may be brought to trial irrespective of prior disciplinary action under Article of War 104 (Dig. Op. JAG, 1912-40, sec. 462 (2)). The court's ruling was correct. In view of our decision on this point, it is unnecessary to consider the evidence and arguments relating to the plea.

6. War Department records show that accused is 34 years old and attended Virginia Polytechnic Institute for four years but did not receive a degree. On 31 May 1931 he was appointed a second lieutenant, Coast Artillery Officers' Reserve Corps. His commission expired on 31 May 1936 and was not renewed. He was inducted into the military service on 22 April 1941 and served as an enlisted man until 10 April 1942, when, upon graduation from the Infantry Officer Candidate School, Fort Benning, Georgia, he was appointed second lieutenant, Army of the United States. He was promoted to first lieutenant on 5 October 1942. In recommending accused for Officer Candidate School, his commanding officer stated that his character was excellent and that he had "demonstrated outstanding qualifications of leadership".

7. The court was legally constituted and had jurisdiction of the person and the subject matter. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the

opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. Dismissal is mandatory under Article of War 95 and authorized under Articles of War 61 and 96.

(on leave), Judge Advocate.

John Rannestad, Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 27 NOV 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 A. Pond (0-281468), Infantry.

2. I concur in the opinion of the Board of Review 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 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 Ex. action.

(Sentence confirmed. G.C.M.O. 49, 1 Feb 1944)

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

SPJGN
CM 242914

19 NOV 1943

UNITED STATES	)	FIRST AIR FORCE
v.	)	Trial by G.C.M., convened at Selfridge Field, Michigan, 16 October 1943. Dismissal and confinement for one (1) year.
Second Lieutenant A. MANSFIELD BRIGHT (0-804626), Air Corps.	)	

OPINION of the BOARD OF REVIEW
LIPSCOMB, GOLDEN and SLEEPER, 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 Charge and Specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that Second Lieutenant A. Mansfield Bright, 302nd Fighter Squadron, 332nd Fighter Group, Oscoda Army Air Field, Oscoda, Michigan, did, at Oscoda Army Air Field, Oscoda, Michigan, on or about 27 September 1943, with intent to commit a felony; viz. rape, commit an assault upon Evelyn D. Walker, a female, not his wife, by willfully and feloniously biting her on the lips and face and by striking her on the face and body with his hands and fists.

He pleaded not guilty to and was found guilty of the Specification and the Charge. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for a period of one year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that the prosecutrix, Evelyn D. Walker, unmarried colored case worker for the Old Age Assistance Bureau, Cook County Bureau of Public Welfare, Chicago, Illinois, while visiting friends at Oscoda Army Air Field, Oscoda, Michigan, saw the accused at the officers' club, on the evening of 26 September 1943. "I had known him in Chicago", she testified,

> "and I went up and spoke to him and he asked me what I was doing in Oscoda. * * * I told him I was going home * * * the next morning. He said he was sorry, that he would like to have me stay longer. We sat down and joined Lieutenant Walton and his party. Lieutenant Walton, I believe it was, said he would like to have some drinks and suggested that we all go to the Gallup Inn. I explained that drinks could not be sold until after 12:00 midnight. * * * I told them I had my car. * * * Lieutenant Price and his wife were using my car house hunting at the time and we had to wait until they came back. When they returned, I took them home and told Lieutenant Walton that I would pick them up later" (R. 6ff-6gg).

Returning to the club, she found the accused and four other colored lieutenants, several of whom - including the accused - were drinking beer. The party proceeded in Evelyn's car to one of these officers' homes, where wine was served; thence, with the accused driving, to Gallop Inn, arriving about ten o'clock. "Drinks are not sold in Michigan until after 12:00 Sunday night but I believe the boys ordered beer", the prosecutrix continued. Being allergic to beer herself, she ordered nothing at that time, confining her activities to dancing and eating potato chips until midnight when hard liquor was available. She danced mostly with the accused "and sometimes with Lieutenant Walton". After midnight they had four drinks each; hers, each time, was scotch and coca-cola. "The men talked mostly about their wives", she admitted. "During the course of the conversation it was remarked that they might go out with girls and

might go pretty far but when they took them home, they expected to say goodnight and go home to their wives". The accused "said he might stay out three or four nights but would come back to his wife. He also said he had sent his wife back to Chicago because she could not take him going out with other girls here in Detroit". The prosecutrix had danced several dances with the accused and was "quite tired", when she kicked Lieutenant Walton's foot to indicate that she wanted to dance with him. Walton got up and the accused said, "Go ahead and dance with Walton", as if he were aware that she had been trying to get rid of him; but he danced with her again after that (6gg-6hh).

They left Gallop Inn shortly before two o'clock on the morning of 27 September 1943, the prosecutrix seated beside the accused, who was driving, the other two officers on the back seat. After delivering these back seat passengers to their respective hutments, the accused turned the prosecutrix' car into a dead end road. "I saw it was the wrong road", she testified,

> "and told him we were on the wrong road and let's go back to the right highway. He then said, 'What we are going to do, we can do right here.' He turned around in the car and put his arms around me and attempted to kiss me and I said, 'Bright, I have got to get up in the morning and you have to fly at 8:30, so let's go find your hutment.' He said, 'I am not going. I am going to fuck you tonight.' I said, 'No, there isn't going to be anything like that.' He grabbed my hand (indicating left hand) and began pressing in backwards and he said, 'Get in the back seat.' He half way pulled me and I half way climbed over the back seat and he pulled me over and took out his penis and I said, 'Bright, there is no sense in this, you will just get yourself in a lot of trouble. You will lose all that you have worked for.' * * * He said, 'I don't give a damn about my wings. All that I know is that I am going to fuck you tonight.' He said, 'Put your leg up on the back of the seat', and I told him, 'No.' He said, 'Goddamn it, I said put your leg on the back seat'. I refused and he slapped me. He had teen trying to put it in all the time and had been unsuccessful. When he would try to make entry into my vagina, I would put my

> leg down and he would notice that he could not enter and he would say, 'I said put your leg up on the back seat.' He pulled my hair until great hands full of it came out and kept trying. I told him I would rather he killed me than take advantage of me in this way and he said, 'Yes, goddamn it, I will kill you. I'll choke you to death.' But he didn't choke me. I pulled down the window of the car and tried to scream so someone would hear but he was hitting with his fists full force. I pleaded with him and became hysterical but he listened to no reason. He said, 'I'm going to fuck you and when I do get in, I'm going to fuck you all night long.'. He continued beating me and pulling my hair, and trying to make entrance. He then said, 'You take it and put it in yourself', and I kicked him and my shoe came off. I got the shoe in my hand and started hitting him about his face but the blows from the shoe were not of any avail. I grabbed him in the back and pinched him right back here (indicated middle of back near waistline) and at that point he bit my lip. I felt blood and told him that now he was in trouble, that I was bleeding. I said, 'Why don't you let me go home and get something done for me?' At that point he let me up and he saw I was bleeding profusely and he said, 'Yes, goddamn it, go on home.' And that was all he said. He got out of the car and I did not turn to see where he was going * * *"(6hh-6ii).

Instead, she tried in vain to find Lieutenant Walton. Then she drove to her hosts, the Morgans, where she reported the attempted rape. Thence she was taken to the hospital. There, at five that morning, an examination by a medical officer disclosed,

> "a laceration on her lower lip, a laceration of her nose, a bruise on her left lower arm and hand, a laceration of her left fifth finger, and a bruise of the left chest over the second rib area anterior, * * *. There was no evidence whatever of intoxication. I did note in making this repair to her lip,"

> the medical officer testified, "that there was the odor that one notices on the breath of another person who has had something to drink, but there was a complete absence of any intoxication".

Six stitches were taken to suture the lip laceration, which, in the medical officer's opinion, could have been caused by teeth (R. 6x-6bb, 6ii).

Later in the morning, the accused's hat and cigarette lighter were found in the prosecutrix' car, as were a wad of hair, and Evelyn's purse, jacket and torn panties, all caked and covered with dried blood (R. 6s-6t, Exs. 4, 5, 6, 7).

4. The evidence for the defense shows that Corporal Harry Eisin of the Second Weather Squadron at Oscoda Air Base was on duty in the hangar plotting a weather map when accused knocked on the door between 0300 and 0330, 27 September 1943. He appeared dazed, said he had "been jumped" and said he was lost. His finger was cut and was bleeding. Corporal Eisin saw nothing irregular in the accused's uniform. Corporal Eisin called the guardhouse and a guard was sent who took accused to his hut in the officers' area and started a fire (R. 6qq-6ss).

According to the owners of the Gallop Inn, on 27 September 1943, about 2 a.m., "Lieutenant Walton, with one colored girl and two other colored officers left Gallop Inn after having a drink and they were orderly and gentlemen, when leaving" (6hhh, Ex. 12).

5. Accused, at his own request, having had his rights fully explained to him, was sworn and testified in his own behalf that he was married and had been living with his wife until sent to Oscoda, 26 September 1943. He stated that he, two other officers and Miss Walker had arrived at the Gallop Inn at about 2330, 26 September 1943; that they had left about 0200, 27 September 1943, and that he was driving Miss Walker's car. He drove back to Oscoda Army Air Field, after which, he testified,

> "* * * I drove to the officer's club and let Lieutenant Carter out. We left there and after Lieutenant Walton had told me just about where I lived, I let him out at his hut. The reason I did not get out and go to my own hut was that I did not want Miss Walker to drive back alone.

> During the drive back, I took my hat off and when I was smoking, I just laid my cigarette case on the front seat beside me. When I got out of the car, I tried to find my way around the field but I got kind of lost and all of a sudden I fell and there was a tree just within my reach and I grabbed this tree for support and I could not get a good grip on the tree and my hands slid down the tree and tore them a little bit. I also scratched my face up a little bit but I did not notice it until the next morning when I was washing. I finally saw a light off in the distance and it happened to be the hangar and I went there and asked the corporal if he could get a guard or somebody to take me home. Then the guard finally came, he took me to my hut and helped me make a fire".

The accused concluded his testimony by saying he had no idea whatever why Miss Walker would have manufactured all the testimony she had given against him (R. 6vv-6hhh).

6. The Specification alleges that the accused with intent to commit rape, assaulted the prosecutrix by biting her lips and face and striking her on the face and body with his hands and fists. The evidence both direct and circumstantial, adduced by the prosecution, convincingly establishes every element of the offense alleged. The accused's version of what occurred at the time and place in question is so inconsistent with the physical facts as to appear wholly incredible; whereas the prosecutrix' contrary version is corroborated by the physical facts. Both quantitatively and qualitatively, the evidence is amply sufficient to establish the accused's guilt beyond a reasonable doubt.

7. The accused is 26 years of age. War Department records show enlisted service, as an aviation cadet, from 21 October 1942, terminated by honorable discharge 29 June 1943; temporary appointment as second lieutenant, A. U. S., and orders to active duty, both effective 30 June 1943.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of

trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 93.

Abner E. Lifschomb, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

(222)

SPJGN
CM 242914

1st Ind.

War Department, J.A.G.O., 23 DEC 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 A. Mansfield Bright (0-804626), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed and ordered executed, and that the United States Disciplinary Barracks, Greenhaven, New York, be designated as the place of confinement.

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

Myron C. Cramer

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

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

(Sentence confirmed. G.C.M.O. 51, 1 Feb 1944)

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

SPJGQ
CM 242940

9 NOV 1943

UNITED STATES v. Second Lieutenant FORREST W. HEDGES (0-1300322), 140th Infantry.	SOUTHERN CALIFORNIA SECTOR WESTERN DEFENSE COMMAND Trial by G.C.M., convened at Pasadena, California, 19 October 1943. Dismissal and confinement for two years.

OPINION of the BOARD OF REVIEW
ROUNDS, HEPBURN and FREDERICK, 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 2nd Lieutenant Forrest W. Hedges, Company D, 140th Infantry, Did without proper leave, absent himself from his post and duties at Company D, 140th Infantry, Irvine Park, California, from about 10:00 A.M. 14 September 1943 to about 9:30 P.M. 29 September 1943.

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

Specification 1: In that 2nd Lieutenant Forrest W. Hedges, Company D, 140th Infantry did at Los Angeles, California, on or about 18 September 1943 with intent to defraud wrongfully and unlawfully make and utter to the Bank of America at 7th and Figueroa streets, a certain check drawn on the Bank of America, 660 South Spring Street, Los Angeles, California in the amount of thirty dollars payable to cash and by means thereof, did fradulently obtain from the Bank of America, 7th and Figueroa

Streets, thirty dollars, he, the said Forrest W. Hedges, then well knowing that he did not have, and not intending that he should have any account with the Bank of America at 660 South Spring Street, for the payment of said check.

Specification 2: In that 2nd Lieutenant Forrest W. Hedges, Company D, 140th Infantry did at Los Angeles, California, on or about 18 September 1943 with intent to defraud wrongfully and unlawfully make and utter to the Brooks Clothing Company, 644 South Broadway street, Los Angeles, California, a certain check drawn on the Valley National Bank of Phoenix, Arizona in the amount of ten dollars, payable to Brooks Clothing Company, and by means thereof, did fraudulently obtain from Brooks Clothing Company, ten dollars, he the said Forrest W. Hedges then will knowing that he did not have, and not intending that he should have sufficient funds in the Valley National Bank of Phoenix, Arizona, for the payment of said check.

Specification 3: (Finding of not guilty.)

Specification 4: In that 2nd Lieutenant Forrest W. Hedges, Company D, 140th Infantry was at Sacremento, California on or about 29 September 1943 in a public place, to wit; Johnnie's Waffle Shop, 1111 8th Street, drunk and disorderly while in uniform.

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

Specification: In that 2nd Lieutenant Forrest W. Hedges, Company D, 140th Infantry, did at Irvine Park, California on or about 13 September 1943, wrongfully borrow twenty dollars from Technician Grade 4 James D. Tucker, Company D, 140th Infantry.

He pleaded guilty to the Specification and Charge I; guilty to Specifications 1 and 2, not guilty to Specification 3, and, excepting the words "and disorderly", guilty to Specification 4 of Charge II; not guilty to Charge II but guilty of violation of Article of War 96 and guilty to the

Specification and Charge III. He was found not guilty of Specification 3, Charge II and guilty of all other Specifications and Charges, excepting the words "and disorderly" in Specification 4 of Charge II. No evidence of previous convictions was introduced at the trial. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for a period of two years. The reviewing authority approved the sentence, failed to designate a place of confinement, and forwarded the record of trial for action under Article of War 48.

3. For the prosecution it was shown, by competent evidence, as to the Specification and Charge I, that Captain William A. Agers, commanding officer of Company D, 140th Infantry, located at San Diego, California and of which accused was an officer, had given accused verbal permission to be absent on the night of 13 September 1943 and until 10 o'clock of the morning of 14 September 1943. Accused left but did not return at the prescribed time and sent no communication or explanation to the Captain regarding his continued absence thereafter. Captain Agers produced the original morning report of Company D, 140th Infantry, and testified from entries therein that accused was absent without leave from 1000, 14 September 1943 until he was placed in arrest in quarters on 3 October 1943 (R. 6, 7).

As to Specification 1 of Charge II it was shown that accused went to the manager of the Seventh and Figueroa Branch of the Bank of America in Los Angeles, California on 18 September 1943 and requested the manager of the branch to cash a check for him. Accused explained that while he had an account in the Los Angeles main office of the Bank of America he did not have blank checks for that branch. The manager thereupon gave him a blank check of the Seventh and Figueroa Branch, after striking out the branch name on the check and writing the letters "L.A.M.O." above it, to indicate the Los Angeles Main Office. Thereupon accused in the manager's presence wrote out a check upon the Main Office in the sum of $30, tendered the check, and requested that it be cashed. As further evidence of his good faith accused showed a slip signed by an officer of the Los Angeles Main Branch to the effect that accused had "allotted his pay" to the bank and that the amount thereof would come to his credit at the end of the month. Without further investigation, the manager then cashed the check for accused giving him $30 in cash. When the check was sent through ordinary channels it was returned marked "no account in this branch". To make certain that the check had not inadvertently been drawn upon the wrong branch the central file for Los Angeles County branches of the Bank of America was then checked and it was found that accused had no account at any branch. The bank has not been reimbursed for the amount thus paid (R. 17, 18; Pros. Ex. B).

As to Specification 2 of Charge II it was shown that a check drawn upon the Valley National Bank of Phoenix, Arizona, in the sum of $10 payable to Brooks Clothing Company, dated 21 September 1943 and bearing the name of "Forrest W. Hedges" as drawer was returned to the company unpaid because of insufficient funds. A second attempt to obtain payment of this same check from the bank upon which the check was drawn was made but the check was again returned and still remains unpaid. It was not shown who tendered the check or what was received in return for it (R. 16; Pros. Ex. A).

With respect to Specification 4 of Charge II it was stipulated and agreed between accused, defense counsel and the prosecution that if Corporal Erastus T. Combs, Company B, 749th Military Police Battalion were present in court and duly sworn as a witness he would testify that at about 2130, 29 September 1943, he was instructed to investigate a complaint from Johnnie's Waffle Shop in Sacramento, California; that, in company with Private Vincent, Combs went to the shop and there found a second lieutenant asleep at a table with a strong odor of alcohol on his breath. They were unsuccessful in trying to awaken the lieutenant whereupon they called the military police headquarters after which the officer of the day arrived. Together they again tried to awaken the sleeping officer without avail. Lieutenant Searson and the enlisted men then carried him outside, all of them assisted in putting him in a jeep and at the Military Police Station Combs helped to take him upstairs. By stipulation it was further agreed that Second Lieutenant Willard D. Searson, 749th Military Police Battalion, would testify that he was officer of the day for the Battalion in Sacramento, California on 29 September 1943; that after receiving a call from Johnnie's Waffle Shop he went to the cafe and there found an officer (who later identified himself as Second Lieutenant Forrest W. Hedges of the 140th Infantry) so soundly asleep that he was unable to awaken him, whereupon he and other members of the military police took him to the police station (R. 14, 15).

As to the Specification and Charge III it was shown that Technician Grade IV James Tucker was a member of the company in which accused was an officer; that on 13 September 1943 he was requested by accused to lend him $20 and that he thereupon loaned that amount to accused (R. 13, 14).

4. For the defense Captain Agers testified that during a period of six months in which he was accused's commanding officer, accused's efficiency rating was very satisfactory. First Lieutenant Lloyd D.

Hanford, Chemical Warfare Service, testified that as a student at a gas and chemical training school conducted by him accused's ratings in five examinations were, respectively, "93½; excellent; excellent; satisfactory; and satisfactory" and that accused was certainly in the top third of the class. Accused elected to remain silent.

5. Although the prosecution failed to establish the commission of the offenses charged with that nicety and precision which is demanded in those cases where the general issue is tendered, it was not necessary to do so in the instant case for the reason that accused pleaded guilty to all the Specifications of which he was found guilty.

It is clear that accused was absent without leave for a period of about fifteen days. His commanding officer said he was given permission to be away on the night of 13 September 1943 but was to return to duty at 1000 on 14 September 1943. His testimony regarding the morning report shows that the entry therein is of absence without leave at 1000 on 15 September 1943. The matter is of no moment because by his plea of guilty accused admitted the absence as alleged in the Specification.

It is also evident that accused presented a check for cashing and received $30.00 therefor at a branch of the Bank of America other than the branch in which he pretended he had an account when, in fact, he had no account in any branch of the bank within Los Angeles County. While the testimony shows a transaction indicating that accused had made an assignment of his pay to a branch of the Bank of America, evidence to the effect that it was not a deposit but presumably a loan, while quite properly excluded as hearsay, indicates, when considered in the light of the guilty plea and accused's failure to explain the transaction, that there were no funds on hand in any branch of the bank with which to honor the check, and that accused knew there were none when he tendered the check and that there would be none when it was presented for payment.

The evidence regarding Specification 2 of Charge II would have been wholly insufficient to support the finding had accused pleaded not guilty. There was no showing that the check was tendered by accused to the payee or that any value was given therefor by anyone. Yet, although these essential elements of the offense were not proven, again accused's plea is, of itself, sufficient to support the finding.

Regarding Specification 4 of Charge II, there can be no question about the drunken condition of accused at the time and place indicated. He was in such a state that he could not be aroused and had to be carried out. A heavy odor of alcohol was on his breath. Though the stipulations did not show that accused was in

uniform it is apparent that he was so clothed as the enlisted member of the military police who found accused in Johnnie's Waffle Shop spoke of him as a "lieutenant" though he had never seen him before. Accused was charged with this offense under Article of War 95 but pleaded guilty to the Specification, excepting the words "and disorderly" and not guilty to the Charge but guilty of a violation of Article of War 96. The court found him guilty of the Specification, with the exception, and guilty of a violation of Article of War 95, as charged. This the court had a right to do. Drunkenness alone may constitute a violation of Article of War 95 where it is alleged as the sole offense and is unaccompanied by any allegation or proof of disorderly conduct (sec. 453(12), Dig. Ops. JAG 1912-40). Accused was not only grossly drunk to the state of helplessness but exhibited his condition in a public restaurant, while in uniform, and such conduct is disgraceful and dishonorable.

As to the Specification and Charge III it was shown that accused, while an officer borrowed $20 from an enlisted man in his command. This is a well-recognized offense under Article of War 96 (sec. 454, 19, Dig. Ops. JAG, 1912-40).

6. Records of the War Department disclose that accused is 22 years of age, was born in Snyder, Texas and attended eight years of grammar and one year of high school. He was a salesman until he attended the Infantry School at Fort Benning, Georgia, from which he was graduated as a second lieutenant, Infantry, on 18 November 1942. He was called to active duty on the same day, assigned to Infantry Replacement Training Center, Camp Wolters, Texas, and was later assigned to the 140th Infantry, Sacramento, California.

7. The court was legally constituted and had jurisdiction of the person and each offense charged. 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 and to warrant confirmation of the sentence. A sentence of dismissal is mandatory upon conviction of a violation of Article of War 95 and is authorized for a violation of Articles of War 61 and 96. There is no limit of confinement that may be imposed on an officer under either Article of War 61 or 96.

William H. Founds, Judge Advocate.

Earle Stephens, Judge Advocate.

Herbert B. Fredrica, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 16 NOV 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. Hedges (0-1300322), 140th Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. I recommend that the confinement be remitted and that as thus modified 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.

T. H. Green,
Brigadier General, U. S. Army,
Acting The Judge Advocate General.

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

(Sentence confirmed but confinement remitted. G.C.M.O. 20, 8 Jan 1944)

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

N.D. (231)

SPJGH
CM 242950

13 DEC 1943

UNITED STATES v. Private GEORGE A. DAVIS (14067938), Company A, 614th Tank Destroyer Battalion; Private JOSEPH WASHINGTON (32114213), Headquarters Company, 758th Tank Battalion; Private ROBERT JEFFCOAT (34245698), Truck Battalion, Tank Destroyer Center, Camp Hood, Texas; Private HENRY WASHINGTON (34406496), Company C, 827th Tank Destroyer Battalion; and Private CLARENCE BURKE (12128711), Company B, 758th Tank Battalion.	EIGHTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Camp Hood, Texas, 21 and 22 September 1943. As to each: Dishonorable discharge and total forfeitures. As to Davis, Jeffcoat and H. Washington: Confinement for life; and as to J. Washington and Burke: Confinement for thirty (30) years. Penitentiary.

REVIEW by the BOARD OF REVIEW
DRIVER, LOTTERHOS and DRISCOLL, Judge Advocates

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

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

CHARGE: Violation of the 66th Article of War.

Specification: In that Private George A. Davis, Company A, 614th Tank Destroyer Battalion; Private Joseph Washington, Headquarters Company, 758th Tank Battalion; Private Robert Jeffcoat, Truck Battalion, Tank Destroyer Center, Camp Hood, Texas; Private Clifton T. Glover, Company D, Truck Battalion, Tank Destroyer Center, Camp Hood, Texas; Private Henry Washington, Company C, 827th Tank Destroyer

Battalion; Private Clarence Burke, Company B, 758th Tank Battalion; and Private Westley Golds, Company C, 827th Tank Destroyer Battalion, acting jointly and in pursuance of a common intent, did, at Camp Hood, Texas, on or about 23 August, 1943, cause a mutiny in the Camp Stockade, Camp Hood, Texas, by urging the prisoners confined in said Camp Stockade concertedly to refuse to obey the lawful orders of Major Lester J. King, their superior officer, to assemble for a formation, with the intent to usurp, subvert and override, for the time being, lawful military authority.

Each accused pleaded not guilty to and was found guilty of the Specification and Charge. Evidence of previous convictions of each accused was introduced. The accused were sentenced to dishonorable discharge and total forfeitures, and to confinement at hard labor as follows: accused Davis, Jeffcoat and H. Washington each for life, and accused J. Washington and Burke each for thirty years. The reviewing authority, as to each accused, approved the sentence and designated the United States Penitentiary, Leavenworth, Kansas, as the place of confinement. The record of trial was forwarded for action under Article of War 50½.

The Board has held the record of trial legally sufficient in the case of two other accused (Private Clifton T. Glover (12091187), Company D, Truck Battalion, Tank Destroyer Center, and Private Westley Golds (33170769), Company C, 827th Tank Destroyer Battalion), jointly tried with the accused named above. As to these two accused it was not necessary to prepare a review.

3. The evidence for the prosecution is substantially as follows: On 23 August 1943 there were about 70 or 75 colored prisoners in the post stockade at Camp Hood, Texas, and a number of white prisoners. The two groups occupied separate barracks. During noon roll call that day Private Clifton T. Glover failed to step up in line. Sergeant Robert O. Murphy, who was sergeant of the guard at the stockade, "jerked him back in line". That afternoon Sergeant Murphy put Glover "on the rock pile" until about 4:45 p.m. After supper each day it was customary for the prisoners to assemble for drill at 6:00 p.m., upon sounding of a bugle. On 23 August the prisoners knew they were to get an extra hour of drill. At 6:00 p.m. that day Sergeant Murphy ordered the bugler to blow assembly, entered the stockade, and stood in front of the place where the prisoners were to fall in. No one was present except Sergeant Murphy. The bugler, about 25 yards from the barracks, blew the call in the same manner as usual, loudly. Previously the prisoners had been "falling out regularly when the bugle was blown". On this occasion, the white prisoners "fell in at the double and just a few colored boys". Sergeant Murphy noticed "a bunch in

the front of the barracks", and "hollered" in a loud voice, from a point about 50 yards from the colored barracks, "Fall in on the double". Five or six men came out of the barracks. He moved up to about 12 yards from the barracks and called, in a loud voice, "Fall out". Some of the men came out but the rest paid no attention to him. At this time Sergeant Murphy observed the men inside the barracks, talking among themselves, taking the beds apart, and removing the "bed connecting rods". (These rods, used to connect the upper and lower parts of double bunks, were made of metal, about 27 inches long, about an inch and a quarter in diameter and weighed about three and a half pounds each). Sergeant Murphy realized that "trouble had started", went back to the gate of the stockade, and called for the officer of the day. He also told the supply sergeant to get "all his guns and ammunition ready", and told the military police sergeant to call out all the men available and bring them down (R. 7-11, 16, 18, 43-44, 207-209).

In about ten minutes some military policemen, armed with night sticks, arrived outside the stockade. About five minutes later, Major Lester King, provost marshal at Camp Hood, arrived. As a part of his duties Major King had supervision of the military police and the maintenance of law and order at Camp Hood. On the night of 23 August he had specifically accepted responsibility for the post prisoners in the absence of the prison officer. When Major King arrived at the stockade and learned what had happened, he had Sergeant Murphy march the men who had assembled for drill, into the kitchen compound. Major King then went into the stockade, followed by 5 or 6 military policemen carrying gas grenades, and proceeded to the colored barracks, where he could see men moving around inside. From the foot of the barracks steps, he ordered "Fall out. Clear this building out" and then repeated "Fall out". Major King "yelled" the order with all the volume he had. No one came out of the barracks. He then directed the military policemen to use gas to empty the building, which they did. About a half minute later the prisoners came out of the rear door of the barracks, in single file, and formed a "round group". Accused were among those who came out of the barracks at that time. When most of the prisoners were out Major King gave an order to fall in, but they did not obey. He then raised his pistol, and stated "Fall in. This is the last time I am going to do it". Thereupon they "fell in" in a military manner (R. 11-12, 20-23, 36, 39-40, 45-52, 55-56, 208-209).

There were 47 men in the barracks when Major King ordered them to come out and all but two came out at the same time. Nearly all of them carried bed connecting rods. Major King sent men into the barracks to bring out the other two prisoners. When the men fell in at the second

order of Major King they still had the connecting rods in their hands. He ordered them to throw them down, which they did, then had them lie down on their faces. The connecting rods were gathered up and thrown over the fence. Thirty-seven connecting rods were picked up there, nine were found just inside the door of the barracks, and one elsewhere in the building (R. 12, 14, 23-25, 33-36, 42).

A number of prisoners in the group, who testified for the prosecution, stated that the men were upset on the afternoon of 23 August because they thought Glover had been given a beating; that they did not hear the bugle, nor Sergeant Murphy's order, nor Major King's order, prior to the time they were out of the building; that the men did not remove the bed connecting rods until they observed military policemen outside with nightsticks; and that the men came out of the building when they learned that gas was to be used and before it was actually used (R. 61, 64-65, 67, 72-73, 75, 81, 89-92, 98, 102-104, 107-109, 111, 114-116, 121, 123, 126, 128, 135, 138, 152, 157, 159, 167, 172, 175-176, 180-181, 186, 194-195, 197, 199, 203).

The activities of the several accused in connection with the disturbance were shown as follows:

Accused Davis: When the bugle blew and one of the prisoners said he was going to "fall out", Davis, who was standing at the door with "one of these iron clubs", said "Ain't nobody going to fall out"; he was the "first one" to "tear down" his bed; he was walking around downstairs with a "bed coupling" in his hand; he was standing at one of the doors and closed the screen; he prevented a prisoner from leaving the barracks after Major King gave the order to fall out; he said he was not going to fall out; and he said nobody was going out (R. 62-63, 68, 71, 77-79, 81-83, 100-101, 103, 105, 122, 127, 150, 153, 163, 173, 178, 187).

Accused Joseph Washington: About supper time when several men were talking to Glover, he said he "wasn't going to fall out to drill"; at drill time he was one of several men who stopped a prisoner who was going out to drill and made him "go back"; he had a bed connecting rod in his hand; he attempted to use one of "those clubs"; he seemed to be a leader; and he was one of several who said "what they would do to the first one that break out of the barracks" (R. 87-89, 92-95).

Accused Jeffcoat: About supper time when several men were talking to Glover, he said he "wasn't going to fall out to drill"; at drill time he was one of several men who stopped a prisoner who was going out to drill and made him "go back"; when Sergeant Murphy gave the order to fall out, Jeffcoat was standing "at the porch" and immediately turned and went back; he was down in the "front end with the other boys"; he had a bed connecting rod in his hand; he seemed to be a leader; he was

one of several who said "what they would do to the first one that break out of the barracks"; he said "when the bugle blowed we was not to fall out that evening", "We should all stick together" and that "if anybody went out they would knock their brains out with a pipe" (R. 17, 79, 87-89, 94-95, 101, 112, 116, 118, 122, 136, 138, 219-220).

Accused Henry Washington: He said "they weren't going to fall out"; right after supper he said "Let's stop all this stuff" and "you are not supposed to drill two hours"; he stood at the back door and would not let anyone out; he said "if anybody goes out he will get hit by one of these bed posts"; he "started out talking and the other boys came up in the huddle"; he instructed accused Davis to stand at the front door; when "they heard the siren" and said "That is tear gas", he said "There ain't but two out there; let them come in and we will take care of them"; he said they were going to beat Sergeant Murphy and "Sergeant Fry" with the bed rods; he "tore up" a bed; he had a bed rod in his hand; he stopped a prisoner on his way to drill; he seemed to be a leader; he said "Those that are falling out will know the consequences"; and he advised a prisoner not to go out and said to another "No need falling out" (R. 61, 64, 68, 70-73, 77-78, 80-81, 83, 87, 89, 93-96, 118, 123, 136, 150, 163, 173-174, 178-179, 186, 196, 221).

Accused Burke: He was "talking to them"; he had a bed rod in his hand; he was one of the first to tear up his bunk; and he said "they was going to get the boy that was in the Training Brigade", "Not fall out, and then stay in", because "they said they was going to stay in". He made a written statement (Ex. B) after being warned of his rights, in which he stated that he "felt that if we all stayed in we were all going to get the same punishment, we all [sic] clubs but we were not going to do anything except bluff, we were not going to take a beating if they came in" and that he "took one of the pipes off the floor but did not tear up any of the beds". He denied that he took a leading part (R. 31-32, 57, 59, 71, 81, 83, 197, 223).

4. For the defense, Second Lieutenant Kermit Smith, prison officer, identified the punishment book, in which there were entries showing that several prisoners, including accused Jeffcoat, H. Washington and Burke, were put on an extra work detail on 26 August because of "riot" on 23 August. When Lieutenant Smith instructed the sergeant to make up the detail he told him to include some of the men "involved in the riot" (R. 210-218).

The accused elected to remain silent (R. 224).

5. The evidence shows that at 6:00 p.m. on 23 August 1943 the bugle was blown for drill in the stockade at Camp Hood, Texas, as was customary. The call was sounded loudly and in the usual manner. In the past the prisoners had always responded promptly. On this occasion, the white prisoners came out of their barracks on the double, but only a few colored prisoners came out of their barracks. The sergeant of the guard, Sergeant Robert O. Murphy, who had posted himself at the place for assembly, then gave an order for the remaining prisoners to fall in on the double. He was about 50 yards from the barracks and gave the order in a loud voice. He moved up to about 12 yards from the barracks and repeated the order in a loud voice. Only a few men responded. Sergeant Murphy could see the men inside, talking, dismantling their bunks, and removing three and a half-pound metal connecting rods which were used to fasten the upper and lower bunks together. He then called for assistance.

In a few minutes, Major Lester King, provost marshal, arrived, as well as several military policemen. Major King went to the steps of the barracks and "yelled" an order for the men to come out. He repeated the order, but no one responded. He then ordered some of the military policemen present, who had gas grenades, to use gas to clear the building. This they proceeded to do. About the same time, the prisoners came out of the back door and stood in a group. Most of them were armed with bed connecting rods. Major King ordered them to fall in but they did not obey. When he repeated the order and threatened them with his pistol, they fell in. He then required them to throw down the rods and lie down on the ground. Forty-seven men came out of the barracks (45 in a group and two later). Thirty-seven rods were picked up on the ground, nine near the barracks door, and one elsewhere in the building.

Mutiny imports collective insubordination and necessarily includes some combination of two or more persons in resisting lawful military authority. The concert of insubordination contemplated in mutiny need not be preconceived nor is it necessary that the act of insubordination be active or violent. It may consist simply in a persistent and concerted refusal or omission to obey orders, or to do duty, with an insubordinate intent. The intent which distinguishes mutiny is the intent to resist lawful authority in combination with others. The intent to create a mutiny may be declared in words, or, as in all other cases, it may be inferred from acts done or from the surrounding circumstances (MCM, 1928, par. 136a). Under the accepted definition, it is clear that a mutiny existed at the post stockade at Camp Hood on the afternoon of 23 August, when 47 prisoners, acting collectively, disobeyed the call to drill by bugle, disobeyed the order of the sergeant of the guard to fall in for

drill, armed themselves with metal bed rods, and disobeyed the order of the provost marshal to come out of their barracks, as well as his first order to fall in, after they had come outside. A clearer case of mutiny could hardly be imagined.

The accused were among the prisoners participating. It may be that some men in the barracks did not join the mutiny, and remained inside only because of fear that the mutinous prisoners would harm them if they attempted to go out. However, the accused were not in that category. All five were shown to have been armed with bed rods; all except Burke actively prevented other prisoners from leaving the barracks for drill; and Burke was one of the first to "tear up his bunk". The conduct of accused not only showed that they were parties to the mutiny, but also that they were actively inciting and causing the rebellious acts of the entire group, both by their words and deeds. The mutiny was a continuous event from a time prior to six o'clock drill until the men submitted to the second order of Major King, outside the barracks, to fall in. All mutinous acts of the accused during that period tended to incite and stir up further rebellion, culminating in the disobedience of Major King's order to come out, given in a loud voice from the barracks steps.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence. Confinement in a penitentiary is authorized by the 42nd Article of War for the offense of mutiny.

Samuel M. Davis, Judge Advocate

F. J. Lotterhos, Judge Advocate

Erich T. Diesell, Judge Advocate

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

(239)

29 DEC 1943

SPJGH
CM 242967

UNITED STATES	)	9TH ARMORED DIVISION
v.	)	Trial by G.C.M., convened at Camp Ibis, California, 8 October 1943. Dismissal, total forfeitures and confinement for ten (10) years.
Second Lieutenant WILLIAM O. HELTON (O-1287711), Infantry.	)	

OPINION of the BOARD OF REVIEW
DRIVER, LOTTERHOS and CLEMENTS, Judge Advocates.

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

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

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

Specification: In that 2nd Lt. WILLIAM O. HELTON, Company "E", 52nd Armored Infantry Regiment, did at Banning, California, on or about 13 August 1943, desert the service of the United States and did remain absent in desertion until he was apprehended at Los Angeles, California on or about 27 August 1943.

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

Specification 1: In that 2nd Lt., WILLIAM O. HELTON, Company "E", 52nd Armored Infantry Regiment, did, at Las Vegas, Nevada, on or about 7 August 1943, with intent to defraud, wrongfully and unlawfully make and utter to the El Cortez Hotel a certain check in words and figures as follows, to wit:

TO: Central National Bank, Junction City, Kansas. — August 7, 1943

Pay to the Order of El Cortez Hotel, Las Vegas, Nevada — $10.39

Ten and 39/100 _____ Dollars

William O. Helton
A.P.O. 259, % Postmaster
Los Angeles, Calif.

and by means thereof, did fraudulently obtain from the El Cortez Hotel services in the amount of $10.39, he, the said WILLIAM O. HELTON, then well knowing that he did not have, and not intending that he should have sufficient funds in the Central National Bank, Junction City, Kansas for the payment of said check.

Specification 2: In that 2nd Lt., WILLIAM O. HELTON, Company "E", 52nd Armored Infantry Regiment, did, at Las Vegas, Nevada, on or about 2 August 1943, with intent to defraud, wrongfully and unlawfully make and utter to the El Cortez Hotel a certain check in words and figures as follows, to wit:

TO: Central National Bank,
Junction City, Kansas. August 2, 1943

Pay to the Order of El Cortez Hotel $50.00
Las Vegas, Nevada

Fifty and no 100 _____ Dollars

William O. Helton
932 E. Hattie St.
Ft. Worth, Texas.

and by means thereof, did fraudulently obtain from the El Cortez Hotel the sum of $50.00, he, the said WILLIAM O. HELTON, then well knowing that he did not have, and not intending that he should have sufficient funds in the Central National Bank, Junction City, Kansas for the payment of said check.

Specification 3: In that 2nd Lt., WILLIAM O. HELTON, Company "E", 52nd Armored Infantry Regiment, did at Camp Ibis, California, on or about 15 July 1943, with intent to defraud, wrongfully and unlawfully make and utter to The Officer's Mess, 52nd Armored Infantry Regiment, a certain check in words and figures as follows, to wit:

Junction City, Kansas ~~April 29~~ July 15, 1943

Central National Bank

Pay to the Order of Cash $5.00

Five and no 100 _____ Dollars

William O. Helton
Co E 52nd A.I.R.

and by means thereof, did fraudulently obtain from the Officer's Mess Fund, 52nd Armored Infantry Regiment, the sum of $5.00, he, the said WILLIAM O. HELTON, then well knowing that he did not have, and not intending that he should have sufficient funds in the Central National Bank, Junction City, Kansas for the payment of said check.

Specification 4: In that 2nd Lt., WILLIAM O. HELTON, Company "E", 52nd Armored Infantry Regiment, did, at Los Angeles, California, on or about 28 August 1943, with intent to deceive T/4 Paul L. Foreman, military policeman, Hq Co., 524th M. P. Battalion, who was then in execution of his office, officially state to said T/4 Foreman that, "I am not A.W.O.L., but am on official leave", or words to that effect, which statement was known by 2nd Lt., WILLIAM O. HELTON, to be untrue in that Lt. HELTON had not been granted official leave for the period in question.

Specification 5: In that 2nd Lt., WILLIAM O. HELTON, Company "E", 52nd Armored Infantry Regiment, did, at Los Angeles, California, on or about 28 August 1943, with intent to deceive 2nd Lt., WILLIAM O. HELD, C.M.P., Suite 600, 411 So. Main Street, Los Angeles, California, who was then in execution of his office, officially state to said 2nd Lt. HELD that, "I am not A.W.O.L., but am on official leave", or words to that effect, which statement was known by 2nd Lt., WILLIAM O. HELTON, to be untrue in that Lt. HELTON had not been granted official leave for the period in question.

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 ten years. The reviewing authority approved only so much of the findings of guilty of the Specification, Charge I, and Charge I as involves a finding of guilty of absence without leave, in violation of the 61st Article of War, approved the sentence, and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution:

a. Specification, Charge I (desertion--approved finding of guilty of absence without leave in violation of the 61st Article of War; Specifications 4 and 5, Charge II (false official statements): An extract copy (Ex. A) of the Extract Admission and Discharge Sheet, 51st Evacuation Hospital, where accused had been admitted as a patient, showed

accused "dropped" from the hospital as of 13 August 1943, as being absent without leave. About 27 August 1943, Technician Fourth Grade Paul L. Foreman, of the Military Police, Los Angeles, California, was directed to trace accused. He located accused at a dinner party in the "Coconut Grove" at the Ambassador Hotel and informed accused that he was wanted for absence without leave and for passing some bad checks. They proceeded to the office of the hotel manager. Accused "claimed" that there was some mistake, that he "wasn't absent without leave", and that he was "on official leave". Foreman then took accused to the Provost Marshal's office in Los Angeles, where he was questioned by Second Lieutenant William O. Held, Assistant Provost Marshal. In response to questions by Lieutenant Held with reference to being absent without leave and passing worthless checks, accused stated that "he was not absent without leave", that he had passed no bad checks and that he was not in any sort of trouble. When Lieutenant Held confronted accused with certain information relative to the fact that "he was wanted", accused suggested that they talk it over alone as he had information he wanted to "get off his mind". Accused was then taken into a private office and Lieutenant Held heard his story. The Provost Marshal had previously received a picture of accused and information that he was absent without leave, and accused was on the "want" list. When Foreman saw him, accused was neatly dressed in "suntan gabardine" uniform, showed his "A.G.O." card, and made no attempt to conceal his identity (R. 9, 12-18).

b. Specifications 1 and 2, Charge II: Captain Donald J. Russell, investigating officer, identified two checks (Ex. B) which had been delivered to him by the auditor of the El Cortez Hotel. One check (Spec. 1), dated 2 August 1943, in the amount of $50, was made payable to the order of El Cortez Hotel, Las Vegas, Nevada, and the other (Spec. 2), dated 7 August 1943 in the amount of $10.39, was made payable to the order of the same payee. Both checks were drawn on Central National Bank, Junction City, Kansas, and were signed "William O. Helton". On cross-examination Captain Russell testified that in the course of his activities as investigating officer he received a letter stating that accused had some checks returned "insufficient funds", and testified that he was advised by "Mr. Alexa", auditor of the El Cortez Hotel, that the checks had been returned "insufficient funds", and that the hotel bill for which one of the checks was rendered remained unpaid. Attached to both checks were documents from First National Bank of Nevada, showing the checks to be "NSF" (R. 9-11).

c. Specification 3, Charge II: First Lieutenant Thomas Harley, in charge of the Regimental Officers Club of the 52nd Armored Infantry

Regiment, identified a check (Ex. C), drawn by accused on Central National Bank, Junction City, Kansas, dated 15 July 1943 in the sum of $5, payable to the order of Cash. The check had been cashed at the Officers' Club by accused and was given to a "wholesaler" in Las Vegas for merchandise purchased by the club steward. The check was first called to the attention of Lieutenant Harley when it was brought to him by the steward, accompanied by a letter from the "wholesaler" explaining that the check "had been submitted to the bank twice and had been returned for lack of funds". The check bore a notation from the Federal Reserve Bank of Kansas City that the item had been returned unpaid a second time and would not be handled again by the bank. It was stipulated that Mr. H. W. Jacobs, President of Central National Bank, Junction City, Kansas, would testify that accused "has carried a checking account with us for a number of months", that on 15 July 1943 his account "showed an overdraft of $3.66", that on 20 August 1943 it "showed an overdraft of $83.83", and that at the close of business on 1 October 1943 it "still shows an overdraft of $83.83" (R. 11-12, 18).

4. For the defense: Accused testified that he entered the 99th Evacuation Hospital, Goffs, California, about 9 August, remained there about eight days, and was transferred to the 41st Evacuation Hospital, Needles, California. After three days there, he was sent to the 51st Evacuation Hospital, Banning, California. He had a "strep" throat and was examined for tuberculosis. Officer patients in the 51st Evacuation Hospital were allowed passes to go into town from three o'clock in the afternoon until nine or ten o'clock in the evening. While at the hospital accused had such a pass and went to Los Angeles, a distance of about seventy miles, without informing the hospital authorities of his intended destination. He registered at the Clark Hotel under his own name, gave the 51st Evacuation Hospital, Banning, California, as his address and later registered at the Ambassador Hotel. At the time accused was questioned by Lieutenant Held and the military police they informed him that he was wanted for absence without leave and forgery. He stated to them that he "had authority to leave the hospital at the time" he left. Accused had no intention of deserting the military service and left the hospital for "financial" reasons (R. 19-21).

With reference to the three checks introduced in evidence, accused testified that the $5 check was "submitted to" the Officers' Club of the 52nd Armored Infantry Regiment, that he had personally called Mr. Jacobs of the Central National Bank in Junction City, Kansas, long distance, and that the latter had agreed to hold his checks until the end of the month. With reference to the two checks "cashed at the El Cortez Hotel", accused was "under the impression" that the sum of $356 had been deposited in the bank to his account by his wife. While on emergency leave at Fort Worth, Texas, he had given her that amount to deposit. At the time he cashed these checks he had reason to believe he had money in the bank and had no intent to defraud or make a false check (R.21-22).

On cross-examination and examination by the court, accused stated that he had returned from leave on 30 July and had entered the 99th Evacuation Hospital about two days later. He admitted that he was absent without leave from the hospital from about 13 August to about 27 August, and that he was apprehended. Accused was in Los Angeles during this period for the purpose of borrowing money to take care of debts that had accumulated due to family troubles. He did not recall that he said he was not absent without leave, at the time of his apprehension. He stated that he was asked whether he had official authority to leave the hospital "at the time" he left, and replied "I did have at the time I left . . . . which naturally did not cover any certain period of time" (R. 22-26).

With reference to the checks, accused stated that he cashed one at the El Cortez Hotel shortly after his return from leave, and gave the $10.39 check to the hotel in payment for a room while he was "on pass" from the hospital. He had given his wife $356 to deposit in his account while he was on leave in Fort Worth, and believed that the money had been deposited. Although he and his wife had had a "slight disagreement" and had not lived together for seven months, he had "all reason" to believe she would deposit the money. He thought that he learned that the money had not been deposited while he was in the hospital at Needles (R. 24-28).

5. a. Specification, Charge I: It is shown by the evidence and admitted in the testimony of accused that he was absent without leave from about 13 August to about 27 August 1943, when he was apprehended by military police in Los Angeles, California.

b. Specifications 4 and 5, Charge II: At the time accused was apprehended he was informed by Technician Fourth Grade Paul L. Foreman that he was wanted for being absent without leave. Accused stated that he was not absent without leave but was on "official leave". When accused was taken to the Provost Marshal's Office and questioned by the Assistant Provost Marshal, Second Lieutenant William O. Held, who informed him that he was wanted for being absent without leave, accused stated that "he was not absent without leave". Lieutenant Held and Sergeant Foreman, in their official capacities as Assistant Provost Marshal and military policeman respectively, were acting in the execution of their office when questioning accused. The statements made by accused were obviously intended to mislead and to affect the official action of the military police and Provost Marshal, and constituted the type of unbecoming conduct contemplated under the 95th Article of War (Winthrop's Military Law and Precedents, Reprint, p. 713).

c. Specifications 1 and 2, Charge II: The evidence shows, by admissions in the testimony of accused, that on 2 August 1943, he cashed a check at the El Cortez Hotel, Las Vegas, Nevada, drawn on the Central National Bank, Junction City, Kansas, in the sum of $50 (Spec. 1), and that on 7 August 1943 he issued another check drawn on the same bank to the same payee in the sum of $10.39 (Spec. 2). Accused testified that he was under the impression that there were sufficient funds in the bank to take care of his checks as he had given his wife $356, when he was on emergency leave at Fort Worth, Texas, to deposit to his account. A stipulation introduced in evidence shows that the account of accused with the Central National Bank was overdrawn $3.66 on 15 July 1943, $83.83 on 20 August 1943 and was still overdrawn $83.83 on 1 October 1943. There was no competent proof that the checks were not paid. A material part of each of these Specifications is the allegation that accused made and uttered the check "then well knowing that he did not have, and not intending that he should have sufficient funds" in the Central National Bank. The evidence does not disclose the condition of his account with the Central National Bank between 15 July and 20 August 1943, or more specifically on the 2nd and 7th of August, the dates the checks in question were drawn. The documents attached to the checks to show they were returned "NSF" were issued by the First National Bank of Nevada, and are incompetent to show the condition of the account with the Central National Bank of Junction City, Kansas.

In CM 124572, Hough, it was held that neither the fact that the check bore the notation "protested for non-payment", nor the fact that the check was not paid, nor both together, will constitute evidence that the check was worthless when drawn. It is there stated "The worthlessness of a check is most easily shown by the sworn testimony of someone who knows that the drawer had no account with the drawee bank at the time".

The Board of Review is of the opinion that the evidence fails to show that accused knew at the time he issued the checks that they would be dishonored or that he intended not to have sufficient funds in the bank to cover their payment.

d. Specification 3, Charge II: The evidence shows that on 15 July 1943, accused made and uttered a check in the sum of $5.00 drawn on the Central National Bank, Junction City, Kansas, which he cashed at the Regimental Officers' Club, 52nd Armored Infantry Regiment. There was no competent proof that the check was not paid. Although it was shown that the account of accused was overdrawn $3.66 on 15 July, accused testified that he had permission from Mr. Jacobs, president of the Central National Bank, to write checks which would overdraw his account until the end of the month. This testimony is inferentially supported by the stipulation showing an overdraft of $83.83 in the account as of 20 August. (It is also

confirmed by a letter from H. W. Jacobs, dated 1 October 1943, in the papers accompanying the record of trial).

The Board of Review is of the opinion that the evidence does not prove beyond a reasonable doubt an intent to defraud on the part of accused in the issuance of this check.

6. The accused is 25 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 9 July 1941; appointed temporary second lieutenant, Army of the United States from Officer Candidate School and active duty, 15 July 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 insufficient to support the findings of guilty of Specifications 1, 2 and 3, Charge II, legally sufficient to support the approved findings of guilty of all other Specifications and the Charges, and legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of the 61st Article of War and is mandatory upon conviction of a violation of the 95th Article of War.

Samuel M. Driver, Judge Advocate

H. Fotterbos, Judge Advocate

Judson L. Clements, Judge Advocate

1st Ind.

War Department, J.A.G.O., 6 JAN 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant William O. Helton (O-1287711), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Specifications 1, 2 and 3, Charge II (making and uttering worthless checks), legally sufficient to support the approved findings of guilty of all other Specifications and the Charges, and legally sufficient to support the sentence and to warrant confirmation thereof. The accused was absent without leave for about 14 days, terminated by apprehension (Spec., Chg. I), and upon being apprehended made two false official statements to the military police to the effect that he was not "AWOL" but on "official leave" (Specs. 4 and 5, Chg. II). His conduct throughout the entire transaction was such as to indicate that he lacks responsibility and does not measure up to the standard of honor and honesty required of an officer. I recommend that the sentence to dismissal, total forfeitures, and confinement at hard labor for ten years be confirmed but that the forfeitures and confinement adjudged be remitted and that the sentence as thus modified be carried into execution.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action carrying into effect the recommendation made above.

Myron C. Cramer

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

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

(Findings of guilty of Specifications 1, 2 and 3, Charge II, disapproved. Sentence confirmed but forfeitures and confinement remitted. G.C.M.O. 102, 10 Mar 1944)

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

(249)

SPJGK
CM 242988

29 NOV 1943

UNITED STATES	)	ARMY AIR FORCES CENTRAL FLYING TRAINING COMMAND
v.	)	
First Lieutenant ANTHONY A. PASQUINI (O-663658), Air Corps.	)	Trial by G.C.M., convened at Army Air Forces Bombardier School, Big Spring, Texas, 16 October 1943. Dismissal.

OPINION of the BOARD OF REVIEW
LYON, HILL 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. The 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: (Withdrawn by direction of appointing authority).

Specification 3: (Withdrawn by direction of appointing authority).

Specification 4: In that First Lieutenant, then Second Lieutenant, Anthony A. Pasquini, Air Corps, did, at Army Air Forces Bombardier School, Big Spring, Texas, on or about 5 September 1943, with intent to deceive Lieutenant Colonel David Wade, officially state to the said Lieutenant Colonel Wade that he, the said Lieutenant Anthony A. Pasquini, had theretofore paid in full a certain obligation owed by the said Lieutenant Anthony A. Pasquini to the Officers' Mess, Army Air Forces Bombardier School, Carlsbad, New Mexico, in the amount of $153.90, which statement was known by the said Lieutenant Anthony A. Pasquini to be untrue in that he had not theretofore paid said obligation in full.

Specification 5: In that First Lieutenant Anthony A. Pasquini, Air Corps, did, at Big Spring, Texas, on or about 21 September 1943, with intent to deceive, 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, September 21, 1943

THE FIRST NATIONAL BANK 88-235
in Midland

Pay to Cash or order $20.00
Twenty & no/100 Dollars

Anthony A. Pasquini
2nd Lt., A.C.

and by means thereof did fraudulently obtain from the said Crawford Hotel, Big Spring, Texas, the sum of $20.00, lawful money of the United States, the said First Lieutenant Anthony A. Pasquini then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank of Midland, Midland, Texas, for the payment of said check.

Specification 6: (Finding of not guilty).

Specification 7: In that First Lieutenant Anthony A. Pasquini, Air Corps, did, at Big Spring, Texas, on or about 20 September, 1943, with intent to deceive, wrongfully and unlawfully make and utter to the Settles Hotel, Big Spring, Texas, a certain check in words and figures as follows, to wit:

National Hotels
Big Spring, Texas, September 20, 1943

On Demand -
Pay to the order of Hotel Settles $20.00
Twenty and no/100 Dollars
I have the above amount to my credit with drawee free of any claims and have authority to make this draft.
Through this representation I have obtained above amount from Hotel Settles

Value Received and Charge to Account

TO First National Bank of Midland
Midland, Texas

Anthony A. Pasquini
2nd Lt., A.C. 0-663658
Box 221, AAFBS
Big Spring, Texas.

and by means thereof did fraudulently obtain from the said Settles

Hotel, Big Spring, Texas, the sum of $20.00, lawful money of the United States, the said First Lieutenant Anthony A. Pasquini then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank of Midland, Midland, Texas, for the payment of said check.

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

Specification: In that First Lieutenant, then Second Lieutenant, Anthony A. Pasquini, Air Corps, being indebted to Captain, then First Lieutenant, James A. Sprick in the sum of $40.00 for the repayment of a loan, which amount became due and payable on or about 3 June 1943, did, at Army Air Forces Bombardier School, Big Spring, Texas, from 3 June 1943 to about 15 Sept. 1943 dishonorably fail and neglect to pay said debt.

Specifications 2 and 3, Charge I, were withdrawn by direction of the appointing authority. The accused pleaded guilty to Charge I and Specifications 5 and 7 thereof and not guilty to Specifications 1,4, and 6 of Charge I and to Charge II and its Specification. He was found not guilty of Specifications 1 and 6 of Charge I, and guilty of the remaining Specifications and of the Charges. No evidence of previous convictions was introduced. He was sentenced to dismissal. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Summary of Evidence.

a. Specification 4, Charge I.

By reason of three "bad checks", dated 13, 15, and 15 August, respectively, accused owed $153.90 to the Officers' Club at Army Air Forces Bombardier School, Carlsbad, New Mexico (R.19,20; Exs. 1-6). About the middle of August accused was transferred to Big Spring Army Air Field, Big Spring, Texas (Ex. 6). There, on or about 1 September, Lieutenant Colonel David Wade, Air Corps, then Director of Training, Army Air Forces Bombardier School, Big Spring, talked with accused about his debts, including those arising from the three checks. At that time accused was on duty as a bombardier instructor in the school. Accused admitted to Lieutenant Colonel Wade that he owed $300. He specifically included the money owed to the Officers' Club on the three checks. Lieutenant Colonel Wade told accused to borrow $300 from the bank and pay up his obligations. Accused promised to pay his obligations within three days, specifically including the three bad checks. Accused did pay one of the checks, in the amount of $70.40, by money order (R.37,38; Exs. 1,7,8,9).

Four or five days after their talk, Lieutenant Colonel Wade met accused "on the Field" and asked accused whether he had made good the checks.

Accused replied that he had. As a matter of fact the $83.50 represented by the second and third checks had not been paid and was not paid until 2 October (R.41; Ex. 9).

Testifying with respect to this Specification, accused admitted the interview on or about 1 September with Lieutenant Colonel Wade and corroborated the latter's testimony regarding the subject matter of the talk (R.38,40,47). The bank would lend accused only $100, and, since this would not suffice, accused did not borrow anything. He intended to write his father and borrow from him, but he was hesitant to have his father know of his difficulties. He admitted seeing Lieutenant Colonel Wade at the old Officers' Club five or six days after their talk, at which time he voluntarily told the colonel that his debts were being taken care of. Accused intended to convey the idea that he had either taken care of the three checks or was in the process of doing so. He did not tell Lieutenant Colonel Wade that he had refused to borrow $100 from the bank or that he hesitated to write his father (R.39,40,47,48; Ex. 16).

b. Specifications 5 and 7, Charge I.

As noted, accused pleaded guilty to these Specifications. The prosecution introduced evidence that accused received cash for the two checks as alleged and that the checks were dishonored by reason of insufficient funds (R.11-17, 20,21,24,25,27,29; Exs. 10,12,15). On 30 September and 2 October, respectively, accused paid up the amounts (R.41,44).

In his testimony, accused identified the two checks and gave no excuse for issuing them. He knew that his bank balance was insufficient to cover them (R.41-43).

c. Specification, Charge II.

On or about 10 May, at Midland Army Air Field, Captain James A. Sprick, Air Corps, Army Air Forces Bombardier School, Big Spring, Texas, loaned accused $40, accused delivering to him a check for that amount, postdated 3 June (R.19; Exs. 13,14). Accused said nothing to indicate that the check would not be met at maturity. On or about 4 or 5 June, Captain Sprick cashed the check at the Officers' Mess. It was dishonored by the bank because of insufficient funds, and Captain Sprick was obliged to make it good (R.21; Ex. 13). A subsequent attempt to put it through the bank resulted in a second dishonor for insufficient funds. During the latter part of July, Captain Sprick wrote accused, requesting him to make the check good. He did not hear from accused until about 5 September, when he received a wire, purportedly from accused, telling him to "sit tight" and that the check would be taken care of. Accused did not pay Captain Sprick until 11 October (R.43,44; Ex. 13).

Accused testified that he was financially involved as a result

of gambling losses, and borrowed the money for transportation from Midland to Big Spring. He promised Captain Sprick that he could and would repay the loan early in June. At the time of the loan, accused knew that his bank balance was "practically nil" and that he had previously issued some "bad checks". He knew also that he had a number of other obligations which would have to be taken care of out of his next pay check, and that it would be difficult to pay Captain Sprick as promised. He did not divulge this situation to Captain Sprick, nor did he say that there might not be enough in the bank to clear the check. Although accused intended to cover the check with his next pay, he admitted that between 10 May and 3 June he issued further checks which would exhaust his June deposit, make it impossible to cover Captain Sprick's check, and render it "more difficult" to assure payment to the captain on 3 June. Accused received a letter from Captain Sprick and subsequently wired him about the fourth or fifth of September, telling him to "sit tight" and that the matter would be taken care of (R.43,50,51).

The following Air Corps officers testified as character witnesses for accused: Major Robert W. Miller, Group Commander, Third Provisional Group; Captain James W. Strudwick, senior group instructor; and First Lieutenant Ray W. Whipple, senior flight instructor. All three agreed that accused was a good bombardier and bombardier instructor and that his students respected him. All three "would care" to have accused with them in combat. Major Miller and Captain Strudwick added that accused had shown initiative and good judgment, and Major Miller testified that he was reliable. Lieutenant Whipple stated that accused's conduct had been that of an officer and a gentleman, obviously not referring to the matters connected with the trial (R.30-35).

4. With reference to Specification 4, Charge I, the testimony of Lieutenant Colonel Wade clearly proves that accused made the false statement as alleged. By accused's own testimony, he admitted that a large part of the debt had not been paid and that he intended to convey the idea that he had either taken care of the debt or was in process of doing so, both of which were false. Since accused had promised to pay his obligations within three days from the first interview, it is reasonable to conclude that accused actually said that the debt had been paid in full, as testified by Lieutenant Colonel Wade. The intent to deceive is obvious. The statement was official, for it related to a matter which was the subject of official action on the part of Lieutenant Colonel Wade.

As to Specifications 5 and 7, Charge I, the pleas of guilty and the evidence warrant the findings.

The allegations of the Specification, Charge II, were proved. The failure and neglect to pay the debt were dishonorable. At the time accused received the loan and issued his post-dated check, he knew that there was little chance of the check's being honored at maturity, and he eliminated whatever chance there was by issuing checks in the interim sufficient to

exhaust the contemplated June deposit. Thereafter, up to his neck in indebtedness, accused took no steps toward paying Captain Sprick, and ignored the latter's communication respecting the debt. The assurance contained in the September telegram proved to be unfounded and evidenced no more than an attempt by accused to lull his creditor into inaction. The transaction was dishonorable from its inception.

5. Attached to the record of trial are a recommendation by the defense counsel that the execution of the sentence be suspended; a communication signed by all the members of the court present at the trial, concurring in the recommendation; and a communication from Major James F. Reed, Air Corps, Director of Training, Army Air Forces Bombardier School, Big Spring, Texas, likewise concurring in the recommendation.

6. War Department records show that accused is 23 years old and graduated from junior college. He served as an aviation cadet from 19 December 1941 until 3 September 1942, when, upon graduation from the Midland Army Flying School (Bombardier), Midland, Texas, he was appointed second lieutenant, Air Corps Reserve. On 21 September 1943 he was promoted to first lieutenant, Army of the United States.

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

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 9 DEC 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 Anthony A. Pasquini (O-663658), 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. In view of the youth of accused, his value to the service as a bombardier and bombardier instructor, and the unanimous recommendation of the court, I recommend that the sentence be confirmed but that the execution thereof be suspended during the pleasure of the President.

3. Consideration has been given to a letter dated 17 November 1943 from Honorable Hiram W. Johnson, United States Senate, to The Adjutant General. The letter accompanies the record of trial.

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

Myron C. Cramer

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

4 Incls.
Incl.1-Record of trial.
Incl.2-Draft of let. for sig. Sec. of War.
Incl.3-Form of Ex. action.
Incl.4-Let. fr. Senator Johnson to TAG.

(Sentence confirmed but execution suspended. G.C.M.O. 26, 13 Jan 1944)

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

SPJGN
CM 243015

11 NOV 1943

UNITED STATES	)	96TH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Fort Lewis, Washington, 15 October 1943. Dismissal, total forfeitures and confinement for ten (10) years.
	)	
First Lieutenant THOMAS C. FISHER, (0-1286461), 382nd Infantry.	)	

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

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

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

CHARGE: Violation of the 61st Article of War.

Specification: In that First Lieutenant THOMAS C. FISHER, 382nd Infantry did without proper leave, absent himself from his organization at Camp Adair, Oregon from about 16 August 1943 to about 20 August 1943.

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

Specification: In that First Lieutenant Thomas C. Fisher, 382nd Infantry, did, without proper leave, absent himself from his organization at Oregon Maneuver Area, from about 10 September 1943, to about 24 September 1943.

He pleaded not guilty to and was found guilty of all Charges and Specifications. Evidence of one previous conviction by general court-martial for violation of Article of War 61 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 ten (10) years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that the accused failed to appear for drill call with his company on 16 August 1943. His company commander searched the company area and directed the first sergeant to search the "B.O.Q." Not finding the accused, his absence was reported to the battalion headquarters and to the regimental executive officer. The accused was next seen on 20 August 1943 when he reported to the evening meal at the company mess. During his absence he had no special leave, furlough, pass or permission to be absent from his company commander, battalion commander or any other superior officer and, upon his return, the accused, while under arrest in quarters, was admitted on 23 August 1943 to the station hospital, where he remained until he was discharged therefrom for duty on 9 September 1943 (R. 5-7, 7-8, 10, 16; Pros. Ex. ("1").

After being discharged from the hospital the accused failed to report to his organization, which was then in the nearby Oregon Maneuver Area, but surrendered to the military police in Memphis, Tennessee, on 24 September 1943 and was returned to his organization on 2 October 1943. During this absence he was without special leave, furlough, pass or permission to be absent from his company, battalion and regimental commander or any other superior officer (R. 11-12, 13, 14-15, 15-17, 20; Pros. Ex. "3").

4. The evidence offered by the defense consisted solely of a stipulation dated 14 October 1943 and signed by the accused, the defense counsel and the trial judge advocate providing as follows:

> "It is stipulated between the accused, the defense counsel, and the trial judge advocate that:
>
> If REGINALD S. ROOD, Captain, MC, Neuropsychiatrist, 103rd Evacuation Hospital, were present that he would testify to the facts set forth in the attached signed certificate dated 7 October 1943."

The attached certificate is as follows:

> "I certify that on 6 October 1943 I interviewed and examined 1st Lt Thomas C. Fisher of Company F, 382nd Infantry. I found him to be sane and of normal intelligence and moral sense. However, since his childhood, he has shown an instability of his emotions which I consider to be a constitutional defect of his nature. Since the age of fifteen years he has periodically developed an emotional tension which has been relieved only by drinking alcoholic beverages. In recent years this drinking has produced periods of several days at a time for which he is amnesic and has no memory. I believe that because of his defect of emotional reaction, he should not be held wholly responsible for his drinking; and that his behavior, as produced by drinking before the periods for which he has no recollection, is, during those periods, outside the control of his normal will. I believe that

he will repeat this type of behavior.

Lt. Fisher's condition should be formally classified as:

1. Constitutional Psychopathic State (Emotional Instability).
2. Chronic Alcoholism."

The court under the ruling of the president, who was also the law member, first refused to receive the stipulation and requested the presence of Captain Rood as a witness. When Captain Rood was shown to be unavailable as a witness, the president of the court questioned the propriety of the defense raising an issue as to the accused's sanity whereupon the defense counsel assured the court that "there is no question about the sanity of the accused. It is a mitigating piece of evidence". Defense counsel asserted further that according to the stipulation which he was offering, the accused "had no control over himself when drinking". The court through its president and law member then ruled that the stipulation would not be accepted but stated "that the defense could take the written stipulation and make an oral stipulation omitting that part of the stipulation that questioned the sanity of the accused". The defense counsel then stated: "Sir, may I remind the court the sanity of the accused is not questioned". The president, thereupon, ruled that an oral stipulation might be made "leaving out the objectionable part of the written stipulation". The defense counsel objected to such a procedure stating, "Sir, I am not a psychiatrist. If I omitted a part of the certificate of the psychiatrist I am wondering if it will have as much weight with the court * * *". The president then on his own initiative accepted an oral stipulation as an amendment to the written stipulation to the effect that if the psychiatrist were present he would testify that the accused was sane (R. 17-20; Def. Ex. 1).

5. The Specification of the Charge and the Specification of the Additional Charge allege respectively that the accused absented himself without leave from his organization from about 16 August 1943 to about 20 August 1943 and from about 10 September 1943 to about 24 September 1943. The evidence shows very clearly that the accused absented himself without authority during the periods alleged and no further discussion of that part of the case is necessary.

The court's action, however, in receiving only that part of the stipulation which asserted that the accused was sane and in arbitrarily rejecting that part of the stipulation which presented strong mitigating factors favoring the accused, violated the accused's rights to place before the court evidence in mitigation of the offense charged. Since, however, the evidence in question did not prejudice the accused's

rights insofar as the findings of guilty are concerned and since the sentence imposed is within the legal limits provided by law, the error does not require the disapproval of either the findings of guilty or the sentence. The Manual for Courts-Martial states that,

> "The reviewing authority may properly consider as a basis for mitigation or remission not only matters relating solely to clemency * * *, but any factors which properly should have been, but apparently were not, considered by the court in fixing the punishment" (M.C.M., 1928, par. 87b).

Although the error in the present case was not rectified by the reviewing authority, it has been held in CM 232160, McCloudy, that "* * * if the irregularity did not prejudice accused so far as the findings are concerned * * * there is no foundation for holding the sentence illegal and relief must come from the final authority in the military justice procedure - the confirming authority". Since the error in question will be rectified by the discretionary action of the confirming authority, the evidence is deemed legally sufficient to sustain the findings of guilty and the sentence.

Although it is impossible to measure the probable effects upon the action of the court which a fair consideration of the evidence wrongfully rejected might have had, the Board of Review is of the opinion that the record can be completely purged of the effect of the error by a remission of the confinement imposed.

6. The accused is approximately 29 years of age. The War Department records show that he had enlisted service from 12 July 1935 until 3 July 1942 when he was commissioned a second lieutenant upon completion of Officers Candidate School, that he has had active duty as an officer since the latter date and that he was promoted to first lieutenant on 1 April 1943

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused which will not be rectified by the discretionary action of the confirming authority were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of all or so much thereof as the confirming authority may in his discretion deem just. Dismissal is authorized upon a conviction of a violation of Article of War 96.

Abner E. Lipscomb, Judge Advocate

Gabriel H. Golden, Judge Advocate

Benjamin R. Sleeper, Judge Advocate

SPJGN
CM 243015

1st Ind.

War Department, J.A.G.O., 25 NOV 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 Thomas C. Fisher (0-1286461), 382nd 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 all or so much thereof as the confirming authority may in his discretion deem just. The Board is of the further opinion that the court erred in excluding certain evidence offered by the defense in mitigation of the offense charged, which error does not, however, affect the legal sufficiency of the findings or the sentence but only goes to the amount of the punishment, and will be rectified by the discretionary action of the confirming authority. In this connection, the Board has suggested the remission of the confinement imposed as an appropriate means of completely purging the record of any possible injurious effect of this procedural error. The accused had previously been tried by a general court-martial for absence without leave from 21 June 1943 to 27 June 1943, and sentenced to forfeit $50 per month for six months. I recommend that the sentence be confirmed but that the confinement and forfeitures be remitted and that the sentence as thus modified be ordered executed.

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

Myron C. Cramer

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

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

(Sentence confirmed but confinement and forfeitures remitted. G.C.M.O. 52, 2 Feb 1944)

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

SPJGQ
CM 243018

16 NOV 1943

UNITED STATES	SECOND AIR FORCE
v.	Trial by G.C.M., convened at Geiger Field, Washington, 21 September 1943. Dismissal and total forfeitures.
Second Lieutenant MAC PHARRISS (0-1112913), 1893rd Engineer Aviation Battalion.	

OPINION of the BOARD OF REVIEW
ROUNDS, HEPBURN and FREDERICK, 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 2nd Lieutenant Mac Pharriss, Headquarters and Service Company, 1893 Engineer Aviation Battalion, Gowen Field, Boise, Idaho, attached 2nd Engineer Aviation Unit Training Center, Geiger Field, Washington, did, without proper leave, absent himself from his properly appointed place of duty at Geiger Field, Washington from about 0800 1 September 1943 to about 1730, 3 September 1943.

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

Specification 1: In that 2nd Lieutenant Mac Pharriss, Headquarters and Service Company, 1893 Engineer Aviation Battalion, Gowen Field, Boise, Idaho, attached 2nd Engineer Aviation Unit Training Center, Geiger Field, Washington, having been restricted to the limits of Geiger Field, Washington, did, on or about 3 September 1943, break said restriction by going to Spokane, Washington.

Specification 2: In that 2nd Lieutenant Mac Pharriss, Headquarters and Service Company, 1893 Engineer Aviation Battalion, Gowen Field, Boise, Idaho, attached 2nd Engineer Aviation Unit Training Center, Geiger Field, Washington, did, at Geiger Field, Washington, on or about 27 August 1943, with intent to defraud, wrongfully and unlawfully make and utter to Post Exchange, Geiger Field, Washington, a certain check, in words and figures as follows: to wit -

---

August 27, 1943
BOISE NATIONAL BANK
BOISE, IDAHO

Pay to the Order of CASH $ 15.00

Fifteen and No/100 - - - - - - - - - - - - - - - - - DOLLARS

/s/ Mac Pharriss 0-1112913

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and by means thereof, did fraudulently obtain from the Post Exchange, Geiger Field, Washington, cash, lawful currency of the United States, to the value of about fifteen (15) dollars, he, the said 2nd Lieutenant Mac Pharriss, then well knowing that he did not have, and, not intending that he should have any account with the Boise National Bank, Boise, Idaho for the payment of said check.

Specification 3: Same form as Specification 2, but alleging check dated August 28, 1943, payable to cash, made and uttered to Post Exchange, Geiger Field, Washington, and fraudulently obtaining thereby $10.00.

Specification 4: (Finding of guilty disapproved by the reviewing authority.)

Specification 5: (Finding of guilty disapproved by the reviewing authority.)

Specification 6: Same form as Specification 2, but alleging check dated August 27, 1943, payable to cash, made and uttered to Officer's Mess Number 1, Geiger Field, Washington, and fraudulently obtaining thereby $10.00.

Specification 7: (Finding of guilty disapproved by the reviewing authority.)

Specification 8: Same form as Specification 2, but alleging check dated August 28, 1943, payable to cash, made and uttered to Officer's Mess Number 1, Geiger Field, Washington, and fraudulently obtaining thereby $5.00.

He pleaded guilty to the Specification of Charge I and Charge I, and to Specification 1 of Charge II, and not guilty to all other Specifications of Charge II and Charge II. He was found guilty of all Specifications and Charges. Evidence of one previous conviction was introduced at the trial, he having been convicted by general court-martial on 17 August 1943 of absence without leave for one day in violation of Article of War 61, being drunk and disorderly in a military police station in violation of Article of War 96, and breach of arrest in violation of Article of War 69. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority disapproved the findings of guilty as to Specifications 4, 5 and 7 of Charge II, approved the sentence and forwarded the record of trial for action under Article of War 48.

3. At the beginning of the trial the prosecution called as a witness Captain William Y. Baker, a member of the Medical Corps and a specialist in nervous and mental illnesses. He testified that he had seen the accused recently on three occasions, one time for a period of four days when he was in Fort George Wright Station Hospital under the witness' direct supervision. While he gave as his opinion on direct examination that the accused was not mentally ill "in the term of psychosis" and that he was "not legally insane", on examination by the court, Major Baker stated that he felt that the accused was emotionally ill and that his judgment was definitely abnormal at times. However, he could not say as to the length of time such periods would continue. Defense counsel first objected to this examination by the court on the ground that the sanity of the accused was admitted, but with the development of the testimony as to the emotional condition of the accused, moved that he "not be tried on this charge". This motion was overruled, and the court proceeded to the trial of the case on its merits (R. 9, 10).

4. In support of the Specification of Charge I, and Specification 1 of Charge II, as to absence without leave and breach of restriction, the prosecution showed by the testimony of Warrant Officer Louis Goodman, Headquarters, Second Engineer Aviation Unit Training Center, that, as assistant adjutant, he took care of the morning reports of the command. The witness identified a morning report as one in which he had made the entries in the course of his duties. When shown an extract from the morning report he identified it as a true, extract copy of the entries appearing in the morning report for 2, 3 and 9 September 1943, insofar as they pertained to the accused (R. 12). This extract copy, showing the accused as absenting himself without leave at 0800, 1 September 1943, and returning to arrest in quarters 3 September 1943, was then admitted in evidence (R. 12; Pros. Ex. A). While the extract was not authenticated in the usual manner, defense counsel not only permitted its admission without objection but protested against any further testimony regarding the offenses of absence without leave and breach of restriction on the ground that accused had entered his plea of guilty to the Specifications in which they are alleged (R. 13).

Second Lieutenant Richard E. Haynes, an officer of the Training Center, Geiger Field, Washington, testified that although accused was assigned to and required to attend the Camouflage School on 30 and 31 August and 1 September 1943, he failed to report at school on 31 August and 1 September 1943 (R. 12, 13, 14). Sergeant Charles B. Sinclair, 971st Guard Squadron, serving with a military police detachment stationed in Spokane, Washington, testified that, upon receiving a call from accused's organization, he went to a room in the Spokane Hotel on 3 September 1943, found accused there in company with his wife, and took him into custody (R. 14, 15). It was also shown that accused had been restricted to the limits of Geiger Field, Washington, on 31 August and 1 September 1943 (R. 11) and that he was restricted to "the base" on 3 September 1943 (R. 12).

As to the worthless check convictions approved by the reviewing authority (Specifications 2, 3, 6 and 8 of Charge II), the evidence of the prosecution may be summarized as follows:

The checks covered by Specifications 6 and 8 (Pros. Exs. D and E) were cashed at the Officers' Club or Mess at Geiger Field, Washington.

Exhibit D, dated 27 August 1943, a check in the amount of $10, signed with accused's name as maker, was cashed by a Miss Drew, a bookkeeper at the Club, who testified that she knew the accused from waiting on him and identified the check in question by her initials on the back. She saw the accused make out the check in person but remembered no unusual remarks made by him at the time (R. 21).

Exhibit E, dated 28 August 1943, a check in the amount of $5.00, signed with accused's name as maker, was identified by Second Lieutenant James M. Walter, Jr., the custodian of the Officers' Club and Mess, as having been cashed by him personally (R. 17). A Major Van Meter had called him on the telephone to say that the accused was coming over to the Club to cash a check, and when accused arrived he was accompanied by the Officer of the Day. Major Van Meter had not telephoned to identify the accused but just to give Lieutenant Walter "more or less authority to cash the check", and Walter did not know why the Officer of the Day came with him (R. 18).

Both checks were subsequently returned by the bank for the reason that the account was closed (R. 17). They were turned over to the Adjutant of the command, who had previously advised Lieutenant Walter that some checks would probably be returned and had requested that they be handed to him. At the time of the return of the checks, the accused was in confinement (R. 20).

Lieutenant Walter further testified that on other occasions, checks had been returned by banks for various other officers (R. 18); the general policy was to call the officer personally and give him twenty-four hours in which to make good such checks; there was an increase in the number of returned checks at the beginning of any month from checks cashed the latter part of the preceding month; except for the "unusual circumstance" that the accused was in confinement, these particular checks of accused would have been handled "in the usual manner" by giving him an opportunity to make them good; and he had no difficulty in contacting the accused in confinement when he finally did make demand upon him for reimbursement some two or three weeks prior to the trial (R. 19). He further testified that, from past experience, he would say the elapsed time between the cashing of a worthless check and its return was about ten days, and that a check cashed on the 27th or 28th of the month would be returned about the 5th or 6th of the following month.(R. 20).

The checks covered by Specifications 2 and 3 of Charge II, dated 27 and 28 August 1943, in the amounts of $15 and $10, being Prosecution Exhibits H and G, respectively, were cashed at the Geiger Field Exchange. They were identified by Miss Charline Jydstrup, Cashier at Post Exchange No. 2, as the checks cashed by her, by her initials on each check. She did not recall any out of the way remarks made by the accused at the time; he was talking a lot but she had other customers and was not listening. The only time the witness remembered having seen the accused before was when he cashed these checks, and when called upon at the trial to point him out in open court, she replied, "I don't even see him." (R. 25).

First Lieutenant Arthur O. Wood, the Post Exchange Officer at Geiger Field, identified Exhibits H and G as checks deposited by the Geiger Field Exchange and returned by the bank for the reason that the account upon which they were drawn was closed. He stated further that the Exchange had never received payment for the checks (R. 22). On cross-examination, he testified that checks cashed for other officers at the Exchange had been returned in the past, and that the policy was to attempt to contact the officer before taking any action. However, when the checks signed by the accused were returned, the witness learned from his assistant, who had been Officer of the Day a short while previously, that the accused was in confinement, so the matter was taken up with Major Brewster, the Courts and Boards Officer. As a result of his advice, the checks were turned over to another officer in the Engineer Training Center, the witness taking a receipt for them, and the accused was never contacted.(R. 23, 24).

The prosecution introduced in evidence a stipulation in the form of a letter from the bank at Boise, Idaho, upon which the various checks in the case were drawn (Pros. Ex. I), certifying that a joint account had been established at that bank by Lieutenant and Mrs. Mac Pharriss under date of 10 June 1943, and listing checks totalling 19 in number and $449.70 in amount charged to the account for the period from 6 July to 5 August 1943. The letter further recites that on 5 August 1943 the account was "withdrawn in full" by the payment of checks issued against it, and subsequent to that date, the balanced-out statement together with cancelled vouchers was mailed to the Geiger Field, Washington, address of accused.

5. The accused did not take the stand, but the defense introduced in evidence the deposition of Staff Sergeant William A. Aull (Def. Ex. A), Chief Clerk at the Officers' Club at Geiger Field, to the effect that the accused was known to the witness and had cashed certain checks at the Officers' Club on or about 27 August and 28 August 1943. At that time, or shortly thereafter, the accused requested that if there were not sufficient funds to cover the checks at the time they reached his bank, or in case the checks were returned for insufficient funds, he be notified so that he could make the proper adjustment. The witness further testified that it was customary at that time of the month for officers cashing checks at the club to make the same request.

6. While no special plea of insanity was interposed in this case, the issue was raised by the evidence adduced by the court on its examination of the prosecution witness, Major Baker. However, the motion of defense counsel that the accused "be not tried on this charge" because of his emotional condition was overruled. While the court did not specifically pass upon the mental capacity of the accused, by overruling the motion of defense counsel and proceeding with the trial of the case, it may be presumed that it found him legally sane.

The pleas of guilty by the accused to the Specification of Charge I and to Specification 1 of Charge II, together with the evidence submitted by the prosecution as to his absence without leave and breach of restriction, are legally sufficient to support the findings of guilt thereon.

However, the evidence will not sustain a conviction upon Specifications 2, 3, 6 and 8 of Charge II. The gist of the offense charged under these Specifications is the intent to defraud, and such an intent not only does not affirmatively appear from the record but seems clearly negatived by the facts and circumstances established by competent evidence of record in the case. Both the custodian of the Officers' Club, Lieutenant Walter, and the Post Exchange Officer, Lieutenant Wood, prosecution witnesses, testified that checks cashed for other officers at the Club and the Field Exchange had been returned in the past and that it was customary to contact such officers and afford them an opportunity to make good such checks. Lieutenant Walter, the Club Custodian, also testified that there was an increase in the number of returned items at the Officers' Club at the first of each month as a result of checks cashed by officers near the close of the preceding month. Staff Sergeant Aull, Chief Clerk at the Officers' Club during the period in question, substantiated the fact that it was customary for officers cashing checks at the Officers' Club near the end of the month to request that they be notified in cases of checks returned for insufficient funds so that they might make them good. He also testified that the accused, upon cashing some checks at the Club on or about 27 August or 28 August 1943, the dates of the checks charged, requested that, if there were not sufficient funds to cover these checks when they reached his bank or in case the checks were returned to the club for insufficient funds, they would notify him so that he could make the "proper adjustment".

Nevertheless, despite the acknowledged custom of both the Officers' Club and the Post Exchange with reference to officers' checks and in the face of the request made by the accused in connection with the checks cashed at the Officers' Club, no demand was made upon him for reimbursement for the checks returned to the Officers' Club until some time after charges had been preferred against him, and, in the case of the checks cashed at the Post Exchange, so far as the record shows, no notice was ever given the accused of their return, although Lieutenant Walter testified he had no difficulty in contacting the accused at the time he made demand upon him for payment of the Officers' Club checks. On the contrary, the returned checks which had been cashed at the Officers' Club were turned over to the Adjutant of the command, and those similarly returned to the Post Exchange were delivered not to accused but to an officer designated by the Courts and Boards Officer. Thus, the accused was afforded no opportunity to make good the checks as was the usual custom, and in view of their small denomination, there is no reason to believe that he would not have done so.

The Specifications also allege that the accused made and uttered these checks, well knowing that he had no account and not intending that he should have any account with the bank on which drawn. Once again the facts do not support the allegation. The only evidence regarding the bank account is contained in Prosecution Exhibit I, consisting of a letter from an official of the drawee bank. This letter shows that the accused and his wife had established a joint bank account a couple of months before at Boise, Idaho, where accused had formerly been stationed. This account shows numerous and substantial withdrawals, whether made by the accused or by his wife, the stipulation does not disclose. On 5 August 1943 the account was "withdrawn in full" by the payment of checks issued against it, and subsequently the balanced-out statement together with cancelled vouchers was mailed to their Geiger Field, Washington, address. It is logical to presume that this statement was mailed by the bank in the ordinary course of business at the end of the month, and if so, then the accused had not yet received the same at the time he drew the checks now under consideration.

While the accused no doubt knew that his balance was running low, as evidenced by the cautious manner in which he drew against it and by his statements to the personnel of the Officers' Club, in view of the joint character of the account, its activity during the month preceding the present transactions, the substantial sums withdrawn during this period, and the fact that the accused at the time was living apart from his wife, who was also authorized to check on the account, it is not believed that the accused necessarily should have known that the account had been closed or that any checks drawn against it would be returned for insufficient funds.

Therefore, the Board of Review is of the opinion that the intent to defraud required in the case was not sufficiently proved, and consequently, the findings as to Specifications 2, 3, 6 and 8 cannot be sustained.

7. War Department records show that the accused was 33 years of age at the time of the various offenses charged. He is a high school graduate and completed two years at the University of Arkansas. He is married a second time and has a six year old son by his divorced wife. The child apparently is living with its mother. He was inducted into the Army on 3 October 1942 and served as an enlisted man until 13 April 1943 when he was discharged to accept a commission as second lieutenant, Army of the United States, on graduation from Engineer Officer Candidate School. He thereafter completed a course in Mechanical Equipment at the Engineer School, Fort Belvoir, Virginia, with an academic rating of excellent.

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 insufficient to support the findings of guilty as to Specifications 2, 3, 6 and 8 of Charge II but is sufficient to support the findings of guilty as to the Specification of Charge I and Charge I and Specification 1 of Charge II and to support the sentence and warrant confirmation thereof. Dismissal is authorized upon conviction of violations of Articles of War 61 and 96.

William H. Bounds, Judge Advocate.

Charles Blum, Judge Advocate.

Herbert B. Ferguson, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 16 NOV 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 Mac Pharriss (0-1112913), Corps of Engineers.

2. I concur in the opinion of the Board of Review that the record of trial is not legally sufficient to support the findings of guilty of Specifications 2, 3, 6 and 8 of Charge II (making and uttering worthless checks), but is legally sufficient to support the findings of guilty of the Specification of Charge I (absenting himself without leave) and Charge I, and Specification 1 of Charge II (breach of restriction) and Charge II, and to support the sentence and warrant confirmation thereof. Accused was previously convicted on 17 August 1943 by a general court-martial for absence without leave, being drunk and disorderly in a military police station, and breach of arrest. Since the receipt of the case by the Board of Review, a teletype has been received from the Commanding General, Second Air Force, dated 6 November 1943, advising that the accused departed his station 29 October for Officer Replacement Pool, but has not yet reported at his destination, and apparently is absent without leave. I recommend that the findings of guilty of Specifications 2, 3, 6 and 8 of Charge II be disapproved, that the sentence be confirmed, but that the forfeitures be remitted, and that the sentence as thus modified be carried into execution.

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

T. H. Green,
Brigadier General, U. S. Army,
Acting The Judge Advocate General.

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

(Findings of guilty of Specifications 2, 3, 6 and 8, Charge II, disapproved. Sentence confirmed but forfeitures remitted. G.C.M.O. 4, 6 Jan 1944)

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

SPJGH
CM 243091

24 FEB 1944

UNITED STATES	)	III CORPS
v.	)	Trial by G.C.M., convened at Camp Gordon, Georgia, 24, 25 and 27 September and 5 October 1943. Dismissal, total forfeitures and confinement for three (3) years.
Second Lieutenant FRANCIS H. MCCARTHY (O-1172984), Field Artillery.	)	

OPINION of the BOARD OF REVIEW
DRIVER, O'CONNOR and LOTTERHOS, 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.
(Finding of guilty disapproved by reviewing authority).

Specification 1: (Finding of not guilty).

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

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

Specifications 1, 2, 3, 4 and 5: (Findings of guilty disapproved by reviewing authority).

Specification 6: In that Second Lieutenant Francis H. McCarthy, 254th Field Artillery Battalion, having delivered to the Security Bank and Trust Company of Lawton, Oklahoma, on or about 5 May 1943, a check in words and figures substantially as follows:

The Security Bank & Trust Co.
86-78

Lawton, Okla., June 5, 1943

Pay to the
order of Security Bk & Trust Co. $51.00

Fifty one & no/100 Dollars
Value received and charge to account of with exchange

To Mellon Nat'l Bank IND
Pittsburgh, Pa.
OMC #30 Ft Sill, Okla.
Southwestern, Lawton

Francis Henry McCarthy
01172984

and having promised said Security Bank and Trust Company of Lawton, Oklahoma that he would have sufficient funds on deposit in Mellon National Bank of Pittsburgh, Pennsylvania to pay said check on 5 June 1943 when it became due, did, without cause, on 5 June 1943, dishonorably fail to keep said promise.

Specification 7: Similar to Specification 6 except it alleges that check was of the date of 3 July 1943.

Specification 8: (Finding of guilty disapproved by reviewing authority).

Specification 9: In that Second Lieutenant Francis H. McCarthy, 254th Field Artillery Battalion did, at Lawton, Oklahoma, on or about 19 June 1943, with intent to defraud wrongfully and unlawfully make and utter to the Security Bank and Trust Company, a certain check, in words and figures as follows, to wit:

(Face)

OMC #30

Pittsburgh, Pa. June 19 1943 No. 9

OK (Indiscernable)

Mellon National Bank 8-26

Pay to the
order of Security Bank and Trust $50.00

Fifty Dollars Dollars

Francis H. McCarthy
01172984

(Reverse)

Pay to the order of
any bank banker or trust co.
Prior endorsements guaranteed

15 Paid through 15
Clearing House or
to the order of any bank

Security Bank & Trust Co.
86-78 Lawton, Okla. 86-78

Endorsement 39-15 Cancelled

Mellon
Pay to the order of
any bank or banker or thru
Pittsburgh Clearing House
Prior endorsements guaranteed
8 26 Jun 23 '43 1809 8 26
Mellon National Bank
8-26 Pittsburgh, Pa.

banker or trust co.
Prior endorsements guaranteed
Jun 21 1943
The Tradesmens National Bank
Oklahoma City
39-15 Okla. 39-15

Endorsement Cancelled 8-26

and by means thereof did fraudulently obtain from the Security Bank and Trust Company fifty dollars and no cents ($50.00), he the said Second Lieutenant Francis H. McCarthy, then well knowing that he did not have and not intending that he should have sufficient funds in the Mellon National Bank for the payment of said check.

Specifications 10 and 11: (Findings of guilty disapproved by reviewing authority).

Specification 12: (Finding of not guilty).

Specification 13: (Finding of guilty disapproved by reviewing authority).

Specification 14: Similar to Specification 9 except that it alleges that the check was dated 22 June 1943, drawn on Potter Title and Trust Company, Pittsburgh, Pennsylvania, and payable to Barths, that it was uttered on 22 June 1943, and that accused thereby fraudulently obtained $33.75 in cash and $16.25 in merchandise.

Specification 15: (Finding of guilty disapproved by reviewing authority).

Specification 16: (Finding of not guilty).

Specification 17: (Finding of guilty disapproved by reviewing authority).

Specification 18: Similar to Specification 14 except that it alleges that the check was payable to, and uttered to, Kerrs Dry Goods Company and that accused thereby fraudulently obtained $50.

Specification 19: Similar to Specification 9 except that it alleges that the check was dated 23 June 1943, drawn on First National Bank, Oklahoma City, Oklahoma, and payable to Skirvin Hotel, Inc., and that it was uttered to Skirvin Tower Hotel on 23 June 1943.

Specification 20: Similar to Specification 19 except that it alleges that the check was payable to, and uttered to, The Skirvin Hotel.

Specification 21: Similar to Specification 9 except that it alleges that the check was dated 24 June 1943 and payable to Harbour Longmire, and that it was uttered to Harbour Longmire Furniture Company on 24 June 1943.

Specifications 22, 23 and 24: (Findings of guilty disapproved by reviewing authority).

Specification 25: In that Second Lieutenant Francis H. McCarthy, 254th Field Artillery battalion, having received a lawful order on or about 1 July 1943 from John W. Gillett, Captain, Corps of Military Police at Oklahoma City, Oklahoma to return to his organization at Camp Gordon, Georgia without delay, the said John W. Gillett, Captain, Corps of Military Police, being in the execution of his office, did at Camp Gordon, Georgia on or about 6 July 1943, fail to obey same.

The accused pleaded not guilty to all Specifications and Charges. He was found not guilty of Specification 1, Charge I, and of Specifications 12 and 16, Charge II, and guilty of all other Specifications and of the Charges. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for five years. The reviewing authority disapproved the findings of guilty of Specification 2, Charge I, of Charge I, and of Specifications 1-5, 8, 10, 11, 13, 15, 17 and 22-24, Charge II, and approved the sentence, but remitted two years of the term of confinement at hard labor. The record of trial was forwarded for action under the 48th Article of War.

3. Evidence for the prosecution:

a. Specifications 6 and 7, Charge II: C. H. Huffer, cashier, Security Bank and Trust Company, Lawton, Oklahoma, testified by deposition (Exs. H, I) that on 5 May 1943, accused borrowed $100 from the bank, the loan being effected by taking from accused two checks, each in the sum of $51, drawn on the Mellon National Bank, Pittsburgh, Pennsylvania and postdated 5 June 1943 and 3 July 1943 respectively. Mr. Huffer made out the checks, accused signed them in his presence, and Mr. Huffer approved them after comparing the signature on the checks and accused with the signature and photograph on the officer's identification card which accused presented. The checks were "put through" for payment after their due dates, were dishonored and never paid. From the notation on the checks Mr. Huffer believed the reason was "insufficient funds" (R. 41-42).

b. Specification 9, Charge II: Mr. Huffer also testified by deposition (Ex. K) that he had no personal knowledge of the check, of which a photostat was attached to the deposition, dated 19 June 1943, drawn on Mellon National Bank, Pittsburgh, Pennsylvania, in the sum of $50, payable to Security Bank and Trust Company, and signed "Francis H. McCarthy". The first time Mr. Huffer saw the check was sometime after 19 June 1943 when the check was returned dishonored. The check was never paid (R. 43-44).

c. Specification 14, Charge II: Leopold V. Barth, merchant, of "Barth Bros. Co.", Oklahoma City, Oklahoma, testified by deposition (Ex. O) that on 22 June 1943, he cashed a check bearing that date, payable to "Barths", drawn by accused on the Potter Title and Trust Company, Pittsburgh, Pennsylvania, in the sum of $50, for which accused received $18.62 in merchandise and $31.38 in cash. Mr. Barth saw accused in the course of making out the check but was not positive he saw him sign it. Accused identified himself by his Adjutant General's Office pass. Mr. Barth testified that the check was not honored by the bank on which drawn and was never paid. On the check appears "NSF" which "I assume means 'Not Sufficient Funds'". On the reverse side of the check appear the bank stamps of the First National Bank and Trust Co., Oklahoma City, dated 23 June 1943, Commerce Trust Co., Kansas City, Mo., dated 24 June 1943, and the Mellon National Bank, Pittsburgh, Pennsylvania, dated 26 June 1943 (R. 47).

d. Specification 18, Charge II: Dorothy Celia Cory, of the credit department, Kerr Dry Goods Company, Oklahoma City, Oklahoma, testified by deposition (Ex. R) that on 22 June 1943 accused presented a check which he signed in her presence, bearing that date, payable to Kerr Dry Goods Co., drawn on Potter Title and Trust Company, Pittsburgh, Pennsylvania, in the sum of $50. Miss Cory, after checking his officer's identification card, approved the check and sent accused to the cashier where he received $50 in cash. The check was not honored at the bank, was returned marked "Insuf. Funds" and never paid (R. 49).

e. Specification 19, Charge II: Mrs. Harold L. Bundy, room clerk, Skirvin Tower Hotel, Oklahoma City, Oklahoma, testified by deposition (Ex. S) that on 23 June 1943, accused presented a check to be cashed inthe sum of $50, bearing that date, drawn on First National Bank, Oklahoma City, Oklahoma, which he signed in her presence. Mrs. Bundy checked his officer's identification card and gave him $50 in cash. The check was returned by the First National Bank marked "No Account" and never paid. On the reverse side of the check appears the bank stamp of the First National Bank and Trust Company, Oklahoma City, Oklahoma, dated 24 June 1943 (R. 49).

f. Specification 20, Charge II: Ralph Pellow, assistant manager, Skirvin Hotel, Oklahoma City, Oklahoma, testified by deposition (Ex. T) that on 23 June 1943, accused presented a check to be cashed, bearing that date, in the sum of $50, drawn on the First National Bank of Oklahoma City, Oklahoma, payable to The Skirvin Hotel. Accused signed the check in his presence and Mr. Pellow gave him the cash after checking his officer's identification card. The check was not honored by the bank, was returned marked "No Account" and never paid. On the reverse side of the check appears the bank stamp of the First National Bank and Trust Company, Oklahoma City, Oklahoma, dated 24 June 1943 (R. 49-50).

g. Specification 21, Charge II: Scott Downey, credit manager, Harbour-Longmire Company, Oklahoma City, Oklahoma, testified by deposition (Ex. U) that on 24 June 1943 accused presented and signed in his presence a check bearing that date in the sum of $50 drawn on Mellon National Bank, Pittsburgh, Pennsylvania, and payable to "Harbour Longmire's". Mr. Downey approved the check and accused received $50 in cash. Accused had previously stated that he wished to make a purchase in the sum of $23.80 and as he left the store without doing so Mr. Downey followed him to a local hotel and found him registered under an assumed name. Mr. Downey stated that the check was not honored by the bank, as the account was closed, and was never paid. On the reverse side of the check appear the bank stamps of the First National Bank and Trust Company, Oklahoma City, Oklahoma, dated 25 June 1943, the Commerce Trust Company, Kansas City, Missouri, dated 28 June 1943, and the Mellon National Bank, Pittsburgh, Pennsylvania, dated 30 June 1943 (R. 50).

h.- Evidence Applicable to All Preceding Specifications: All of the witnesses, except Mrs. Harold L. Bundy, testified that accused was not drunk and appeared to know what he was doing when he signed the various checks. Mrs. Bundy (Spec. 19, Chg. II) testified that at the time accused cashed the check referred to in her testimony, he "appeared to have been drinking, but was not wavering back and forth nor did he speak incoherently" (Exs. H, I, O, R, S, T, U).

The witnesses identified a photograph attached to each deposition as a likeness of the accused. The witnesses also identified photostats attached to each deposition as true copies of the checks referred to in their testimony. The original checks (Exs. H-1, I-1, K-1, O-1, R-1, S-1, T-1, U-1) from which these photostats were made were identified by Captain Joseph D. McWherter, Jr. Jules V. DeCandt, qualified as a handwriting expert, testified that the signature of the maker of each check, with one exception, was in the handwriting of accused. Mr. DeCandt "wouldn't say" that the signature on the check which was referred to in Exhibit O (Spec. 14, Chg. II), was in the handwriting of accused (R. 55, 78, 83-85, 129-134; Exs. H, I, K, O, R, S, T, U).

During the investigation accused made a voluntary statement in which he admitted writing a number of checks, but could not remember some of them (R. 66-67).

i. Specification 25, Charge II. The trial judge advocate and defense counsel stipulated that a written order (Ex. W) from Headquarters, 1827th Unit, Military Police Detachment, Oklahoma City, Oklahoma, dated 1 July 1943, signed by Captain John W. Gillett, CMP, Provost Marshal, was given accused, directing him to return to his organization at Camp Gordon, Georgia, without delay. Accused returned to duty at 2100 6 July 1943 (R. 34-35, 54; Ex. B).

Mr. William D. Fargo, qualified as an expert witness on transportation, testified that one could leave Fort Sill, Oklahoma, at 12:40 p.m., on Monday for example, and arrive in Augusta, Georgia, 2:30 p.m., Wednesday; by another route the corresponding figures would be 9:30 a.m. Monday and 2:00 a.m. Wednesday. This was the shortest time in which a person could make the trip and if one traveled partly by bus and partly by rail, the time would not be "nearly that fast" (R. 75-77).

In his voluntary statement to the investigating officer, accused stated that he was released on 1 July, given an order at Oklahoma City to report to his commanding officer at Camp Gordon without delay, caught a train on 2 July, stopped at Springfield and caught a bus, and arrived at Augusta, Georgia between 3:30 and 5:00 p.m. on 5 July. He signed in at Camp Gordon at about 11:00 p.m. on 6 July. (R. 66-67)

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

The accused, through his counsel, made an unsworn statement that he was sent to Fort Sill in April 1943, at which time he had a joint bank account with his sister in the Mellon National Bank, Pittsburgh, Pennsylvania. Through April and May, his sister drew upon this joint account, without knowledge of the accused, due to the sickness of his father. The

accused drew a check upon that account on 8 April to the De Soto Hotel and later, when he learned that the check had been dishonored, sent to the Potter Title and Trust Company a deposit of $50 to cover the check. Later he made out checks to the City National Bank and to the Security Bank and Trust Company, both of Lawton, Oklahoma, in good faith, believing he had money on deposit in the Potter Title and Trust Company and in the Mellon National Bank because of a loan made by him from the Potter Title and Trust Company and because his pay checks were sent directly to the Mellon National Bank. When he learned that the checks were being dishonored, he went to the City National and the Security Bank and Trust Company and borrowed money from each bank to cover the prior checks, giving postdated checks as security therefor and intending to pay them out of his later pay checks. About 21 June, because of financial worries, he was relieved from school and began drinking heavily and did not remember writing any checks thereafter. He missed the one train out of Lawton on 21 June, due to "clearing" Fort Sill, and caught the bus to Oklahoma City at 0600 22 June, arriving too late to catch the 0845 train out of Oklahoma City. He checked into a hotel intending to catch the only other train out, at 0420 23 June, but due to drinking overslept and missed the 0845 train. He was arrested 24 June, taken to the city jail and later to the Will Rogers Hospital, from which he was released 1 July. Accused did not remember anything about writing checks in Oklahoma City, and did not remember any of the persons whose depositions were in evidence in this case. After his arrest he learned for the first time that he had made a $10 deposit in the Federal Building and Loan Association in Oklahoma City. He was given an order by Captain Gillett to report to Camp Gordon without delay but could not catch another train (the first one available to him) out of Oklahoma City until 0845, 2 July, and he arrived at Augusta, Georgia, 5 July at 0330. The whole trip having been made by day coach and by bus, he was so tired he went to a hotel to get some sleep. He attempted to borrow money from two banks in Augusta. On 6 July, he reported to Camp Gordon, believing that a one day lay-over was not an unreasonable delay. Accused did not intend to defraud anyone. He acknowledged that he owed some money to banks in Lawton, and stated that he had attempted to make arrangements to repay any creditors he might have, which was dependent upon his continuance in the military service, since his father and sister were partially dependent upon him for their support (R. 135-137).

It was stipulated that accused was taken into custody in Oklahoma City on 24 June, placed in confinement at Will Rogers Hospital on 26 June, and released on 1 July to return to Camp Gordon (R. 112).

5. a. Specifications 6 and 7, Charge II: Accused borrowed $100 from the Security Bank and Trust Company, Lawton, Oklahoma, on 5 May 1943,

giving in return two checks in the sum of $51 each, drawn by himself on the Mellon National Bank, Pittsburgh, Pennsylvania and postdated 5 June 1943 and 3 July 1943 respectively. The checks were "put through" for payment after their due dates and were not honored, the notation on the checks stating the reason as "insufficient funds". The checks were never paid.

b. Specification 9, Charge II: The evidence applicable to this Specification is contained in Exhibit K, in which the deponent testified that he had no personal knowledge of the check and did not see it until after it was returned dishonored by the drawee bank. The check was never paid.

c. Specifications 14, 18, 19, 20 and 21, Charge II: The evidence supporting these Specifications shows that from 22 June 1943 to 24 June 1943 accused signed and cashed five checks in Oklahoma City in the sum of $50 each, receiving cash and merchandise therefor. The checks were drawn on the Potter Title and Trust Company, Mellon National Bank, both of Pittsburgh, and the First National Bank of Oklahoma City, Oklahoma, and were as described in these Specifications. The various witnesses who testified concerning the making and uttering of the checks stated that the checks were dishonored and were never paid.

d. The foregoing evidence shows that accused made and uttered a number of checks to various banks and merchants, receiving cash or merchandise therefor. The payees of the checks, or their agents, testified that the checks were dishonored and never paid. The basis for this testimony is not clearly shown, but it appears to be derived from the fact that the checks were returned unpaid bearing stamps or notations such as "NSF" or "No Account" either on the checks themselves or on attached slips. Examination of the photostats of the checks in the record discloses the presence of such stamps as well as the bank stamps of the drawee banks dated shortly after the dates of issuance of the respective checks. No testimony was procured from any officer or agent of the banks on which the checks were drawn.

It was incumbent upon the prosecution to establish that accused did not have sufficient funds or credits in the respective banks upon which the checks were drawn to pay the checks when presented. There is no competent evidence to prove this essential element of the offense charged. The mere statement of the witnesses who cashed the checks that they were returned because of "no account" or "not sufficient funds" can hardly be said to be proof of this fact (CM 121721, Graydon). It has been held that notations such as "Not Sufficient Funds" and "No Account" on returned checks or on slips attached to the checks are not competent to prove that the maker of the checks had insufficient funds or had no account in the bank to meet the checks (Dig. Op. JAG, 1912-40, sec. 395(16); See also CM 204927, Parsons). It may be true that such a notation on a returned check would be accepted in every day commercial affairs as proof that the drawer of the

check did not have sufficient funds to meet the check but it cannot be accepted in a court of law to prove an essential element of a criminal offense, without holding that the rules of evidence permit the reception, without preliminary foundation, of the unsworn statement of an unknown person.

In the absence of proof that the accused had no account in the banks or insufficient funds or credits in the banks for payment the allegations in the Specifications that accused made and uttered the checks "well knowing that he did not have and not intending that he should have sufficient funds" in the banks for payment are not proven. The Board is therefore of the opinion that the findings of guilty of these Specifications cannot be sustained.

In addition to the foregoing deficiency in the proof, which is applicable to all preceding Specifications, there is a failure of proof under Specification 9, Charge II, that accused uttered the check and received value for it.

It should be further noted that Specifications 6 and 7, Charge II, involve postdated checks given for a loan. The Specifications allege that accused "having promised * * * he would have sufficient funds on deposit * * * to pay said check * * * when it became due, did, without cause * * * dishonorably fail to keep said promise". Whether the offense would be proven merely by showing that accused had insufficient funds in the bank on the due dates of the checks need not be considered here in view of the fatal defects in the proof previously discussed.

e. Specification 25, Charge II. The issue involved under this Specification was the promptness of accused in returning to his station at Camp Gordon after receiving an order at Oklahoma City on 1 July 1943 to return there, it being alleged that accused should have returned on 5 July 1943 but that he did not until 6 July 1943. It appears that accused departed from Oklahoma City on 2 July, that by train he should have arrived at Augusta, Georgia, on 4 July, that he traveled part of the way by bus and arrived on 5 July, and that he waited until 6 July to report at Camp Gordon. The evidence is deemed insufficient to support beyond a reasonable doubt the finding of guilty. The staff judge advocate in his review recognized this fact and recommended (p. 11) that the finding be disapproved. In drafting the action, which was adopted in toto by the reviewing authority, he inadvertently omitted Specification 25 from the Specifications which he recommended should be disapproved.

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

17 February 1941; appointed temporary second lieutenant, Army of the United States, and active duty, 5 November 1942.

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

Samuel M. Drew, Judge Advocate

Thomas Lamar, Judge Advocate

F. J. Lotthuhos, Judge Advocate

1st Ind.

War Department, J.A.G.O., 26 FEB 1941 - To the Commanding General, III Corps, Presidio of Monterey, Monterey, California.

1. In the case of Second Lieutenant Francis H. McCarthy (0-1172984), Field Artillery, I concur in the foregoing opinion of the Board of Review holding the record of trial not legally sufficient to support the findings of guilty and sentence, and, for the reasons therein stated, recommend that the findings of guilty and the sentence be disapproved. You are advised that the action of the Board of Review and The Judge Advocate General is taken under the provisions of Article of War 50½ and in accordance with note 4 following that article (M.C.M., 1928, p. 216), and that under the further provisions of that article the record of trial is herewith returned to you for a rehearing or such other action as you may deem proper.

2. When copies of the published order in this case are forwarded to this office together with the record of trial, they should be accompanied by the foregoing opinion and this indorsement, except that in the event a rehearing is directed the foregoing opinion and this indorsement should be returned alone and the disposition of the record of trial and the publication of the general court-martial order in the case shall follow the provisions of paragraph 89, Manual for Courts-Martial, 1928. 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 243091)

Myron C. Cramer

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

1 Incl-
Record of trial.

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

(285)

SPJGK
CM 243105

1- DEC 1943

UNITED STATES	)	SECOND AIR FORCE
v.	)	Trial by G.C.M., convened at Army Air Base, Pyote, Texas, 14 October 1943. Dismissal, total forfeitures, and confinement for six (6) months. Disciplinary Barracks.
Second Lieutenant GUY E. SMITH (0-804746), Air Corps.	)	

OPINION of the BOARD OF REVIEW
LYON, HILL 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. The accused was tried upon the following Charges and Specifications:

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

Specification: In that Second Lieutenant Guy E. Smith, 93rd Bombardment Squadron, 19th Bombardment Group, did, without proper leave, absent himself from his station at Army Air Base, Pyote, Texas, from about 5 August 1943 to about 5 September 1943.

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

Specification 1: In that Second Lieutenant Guy E. Smith, 93rd Bombardment Squadron, 19th Bombardment Group, did, at Odessa, Texas, on or about 2 September 1943, with intent to defraud, wrongfully and unlawfully make and utter to the Elliott Hotel, Odessa, Texas, a certain check, in words and figures as follows, to wit:

CUSTOMERS

THE FIRST NATIONAL BANK 88-2161
Odessa, Texas September 2, 19 43.
Pay to the order of C A S H $15.00
Fifteen and no/100 DOLLARS
Value Received and Charge to Account of
TO Electra State Bank
Electra, Texas /s/ Guy E. Smith
(ASN) 0-804746

D
R
A
F and by means thereof, did fraudulently obtain from the Elliott
T Hotel, Odessa, Texas, Fifteen Dollars ($15.00), lawful money of the United States, he, the said Second Lieutenant Guy E. Smith, then well knowing that he did not have and not intending that he should have any account with the Electra State Bank, Electra, Texas, for the payment of said check.

Specification 2: Same form as Specification 1, but alleging check dated 4 September 1943, payable to the order of Cash, made and uttered to the Elliott Hotel, Odessa, Texas, at Odessa, Texas, and fraudulently obtaining thereby $25.00.

Specification 3: Same form as Specification 1, but alleging check dated 4 September 1943, payable to the order of Cash, made and uttered to the Elliott Hotel, Odessa, Texas, at Odessa, Texas, and fraudulently obtaining thereby $15.00.

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

Specification 1: In that Second Lieutenant Guy E. Smith, 93rd Bombardment Squadron, 19th Bombardment Group, having received a lawful order from Captain James A. Freguson to report to him immediately at Army Air Base, Pyote, Texas, the said Captain James A. Ferguson then being in the execution of his office, did, at Odessa, Texas, on or about 3 September 1943, fail to obey the same.

Specification 2: In that Second Lieutenant Guy E. Smith, 93rd Bombardment Squadron, 19th Bombardment Group, having been restricted to the limits of his post at Army Air Base, Pyote, Texas, did, at Army Air Base, Pyote, Texas, on or about 20 September 1943, break said restriction by going to Odessa, Texas.

He pleaded guilty to Charges I and III and to their Specifications, and not guilty to Charge II and its Specifications, and was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to dismissal, total forfeitures, and confinement at hard labor for ten years. The reviewing authority approved only so much of the sentence as provides for dismissal from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months, and forwarded the record of trial for action under Article of War 48. The legal effect of this action was to approve the sentence and remit nine years and six months of the confinement adjudged.

3. In view of the accused's plea of guilty to Charge I and its Specification (absence without leave in violation of Article of War 61), and Charge III and its Specifications (failure to obey a lawful order of his superior officer and breach of restriction in violation of Article of War 96), the evidence introduced by the prosecution was confined to Charge II and its three Specifications - issuing of worthless checks with intent to defraud in violation of Article of War 95, to which the accused pleaded not guilty.

Summary of the evidence. In September 1943 accused was a guest at the Elliott Hotel, Odessa, Texas, during which time he received from the hotel, cash or credit on account in exchange for checks signed by the accused as follows: One check for $25 dated 4 September 1943, and two checks each for $15 dated respectively 2 and 4 September 1943. The checks were drawn on the Electra State Bank, Electra, Texas, and each check was dishonored and returned by the drawee bank marked "no account" (R. 6a-6b, 6d-6f; Exs. A,B, and C). Mr. Charles O'Donnell, assistant manager of the hotel, advised the accused by mail that his checks had been dishonored. Several days later Captain James F. Sewares, Air Corps, the investigating officer, called at the Elliott Hotel and obtained the checks from Mr. O'Donnell on memoranda receipt. About one week thereafter Mr. O'Donnell received from Captain Sewares full payment of the checks (R.6e-f, 6m). Mr. O'Donnell stated that about a month prior to the negotiation of Exhibits A, B, and C, accused gave him checks on another bank which were unpaid and returned, but that accused later paid these checks. Captain Sewares, had a conversation with the accused about 23 or 24 September 1943, at which time he advised accused of his rights under Article of War 24. He asked accused if he understood the Charges and Specifications which had been preferred against him, to which accused replied in the affirmative. He told accused that anything said by him could be used against him in court and that he "did not have to sign anything or write anything". Accused replied that he did not desire to make any statement. At this stage of the direct examination the trial judge advocate announced that he had no further questions. On cross-examination and in response to questions by the defense, Captain Sewares stated that the day after he spoke to the accused he went to the Elliott Hotel, got the checks, brought them back to the post, and showed them to the accused. The accused did not have much to say but admitted that they were his checks. Witness stated that he had "contacted him [the accused] twice in regard to the payment of the checks and two or three times in the Officers' Mess". He told the accused that Mr. "Elliott" was very much upset, and asked accused what he was going to do about it. Accused stated that he was ready to pay the checks and thereupon "pulled the money out of his pocket" and gave it to Captain Sewares, who in turn delivered the money to the Elliott Hotel (R.6j-6m).

For the defense the accused admitted that he wrote the checks and gave them to the hotel in exchange for cash and for payment of his hotel bill. He testified that when the checks were negotiated he was of the opinion

that he had an account in the Electra State Bank. In this connection he stated that he had been carrying "a small account" with a bank in Longview, Texas, and that in June 1943 he requested his mother to transfer the Longview account to the Electra State Bank and thought that it had been done, but that "evidently she failed to do it and the checks just bounced". Accused testified that he was in Sebring, Florida, when he requested the transfer, and that he learned while in Florida, and as far back as June that the transfer had not been accomplished because some checks which he had drawn in reliance upon the transfer "were returned there". He stated that he told his mother of the difficulties resulting from her failure in this regard, and that he again requested her to make the transfer, which she promised to do, but failed to do because of illness (R.6o). He stated that he notified his mother when the checks here involved were returned but that his mother was sick in bed (R.6r). It appears from the testimony of accused that he visited his home in Electra, Texas, sometime in August 1943, and that although he lived within four or five blocks of the Electra State Bank he took no steps while there to verify the status of his account with that bank (R.-6n-6r). He had never received any statement from the Electra State Bank, nor had the bank requested a specimen of his signature (R. 6q-6t). When he opened his account with the bank in Longview (a distance of 325 miles from his home) he was required to sign and file with the bank a signature card. He was the only one authorized to draw checks on the Longview account, but his mother was well known and could have effected a transfer of his account. He did not deposit his monthly pay checks with the Longview bank. He kept no check stubs and had no idea of the status of his account with the Longview Bank. His last check on that bank was drawn sometime "in the spring". Accused knew he could transfer his balance in the Longview Bank by the simple process of drawing a check, but stated that he wanted his mother to attend to it. His balance was low and "she was going to add to it" (R.6t). He stated that after charges were filed against him he made no effort to find out the condition of his account with the Electra Bank because he was concerned about the condition of his mother's health, and "I didn't want to bother home until I got through with this" (R.6s). He stated that his mother closed out the Longview account in August, at which time there was a credit balance of $75 or $80, but it does not appear when accused learned of this withdrawal (R. 6q-6u). The record of trial contains the following entry:

> "Due to the fact that the accused's Mother has been ill and it was rather unwise to procure a statement from her, the defense would like to stipulate between the accused, his counsel, and the prosecution that, if the accused's Mother were present in court, she would testify as follows: That she was going to transfer the accused's account from the Longview Bank to the Electra State Bank; that she told the accused that she would place money in the Electra State Bank for him on two different occasions; and, that that money was never transferred or deposited and that she failed to do so." (R.6w).

4. No evidence was introduced with reference to Charge I and its Specification, absence without leave in violation of Article of War 61; or Charge III, failing to obey the lawful order of his superior officer (Specification 1), and breach of restriction (Specification 2) in violation of Article of War 96. However, the findings of guilty are supported by the accused's plea of guilty as to these Charges and Specifications. With respect to Charge II and its Specifications, the evidence very clearly shows that the accused negotiated with the Elliott Hotel the checks described in the Charge and Specifications, and that by means thereof he obtained from the hotel money or services as alleged; that the checks were returned from the drawee bank marked "no account", and that the accused did not have an account with the drawee bank when the checks were negotiated. The accused was advised that the checks had been dishonored, and after charges were preferred and in the course of the official investigation of the charges, the accused redeemed the checks. The evidence thus clearly shows that accused is guilty of wrongfully issuing the checks without having taken reasonable precautions to ascertain whether or not sufficient funds had been deposited to his credit in the drawee bank to pay the checks. Such conduct was to the discredit of the military service and was violative of Article of War 96. However, the Specifications are laid under the 95th Article of War and the question presented is were the checks negotiated with the intent to defraud as alleged? The accused contends that he had a small account with a bank at Longview, Texas; that he had requested his mother to transfer this account to his credit at the drawee bank; and that when he negotiated the checks he honestly believed that the transfer had been made and that the checks were good. In support of this contention the record contains a stipulation that accused's mother if present at the trial would testify that "she was going to transfer the accused's account from the Longview Bank to the Electra State Bank; that she told the accused that she would place money in the Electra Bank for him on two different occasions; and that the money was never transferred or deposited and that she failed to do so". The court had an opportunity to observe the demeanor of the accused on the witness stand and to appraise his testimony. It was the province of the court to accept or reject his testimony. Despite the testimony of accused, the Board of Review is of the opinion that the court was fully justified in finding the accused guilty as charged beyond any reasonable doubt. The record contains an abundance of evidence which supports an inference of fraud. The accused seems to have had a weakness or predisposition for giving bad checks. He had previously given worthless checks to this same hotel. He had recently been involved in some difficulties because of negotiating bad checks at Sebring, Florida, drawn on this same bank. The court was not bound to believe and was justified in not believing the accused's story about his account at the Longview Bank. The accused's home was Electra, Texas. There is no explanation of why he should maintain a bank account in Longview, Texas, 325 miles distant from his home (R.6s). If he really had an account at Longview, Texas, and desired to transfer it to his home bank why should he have waited for his mother, who had no authority

in the premises, to make the transfer, when he himself could have accomplished it by the swift and simple process of a check or draft on the Longview Bank for his credit in the Electra State Bank? If no one other than he had the authority to check against his Longview account, as testified by accused, how did he expect his mother to effect the transfer of the account? Assuming that accused had an account in the Longview Bank, he stated on cross-examination that he had not drawn on the account since spring, that he kept no check stubs, and that he had no idea of the status of the account when he negotiated Exhibits A, B, and C. If the accused had had an account with the Longview Bank it would have been an easy matter for him to have established this fact through a deposition of some officer of the Longview Bank. It is understandable how the accused could have made the initial mistake of drawing checks in Florida in reliance upon the alleged contemplated transfer of his account, but when these checks were dishonored by the Electra State Bank with the resulting "difficulty" which followed, it seems inconceivable that he would again have assumed the risk without assuring himself that his account had been transferred, and that his credit balance was sufficient to meet the checks. The demeanor and conduct of the accused, his gross negligence and indifference to the status of his bank account (if any), the fact that he had received no confirmation of any deposit in the Electra State Bank and no notice of any transfer from the Longview Bank, the admission of accused that he had no idea of the status of his account with the Longview Bank, and his failure to offer corroborative and positive evidence of the actual existence of the Longview account, warrant the conclusion beyond a reasonable doubt that the accused negotiated the checks with the intent to defraud.

5. The accused is 24 years of age. The records in the Office of The Adjutant General show that the accused attended Texas A. and M. College two years, majoring in "market and finance". He joined the Texas National Guard 22 September 1940 and became Sergeant, Battery D and C, 131st Field Artillery. He was appointed an aviation cadet September 1942, and upon completion of the prescribed course of instruction was honorably discharged as an aviation cadet, rated as a pilot and commissioned a temporary second lieutenant, Army of the United States, 28 May 1943. He attended the Army Air Forces Pilot School, Hendricks Field, Florida, from 2 June 1943 to 14 July 1943. The Special Service School report gives his air work rating as "Excellent", his academic rating as "superior", and stated that his special aptitude is for "Combat duty on Four-Engine Aircraft".

6. The court was legally constituted and had jurisdiction of the person and the subject matter. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. Dismissal is mandatory under Article of War 95 and authorized under Articles of War 61 and 96.

_____, Judge Advocate.

(On Leave), Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 18 DEC 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 Guy E. Smith (0-804746), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence as approved by the reviewing authority and to warrant confirmation thereof. Under all the circumstances, it is believed that dismissal is sufficient punishment. I, therefore, recommend that the sentence be confirmed but that the forfeitures and confinement be remitted, and that the sentence as thus modified be carried into execution.

3. Consideration has been given to letters from Honorable Tom C. Connally, United States Senate, and Honorable Lindley Beckworth, House of Representatives, which accompany the record of trial.

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

Myron C. Cramer

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

5 Incls.
Incl.1-Record of trial.
Incl.2-Draft of ltr. for sig. Sec. of War.
Incl.3-Form of Ex. action.
Incl.4-Ltr. to Senator Connally. (A copy)
Incl.5-Ltr. fr. Representative Beckworth.

(Sentence confirmed but forfeitures and confinement remitted. G.C.M.O. 60, 9 Feb.1944)

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

SPJGN
CM 243121

30 NOV 1943

UNITED STATES	)	MILITARY DISTRICT OF WASHINGTON
	)	
v.	)	Trial by G.C.M., convened at Fort Belvoir, Virginia, 8 and 11 October 1943. Dismissal.
	)	
Captain JULIAN F. MUNSTER (0-326619), Corps of Engineers.	)	

OPINION of the BOARD OF REVIEW
LIPSCOMB, GOLDEN and SLEEPER, 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 Charge and Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Captain Julian F. Munster, Corps of Engineers, Company B, Student Officer Training Regiment, Fort Belvoir, Virginia, did, at Fort Belvoir, Virginia, on or about 8 September 1943, wrongfully take and use for his own personal benefit, without proper authority, a certain army vehicle, to wit: one truck, quarter ton, four by four, C-16, W20114702, property of the United States, furnished and intended for the military service thereof, of a value of more than fifty ($50.00) dollars.

Specification 2: In that Captain Julian F. Munster, Corps of Engineers, Company B, Student Officer Training Regiment, Fort Belvoir, Virginia, did, at Fort Belvoir, Virginia, on or about 8 September 1943, unlawfully enter the 241st Engineer Combat Battalion Motor Pool, a locked enclosure, with intent to commit a criminal offense, to wit: the wrongful taking of an army vehicle.

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

3. The evidence for the prosecution shows that about 12:15 a.m., 8 September 1943, the sentinel in the area of the 241st Engineer Combat Battalion Motor Pool, hearing a crash there, discovered, upon investigation, that the locked gate of the fenced motor pool enclosure had been forced open. At the same time, he observed a vehicle proceeding southward along Gunston Road. His calling the corporal of the guard woke the senior officer in charge of the motor pool, who slept nearby. This officer promptly proceeded to the motor pool, checked the jeeps there, then, after a conference with the motor pool sergeant, called military police headquarters to report that one was missing (R. 9-14, 48).

At 12:20 a.m., a military policeman on duty at the Belvoir Road gate saw the accused, without hat or tie, drive a jeep bearing the identification C-16 on its bumper, through the gate and on to the highway. About one, the same morning, two military police and two Alexandria policemen observed a hatless soldier park a jeep in that city, alight, cross the street and enter a doughnut shop. About 2:20, the two civilian policemen were informed at police headquarters in Alexandria that a jeep had been stolen from Fort Belvoir, identified, among other particulars, by the number C-16 on the bumper. Shortly thereafter, they located this jeep near the A. B. & W. Bus terminal station in Alexandria. While they were trying to start it, the accused approached, stopped when he observed the policemen, then walked over to the bus station. After the motor started the accused walked over to the jeep. One of the policemen inquired if he knew anything about it. Despite his denial, the policemen, observing that the accused had "been drinking" and having recognized him as the soldier whom they had earlier seen emerge from a jeep and enter a doughnut shop in Alexandria, arrested and turned him over to the MPs, along with the jeep, which was identified as one normally kept in the 241st Engineer Battalion Motor Pool, the officer in charge of which had authorized no one to use it between 7 p.m., 7 September 1943 and 6 o'clock the next morning. A shred of cloth removed, later on the morning of 8 September 1943, from the barbed wire fence enclosing the motor pool, was identified as exactly similar in all respects to the fabric of a torn shirt removed from the accused's laundry bag during the course of the investigation (R. 25-27, 30-31, 34-37, 44-46b, 50-54, 61-71; Exs. 8-11).

4. The evidence for the defense shows that the accused was in a restaurant in Washington from 11:50 p.m., 7 September 1943, until 12:25 a.m., 8 September 1943, without tie or hat, with his shirt open,

and, so obviously drunk that service was refused him. He was seen in another restaurant in Washington between 12:30 a.m. and 1:30 a.m., 8 September 1943, hatless, tieless and with collar unbuttoned, and in a cocktail lounge there between 9:45 p.m. and 12:30 p.m., during the week of 6 September 1943, when nothing unusual was noted in his appearance. About 2 a.m., 8 September 1943, drunk, wearing no hat or tie, with shirt open, he boarded an A. B. & W. bus, in Washington, bound for the Alexandria bus terminal, where he alighted. The proprietor of the doughnut shop referred to by the Alexandria policemen, testified the accused was not there during the time in question (R. 71-95).

Officers, who were formerly associated with the accused, characterized as excellent his reputation for efficiency, truth and character as an officer, especially mentioning the difficult task of assisting in the advance pioneer clearing of a portion of the Alaska Highway (R. 96-99; Def. Exs. 2-4).

5. The accused, having been advised of his rights, elected to remain silent.

6. The first Specification alleges misappropriation of an Army vehicle; the second, unlawful entry of the motor pool's locked enclosure with intent to commit the criminal offense described in the first. The evidence through which the defense sought to prove an alibi is effectively discredited by the forthright testimony of numerous unimpeached witnesses for the prosecution, convincingly establishing a chain of circumstances which impels an inference of the accused's guilt as alleged in each Specification.

7. The court found the accused guilty of the alleged offenses and sentenced him "to be reduced to his permanent grade of 1st lieutenant and to be suspended from promotion for a period of one year." Before the record of trial was authenticated, the court reconvened on its own motion for the purpose of reconsidering the findings and sentence; it adhered to its original finding of guilty; then, having revoked its original sentence and sentenced the accused to be dismissed the service, overruled defense counsel's objection that the final sentence, being more severe than the original, was "out of order". Until authentication of the record, a court-martial is not deprived, by the final provision of Article of War 40, of its inherent right to reconsider and alter its original sentence, even though such alteration involves an increase - within legal limits - of the severity thereof; nor is this inherent right in any manner impaired by the prior announcement of its original sentence (Bull. JAG, May 1943, Sec. 395 (37)). It follows that the court's action, in this particular, was unexceptionable.

8. The accused is 30 years of age. War Department records show appointment as second lieutenant, Engineers - Reserve, 1 June 1935, promotion to first lieutenant, 10 November 1938 and, temporarily, to captain 29 April 1942, with extended active duty from 29 March 1941.

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

Abner E. Lipscomb, Judge Advocate

Gabriel H. Golden, Judge Advocate

Benjamin R. Sleeper, Judge Advocate

SPJGN
CM 243121

1st Ind.

War Department, J.A.G.O., 11 DEC 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 Julian F. Munster (O-326619), Corps of Engineers.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but commuted to a reprimand and the forfeiture of $50.00 of his pay per month for six months, and that the sentence as thus modified be ordered executed.

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

Myron C. Cramer

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

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

(Sentence confirmed but commuted to reprimand and forfeiture of $50 pay per month for six months. G.C.M.O. 35, 17 Jan 1944)

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

30 NOV 1943

(299)

SPJGH
CM 243205

UNITED STATES	)	III CORPS
v.	)	Trial by G.C.M., convened at Camp Gordon, Georgia, 26 October 1943. Dismissal, total forfeitures, and confinement at hard labor for three (3) years. Federal Reformatory.
Second Lieutenant DONALD E. THRALL (0-1180749), Field Artillery.	)	

OPINION of the BOARD OF REVIEW
DRIVER, LOTTERHOS and LATTIN, Judge Advocates.

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

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

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

Specification: In that Second Lieutenant Donald E. Thrall, Hq III Corps Artillery, did, at Camp Gordon, Georgia, on or about 2 October 1943, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection per os with Technician IV Grade Henry O. Scheunemann, Hq Battery, III Corps Artillery.

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

Specification: In that Second Lieutenant Donald E. Thrall, Hq III Corps Artillery, did, at Camp Gordon, Georgia, on or about 2 October 1943, drink intoxicating liquor with Technician IV Grade Henry O. Scheunemann and Private Francis X. Moeller, both Hq Battery, III Corps Artillery.

He pleaded guilty to, and was found guilty of, both Specifications and Charges, and was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for three years. The reviewing authority approved the sentence, designated the

Federal Reformatory, Chillicothe, Ohio, as the place of confinement, and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution is substantially as follows: At approximately 8:00 p.m. on 2 October 1943, the accused entered Post Exchange No. 13, pointed to Technician Fourth Grade Henry O. Scheunemann and said, "You are the man I want". Scheunemann, at the invitation of accused, followed him to his (accused's) room where the accused mixed drinks of "rum, coke and ice" and the two sat down and drank them. At approximately "10:45 or 11:15" p.m. Scheunemann, at the suggestion of accused, went to the officers' mess and procured more ice. He invited Private Francis X. Moeller to go to the quarters of accused to have a drink. The enlisted men went to the room of the accused where the three had one drink and talked for about twenty minutes or half an hour. Upon leaving the accused, Scheunemann went to his bed, which was in the supply room, and went to sleep. He woke up, found the covers off his bed, his shorts down around his knees, and the accused on his hands and knees with Scheunemann's penis in his mouth. Scheunemann jumped up, shook the accused vigorously and told him to leave (R. 7-11).

From the time he first entered the room of the accused until he finally left it, Scheunemann had four or five drinks and the accused had "at least as many". During all of the conversation, there had been no indication on the part of accused of his desire to indulge in "unnatural actions" with Scheunemann. Private Moeller testified that neither the accused nor Sergeant Scheunemann was intoxicated, and that the accused had full possession of his faculties. The bottle was empty when the two departed from the quarters of the accused (R. 9-11).

4. The evidence for the defense is substantially as follows: Captain Robert E. Thomson testified that as acting adjutant he was the custodian of Form 66-1 of the officers of Headquarters III Corps Artillery and that paragraph 15 of Form 66-1 of accused showed that, in the three entries made between 4 May and 15 September 1943, the accused had been rated "Superior". The rating from 16 September to the time of trial had not yet been completed (R. 12).

Major Philip S. Wagner, a medical officer whose specialty is psychiatry, and who was on detached service with the station hospital, testified that he did not know the accused, but that during his seven years practice in psychiatry, he had had cases involving homosexuality. He considered homosexuality a psychiatric disorder. There are many different types of homosexuality. In the case of a person whose homosexual

tendencies do not normally manifest themselves periodically, excessive drinking resulting in intoxication might "permit" him to practice homosexuality. Persons afflicted with homosexual tendencies can suppress their inclinations "when they recognize them as inappropriate". While excessive drinking breaks down will power, the taking of four or five drinks of rum might or might not have much effect upon a person's inhibitions. That would depend upon the person doing the drinking. "Overt" homosexuality is not acceptable in the military service regardless of the circumstances (R. 13-15).

5. a. Charge I: The evidence shows, and the accused admits through his plea of guilty, that on 2 October 1943 he committed sodomy per os upon Technician Fourth Grade Henry O. Scheunemann without Scheunemann's consent and while Scheunemann was asleep.

b. Charge II: The evidence shows, and the plea of guilty of the accused is an admission, that on 2 October 1943 he drank several drinks of intoxicating liquor (rum) with Technician Fourth Grade Henry O. Scheunemann and one drink with Private Francis X. Moeller, both being enlisted men as charged.

There was no evidence, on either charge, that the accused was intoxicated when he committed the offenses charged. In fact, the only evidence submitted was that, while he had been drinking, he was not intoxicated and was in control of his faculties.

6. The record (under "Organization of the Court") fails to account for the trial judge advocate, assistant trial judge advocate and defense counsel, as present or absent when the court convened (R. 2). However, it does appear that "the trial judge advocate" asked accused whom he desired to introduce as counsel, that the "personnel of the prosecution" were sworn, and that the regularly appointed trial judge advocate authenticated the record. At the outset of the trial the court asked "Does the Defense have any objection to proceeding with the trial in the absence of the Assistant Defense Counsel", to which "Defense" responded "No" (R. 3). It appears that accused was represented by counsel throughout the trial, and that Lieutenant Colonel Wellington A. Samouce, individual counsel requested by accused, signed the certification that he had read the record before it was authenticated. Under the circumstances the accused was not prejudiced and the validity of the proceedings was not affected (Dig. Op. JAG 1912-40, sec. 395 (54); CM 127547).

7. The accused is 28 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from

15 April 1941; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School, and active duty, 15 April 1943.

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

Samuel M. Driver, Judge Advocate

F. J. Lotthuhos, Judge Advocate

Norman D. Lattin, Judge Advocate

1st Ind.
9- DEC 1943

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 Donald E. Thrall (0-1180749), Field Artillery.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. The accused committed sodomy per os upon an enlisted man (Spec., Chg. I), and drank intoxicating liquor with the same enlisted man and another (Spec., Chg.II). I recommend that the sentence to dismissal, total forfeitures and confinement at hard labor for three years be confirmed and carried into execution.

3. The accused was tried on 26 October 1943. On 18 October 1943 he tendered his resignation as a Second Lieutenant, Army of the United States, for the good of the service. The Commanding General, Headquarters III Corps Artillery, the Commanding General, III Corps, the Commanding General, Second Army, and the Commanding General, Army Ground Forces, all recommend that his resignation be not accepted, particularly since his sentence includes confinement at hard labor for three years. I do not believe that the resignation of the accused for the good of the service should be accepted because it will not only let him out of the Army, but it also will result in his escaping punishment for his crime. Consequently, I agree with the foregoing recommendations that his resignation for the good of the service be not accepted.

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 carrying into effect the recommendation made above.

Myron C. Cramer

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

4 Incls.
Incl.1-Record of trial.
Incl.2-Drft. ltr. for sig. S/W.
Incl.3-Form of action.
Incl.4-Resignation dated 18 Oct. 1943.

(Resigned)

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

SPJGQ
CM 243215

11 NOV 1943

UNITED STATES	98TH INFANTRY DIVISION
v.	Trial by G.C.M., convened at Tennessee Maneuver Area, APO 98, Nashville, Tennessee, 25 September and 2 October 1943. Dismissal and total forfeitures.
First Lieutenant HILLARD S. OWEN (0-1290297), Infantry.	

OPINION of the BOARD OF REVIEW
ROUNDS, HEPBURN and FREDERICK, 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 I: Violation of the 61st Article of War.

Specification 1: In that 1st Lt. Hillard S. Owen, Company "I", 390th Infantry, did, without proper leave absent himself from his company at Camp Breckinridge, Kentucky, from about 30 August 1943 to about 1 September 1943.

Specification 2: In that 1st Lt. Hillard S. Owen, Company "I", 390th Infantry, did, without proper leave absent himself from his command at Camp Breckinridge, Kentucky, on or about 1 September 1943, and did remain absent without leave until he was apprehended by military authorities on or about 2 September 1943.

He pleaded not guilty to and was found guilty of the Charge and the Specifications. Evidence was introduced of two previous convictions by general courts-martial of two similar offenses: One in July 1943; the other in August 1943 - both for absences of two days each. For these former offenses a fine had been imposed upon the accused. He was sentenced in the subject case to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at

hard labor for two years. The reviewing authority approved only so much of the sentence as provides for dismissal from the service and total forfeitures and forwarded the record of trial for action pursuant to Article of War 48.

3. The competent evidence for the prosecution showed that the military organization, of which the accused was an officer, was preparing on 30 August 1943 to leave on maneuvers, and, in fact did leave for that purpose on 31 August 1943 from Camp Breckinridge, Kentucky. About noon on the 30th accused asked permission from his company commander to request from the battalion commander oral authority to be absent for several hours to visit Henderson, Kentucky (R. 12). This was granted. Accused then requested the battalion commander for a VOCO to be absent for that afternoon of 30 August 1943 for the purpose of storing his car and some clothing in Evansville, Indiana (R. 16), which was granted with the understanding that accused would return as soon as he had completed his business even if such did not require the entire afternoon (R. 17). Accused thereupon left the camp. His company commander searched for him that evening without success and his organization left on maneuvers on the 31st without the accused as he was not present (R. 13-14).

About 7:00 p.m., 1 September 1943, accused appeared at the office of the Officer of the Day of Camp Breckinridge and requested the OD to place him under arrest and tendered to him a written resignation as an officer of the Army of the United States "by reason of violation of the 61st Article of War" (R. 18-19). The document was written in longhand and signed by the accused. While the OD was telephoning for advice on the situation accused walked out and failed to return (R. 19). He was apprehended the following day, 2 September 1943, in a private residence in Henderson (Kentucky) (R. 21).

4. The accused at his own request after having been fully advised as to his rights elected to testify under oath. He had enlisted in the Indiana National Guard 8 October 1940. This organization was inducted into Federal service 3 February 1941. In May 1942 he was sent to OCS at Fort Benning, Georgia, and commissioned a second lieutenant 17 August 1942. He was promoted to first lieutenant 15 December 1942 and in the following February was appointed Aide to the Assistant Division Commander, Eberle. During February his wife died. This incident caused him considerable unrest and he started to drink "quite a bit" (R. 21-22). He also became involved with a girl who lived in Henderson, Kentucky, and the combination of the two brought about his present predicament and was the cause of previous court-martials for the same cause (R. 23). When he requested a VOCO on 30 August he fully intended to do the things he said he was going to do, and did do them, but, he afterwards met "this girl" and started drinking. What happened after that until the following Wednesday morning (1 September 1943) was "more or less a blank" (R. 23). He returned pretty well under the influence of liquor and while

in that condition tendered the written resignation to the OD. He then walked out with the intention of getting a "coke" but drank beer instead and the first thing he "realized" he was on the bus headed "for town". He went to this girl's home and continued drinking until he was apprehended. He was returned to the camp and placed in the stockade where he has been confined to the date of trial (R. 24-25).

5. The accused was charged with absenting himself without proper leave from his organization upon two occasions between 30 August and 2 September 1943. The prosecution clearly showed that the accused was absent from late afternoon of 30 August 1943 until evening of 1 September 1943, and again from that evening until the following evening when he was apprehended. He had no authority to be absent during the periods alleged. The accused admitted his unauthorized absences at the times specified and blamed his conduct on liquor and a woman. The competent legal evidence amply supports the findings of guilty of the Charge and the Specifications.

6. At the beginning of the trial the trial judge advocate announced in open court that if any member of the court was aware of any facts which he believed to be a ground for challenge against any member he should state such facts. One member of the court announced that he had knowledge of the accused's letter of resignation discussed above and therefore some knowledge of the facts of the case. The defense counsel thereupon challenged that member for cause. The member was questioned and it appeared that, although the member had read the document described, nevertheless the knowledge he had gained therefrom would not influence his opinion in any way in arriving at a fair verdict. Thereupon the law member announced "If there are no more questions the court will overrule the objection to the witness".

The law member acted erroneously. It is within the sole province of the court to pass upon the relevancy and validity of challenges for cause and not that of the Law Member alone (MCM, 1928, par. 58, p. 44). However, the error did not injuriously affect the substantial rights of the accused because, first, no valid grounds for a challenge for cause were shown, and, secondly, the commission of the offenses with which the accused was charged was not only clearly proven by the evidence of the prosecution but also admitted by the accused when he took the stand and testified under oath.

7. The defense thereupon challenged all of the members of the court present for cause. The grounds for this challenge to the array was that the same court in its official capacity had tried and convicted the accused of a similar charge approximately one month previous, namely, 28 August 1943 (Pros. Ex. B), at which time it had also received evidence of a prior conviction of absence without leave. The court overruled the challenge. Attached to and made part of the record in the instant case (Pros. Ex. B) is a copy of a general court-martial order clearly showing that the same court had on 28 August 1943 found the

accused guilty of a violation of the 61st Article of War, imposed a sentence upon him, and that, prior to fixing the sentence, it had received evidence of a prior conviction of a similar charge. Evidence of prior convictions is clearly inadmissible until after the court has reached its findings. Such evidence is ordinarily highly prejudicial to the accused. As stated by the Manual for Courts-Martial, 1928, paragraph 112b, page 112:

> "A fundamental rule is that the prosecution may not evidence the doing of the act by showing the accused's bad moral character or former misdeeds as a basis for an inference of guilt. This forbids any reference to his bad character in any form, either by general repute or by personal opinions of individuals who know him, and any reference in the evidence to former specific offenses or other acts of misconduct, whether he has or has not ever been tried and convicted of their commission."

The court having previously tried the accused, it must be presumed to have had knowledge of the prior convictions during the trial of the instant case. The question here, however, is not one of evidence, as no evidence of that nature was offered by the prosecution at this trial, but one of procedure. The procedure followed by the convening authority of referring this case to the same trial court, under these circumstances, has the same objectionable feature, namely, admitting evidence of prior convictions. It has always been peculiar to military justice that a court-martial may, at the same time, try an accused for numerous offenses notwithstanding their dissimilarity in kind or difference in time of commission. If the offenses in the subject case had been committed prior to the trial of 28 August, there could have been no valid objection to including under an additional charge these very offenses and the court could have properly tried all of the charges at the same time and in that manner have had before it the evidence of all of the offenses. This procedure, as stated, is peculiar to procedure in military justice and for the very reasons set forth in the quotation above is not permitted in civil courts. The practice of referring a charge for trial to a court that has previously tried the accused for another offense should not be encouraged. Ordinarily, such a practice would be extremely prejudicial to the accused.

It is not necessary, however, in this case to pass upon the legality of the procedure followed because, in the opinion of the Board, the error, if an error it was, was not prejudicial to the substantial rights of the accused. He was clearly guilty of the offenses with which he was charged. He frankly admitted their commission. Evidence or knowledge of prior similar offenses was unnecessary to prove the commission of the offense. Such evidence or knowledge, under the circumstances of this case, could have had no bearing upon the guilt of the accused nor upon the findings of the court. It did no doubt affect the court's sentence,

but evidence of prior convictions is admissible to assist the court in fixing the sentence. It follows that no harm was done the accused. Under Article of War 37 the error, if any, was immaterial.

> A.W. 37: "The proceedings of a court-martial shall not be held invalid, nor the findings or sentence disapproved in any case on the ground of improper admission or rejection of evidence or for any error as to any matter of pleading or procedure unless in the opinion of the reviewing or confirming authority, after an examination of the entire proceedings, it shall appear that the error complained of has injuriously affected the substantial rights of an accused * * *."

It was also error on the part of defense counsel to object to the array. It is necessary in court-martial procedure that challenges be made one at a time for the obvious reason that when a member is challenged he should not sit on the court as a voting member to pass upon his own challenge. The defense counsel in this case was private, civil counsel employed by the accused, who, very likely, was not familiar with this procedure and therefore should have been advised by the court of the proper manner in which to make his challenges. However, as is set forth above, the substantial rights of accused were not affected and the procedure followed in this case could not have affected the final results thereof.

8. The record shows the accused to be 29 years of age. He enlisted in the Indiana National Guard 8 October 1940. This organization was inducted into federal service in February 1941. In May 1942 accused was sent to O.C.S. at Fort Benning, Georgia. On 17 August 1942 he was discharged and appointed second lieutenant of Infantry in the Army of United States. On 15 December 1942 he was promoted to first lieutenant.

9. The court was legally constituted and had jurisdiction of the person and subject matter. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. Dismissal and total forfeitures are authorized upon conviction of a violation of A.W. 61.

William A. Rounds, Judge Advocate.

Earle Hepburn, Judge Advocate.

Herbert B. Ledman, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 16 NOV 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 Hillard S. Owen (0-1290297), 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 as approved by the reviewing authority and to warrant confirmation thereof. I recommend that the sentence as approved by the reviewing authority be confirmed and 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.

T. H. Green,
Brigadier General, U. S. Army,
Acting The Judge Advocate General.

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

(Sentence as approved by reviewing authority confirmed. G.C.M.O. 414, 28 Dec 1943)

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

N.D.

(311)

29 NOV 1943

SPJGH
CM 243255

UNITED STATES v. Second Lieutenant JAMES A. MCKENNA (0-682439), Air Corps.	)	ARMY AIR FORCES CENTRAL FLYING TRAINING COMMAND Trial by G.C.M., convened at Childress Army Air Field, Childress, Texas, 22 October 1943. Dismissal and confinement for two (2) years.

OPINION of the BOARD OF REVIEW
DRIVER, LOTTERHOS and LATTIN, Judge Advocates.

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

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

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

Specification: In that Second Lieutenant James A. McKenna, Air Corps, did, without proper leave, absent himself from his organization at Childress Army Air Field from about 12 September 1943 to about 14 September 1943.

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

Specification 1: (Finding of Not Guilty).

Specification 2: In that Second Lieutenant James A. McKenna, Air Corps, did, at Childress, Texas, on or about 1 September 1943, with intent to deceive Lieutenant Colonel Helmer A. Holmstrom, Air Corps, officially state to the said Lieutenant Colonel Helmer A. Holmstrom that he desired an emergency ten day leave to visit his sister in Saint Paul, Minnesota, the said sister being severely ill and in an oxygen tent, or words to that effect, which statement was known by the said Second Lieutenant James A. McKenna to be untrue in that said sister was not severely ill and was not in an oxygen tent.

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

Specification: In that Second Lieutenant James A. McKenna, Air Corps, did, at Childress, Texas, on or about 20 June 1943, wrongfully, unlawfully and bigamously marry Kathryn A. Rory, having at the time of said marriage to Kathryn A. Rory a lawful wife then living, to wit, Mary Jo McKenna.

He pleaded not guilty to all Specifications and all Charges, and was found not guilty of Specification 1, Charge II and guilty of all other Specifications and of all Charges. He was sentenced to dismissal, total forfeitures, and confinement at hard labor for two years. 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, in pertinent part, is substantially as follows:

a. Specification, Charge III: On 30 July 1938, accused and Mary Jo Youngquist were married at Somerset, Wisconsin. A certified copy of the marriage record (Ex. G) was introduced in evidence. Two children were born of the marriage, Mickey, now four years of age, and Pat, now 19 months of age. Mrs. McKenna left accused about April 1941 and they were separated four or five months. About April 1942 accused went to Superior, Wisconsin to work. His wife went there to live, remained about two weeks, and then returned home to her family. They did not live together after that time. Mrs. McKenna resides at 625 Grand Avenue, St. Paul, Minnesota. In April 1943 accused filed suit for divorce in Childress, Texas and his wife contested the suit. So far as she knew the divorce was never granted. At some time between 30 May and 3 June 1943, accused filled out his officer's qualification card (Form 66-1) and signed it in the presence of Second Lieutenant Thomas R. Mason. On this form accused stated that he was married, that his wife's address was 625 Grand Avenue, St. Paul, Minnesota, and that he had two dependents other than his wife (R. 6-8, 18-21; Exs. D, E and F).

Accused and Kathryn Rory, whom he had known since May 1942, planned to get married after he received his commission. On 21 May 1943 she quit her job in Milwaukee, Wisconsin. About 1 June she discovered that she was pregnant. Accused received his commission about 3 June. She went to Childress, Texas on 14 June, and insisted that they get married. She knew that accused had a former wife living, but he told her that he was divorced. On 20 June accused and Kathryn Rory were married in the First Presbyterian Church at Childress, Texas by Lieutenant Frank D. Travis, Chaplain, United States Naval Reserve (then a civilian minister). A certified copy of the

marriage license and certificate of marriage (Ex. I) were introduced in evidence. After the marriage accused and Kathryn Rory lived together for about three weeks at 1111 Avenue D, N.W., Childress, Texas (R. 21-23; Ex. H).

b. Specification, Charge I and Specification 2, Charge II: At about 9:00 p.m. on or about 1 September 1943 accused telephoned to Lieutenant Colonel Helmer A. Holmstrom, executive officer, who had authority to grant emergency leaves, and requested an emergency leave to visit his sister. Accused stated that his sister was "severely ill and under an oxygen tent" and that she was ill with the same disease of which the father of accused had died in the spring. Accused may have also mentioned something about his mother. Colonel Holmstrom then granted a ten day emergency leave for accused to go to St. Paul, Minnesota, to take care of the situation at home, "that is the sister being ill", and advised accused that if it were absolutely necessary he could ask for additional leave. Colonel Holmstrom called the personnel office and gave instructions that the verbal leave be confirmed in special orders, which was done (R. 16-17).

Miss Elizabeth Jean McKenna, of St. Paul, Minnesota, is the only sister of accused. She was in a hospital under treatment for tuberculosis prior to March 1943, when she was discharged. She began working for Northwest Airlines, Inc. at St. Paul on 23 July 1943. From 15 August to 15 September she was absent from work only one day (18 August) on account of illness. During that period of time her only other absence, other than on Sundays and holidays, was about three hours (on 28 August). On or about 1 September she was not seriously ill nor in an oxygen tent, and did not request accused to come to St. Paul. Miss McKenna thought that her father died of pneumonia. He also had tuberculosis and was under an oxygen tent at the time of his death in May 1943. Miss McKenna's mother is "terribly nervous" and is in a palsied condition (R. 17-18; Exs. C and D).

An extract copy of the morning report of the organization to which accused belonged (Ex. A) showed accused from emergency leave to absent without leave 12 September 1943 and from absent without leave to duty 14 September (R. 10-11).

c. On cross-examination Second Lieutenant Thomas R. Mason, formerly adjutant and personnel officer of the cadet detachment, testified that accused had only one demerit and no "punishment tours" while he was a cadet and that his reputation, demeanor and academic work were "very good" or "excellent" (R. 9).

4. a. As to the Specification, Charge III, accused testified that he and his wife (Mary Jo) were separated three or four times, in the spring of 1941 for about four, five or six months, and again in 1942, when, after two or three weeks in Superior, Wisconsin, she left him and they have not lived together since. About April or May 1943 accused filed suit for divorce in Childress, Texas, while he was a cadet. Sometime afterward his wife wrote him that she would contest the suit, but he felt that he would get the divorce. When accused received ten days of leave upon his graduation, he went to St. Paul and talked to his wife. She told him then that if he still wanted the divorce she would not contest it. He knew nothing about Texas divorce laws and thought "it was just a matter of formality of issuing the papers" and that he was free to get married. This was his "own impression" and he did not get it from his lawyer. He married Miss Rory on 20 June because circumstances arose whereby she had to go home immediately, and they had planned to marry. He did not know she was pregnant, though she insisted on their marriage. He did not feel that he was doing anything wrong (R. 30-32).

On cross-examination and examination by the court he stated that he had attended University of Notre Dame and University of Minnesota and that he had credits equivalent to two years in college. He thought his second marriage was not bigamous because his lawyer stated "it was just a matter of thirty days and it was quite sometime after that". He saw his lawyer twice, in April and again in June. Accused went to the lawyer after the marriage to "check up on the case itself". The lawyer said he would have to wait until September to get the divorce. Kathryn Rory went back to Wisconsin the day they were married, but returned later, and they lived together less than three weeks (R. 35-38).

b. As to the Specification, Charge I and Specification 2, Charge II, accused testified that two or three days before 1 September he had received various letters from home stating the condition of his sister, mother and two children. His younger son has thymus trouble, which causes choking, and his older boy had needed an operation. Accused telephoned his wife to find out the condition of the boys and his family. She stated that she was afraid of "this thymus" because of blueness of the lips; that his sister's "boyfriend" had been severely injured in an accident and "she was home in bed sick at the time"; that his mother was "high strung and nervous"; and that she would like for him to come home and "get a few things straightened out". On 1 September accused telephoned Colonel Holmstrom and asked for emergency leave, tried to give him a picture of the situation, and told him how worried the mother of accused was because of his father's death and about his sister's condition with tuberculosis. Accused did not tell Colonel Holmstrom that his sister was under an oxygen tent, but may have stated that his

father died under one. His sister's illness is severe and of exactly the same type as his father had. Accused tried to explain the whole situation to Colonel Holmstrom (R. 28-30).

Accused testified further that on his return trip from St. Paul, toward the end of his leave, he stopped at Omaha, Nebraska, to see relatives there. He learned that Miss Belle Wakeman, a mutual acquaintance of accused and Flight Officer Richard Boehm, had heard from Boehm that he would be there on a flight over the weekend. Accused asked Miss Wakeman to telegraph Boehm that he desired to fly back to Childress with him. Later she advised him that she had received a telegram from Boehm stating that if accused wanted to fly back with them he should meet them in Lincoln, Nebraska. On Saturday evening (11 September) accused met Flight Officer Boehm but they did not discuss the flight back or "any proposition whatsoever". Accused understood he was due back at Childress on Sunday evening, and when he left Boehm Saturday night they expected to "contact each other" the next day. When accused had not heard from Boehm at about 3:00 p.m. Sunday, he called Miss Wakeman and learned that Boehm had told her that they were leaving about 1:00 p.m. Accused then caught the first train back to his base and returned immediately. He had relied on the telegram from Boehm for his transportation to the base (R. 25-26).

On cross-examination and examination by the court, accused stated he considered his sister seriously ill on account of her tubercular condition, and that he telegraphed for an extension of leave before he left St. Paul. When he saw that he was going to be late in returning from his leave, he did not attempt to notify his commanding officer because he did not know it was necessary. When accused saw Boehm he did not discuss the flight back because it did not seem to need discussing. Accused returned to his organization about 8:00 p.m. on Tuesday (R. 32-33, 35, 39).

By stipulation, it was shown that on 11 September, Flight Officer Boehm telegraphed to Miss Wakeman, as follows: "If McKenna expecting fly back meet us Lincoln 1400 Saturday"; and that Dr. Everett K. Geer had been treating the sister of accused for pulmonary tuberculosis since June 1942, that she was in the hospital from 20 August 1942 to 11 March 1943 and that she is being treated every two weeks (R. 24-25).

5. Flight Officer Boehm, a witness for the court, testified that on the afternoon of Saturday (11 September) he and three other persons made a flight from Childress, Texas to Lincoln, Nebraska. He had previously telegraphed Miss Wakeman, as was stipulated. On arriving at Lincoln he called several airports but accused was not at any of them. He then went to Omaha by train. That evening he saw accused, who asked if

he could ride back in the plane. He referred accused to "Lt. Montgomery", the pilot, but did not know whether accused spoke to Lieutenant Montgomery about it. Only four persons were supposed to ride in the type plane they were using, although it could easily carry an extra load. When he wired Miss Wakeman, he had spoken to Lieutenant Montgomery, who stated that he "would make arrangements". They left Omaha by train late in the afternoon of Sunday (12 September) and started the return flight from Lincoln probably before dark (R. 42-44).

6. The evidence clearly shows that accused was married to Miss Mary Jo Youngquist on 30 July 1938, that they had two children, that they separated in the spring of 1942 and that they did not live together afterward. About April 1943 accused filed suit for divorce in Texas and his wife contested it. On 20 June 1943, when a divorce had not been granted to accused although he thought that it would be a mere formality, he married Miss Kathryn Rory, at Childress, Texas, and they lived together for about three weeks.

About 1 September accused telephoned Lieutenant Colonel Helmer A. Holmstrom, executive officer, and requested an emergency leave to go to his home in St. Paul. Accused stated that his sister was seriously ill and under an oxygen tent. Colonel Holmstrom granted a ten day emergency leave. In fact, the only sister of accused was not seriously ill at the time (though she was tubercular) and was not under an oxygen tent. She was engaged about her usual work at the place where she was employed, and was absent from work on account of illness only one day (18 August) between 15 August and 15 September.

Accused did not return from his leave to his organization until about 8:00 p.m. on 14 September, and was absent without leave from 12 September to 14 September.

In the opinion of the Board of Review the evidence sustains all findings of guilty beyond any reasonable doubt. The conduct of accused in falsely stating to Colonel Holmstrom that his sister was seriously ill and under an oxygen tent, for the purpose of inducing Colonel Holmstrom to grant an emergency leave, constituted a false official statement. As such it was definitely dishonorable, and an offense in violation of the 95th Article of War.

7. The accused is 27 years of age. The records of the Office of The Adjutant General show his service as follows: United States Naval Reserve, April 1942 to October 1942; enlisted service, November 1942 to December 1942; aviation cadet from December 1942; appointed temporary second lieutenant, Army of the United States, and active duty, 3 June 1943.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 61st or 96th Article of War, and is mandatory upon conviction of the 95th Article of War.

Samuel M. Driver, Judge Advocate

F. J. Lotterhos, Judge Advocate

Norman D. Latty, Judge Advocate

1st Ind.

War Department, J.A.G.O., 9 DEC 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 James A. McKenna (0-682439), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. The accused, while his lawful wife was still living, unlawfully married another woman (Spec., Chg. III); in order to obtain an emergency leave, made a false official statement to a superior officer that his sister was seriously ill and under an oxygen tent (Spec. 2, Chg. II); and was absent without leave for two days (Spec., Chg. I). He was found not guilty of Specification 1, Charge II. I recommend that the sentence to dismissal, total forfeitures and confinement at hard labor for two years be confirmed and carried into execution.

3. Consideration has been given to the following papers accompanying the record: letter of 29 October 1943 from Mr. John J. McDonough, Mayor, St. Paul, Minnesota; letter of 29 October 1943 from Mr. Fred M. Truax, St. Paul, Minnesota; letter from uncle of accused, Mr. Charles R. McKenna, Sioux City, Iowa; clemency plea of accused dated 16 November 1943; and letter of 22 November 1943 from Honorable Charles B. Hoeven, Member of Congress. Consideration has also been given to the following letters attached to the record and requesting clemency for accused: from Mr. Torence Moore, a minister, dated 7 October 1943; from Mrs. C. J. Youngquist, mother-in-law of accused, dated 9 October 1943; from Mrs. Emma McKenna, mother of accused, and Miss Betty Jean McKenna, sister, dated 10 October 1943; from Mr. Herbert Lewis, St. Paul, Minnesota, dated 20 October 1943; from "Mrs. Kathryn Rory McKenna", second wife of accused, dated 23 "August" (October) 1943; from Mrs. James McKenna, wife of accused, dated 24 October 1943; from Mr. Milton Rosen, St. Paul, Minnesota, dated 28 October 1943.

There is also forwarded herewith for consideration of the President a letter from the accused dated 23 November 1943 to "Commander in Chief of the Armed Forces", with the indorsements attached thereto.

4. The United States Disciplinary Barracks, Fort Leavenworth, Kansas, should be designated as the place of confinement.

5. 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 carrying into effect the recommendation made above.

Myron C. Cramer.

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

9 Incls.
Incl.1-Record of trial.
Incl.2-Drft. ltr. for sig. S/W.
Incl.3-Form of action.
Incl.4-Ltr. fr. Mr. McDonough, 29 Oct. 1943.
Incl.5-Ltr. fr. Mr. Truax, 29 Oct. 1943.
Incl.6-Ltr. fr. Mr. McKenna, Sioux City, Iowa.
Incl.7-Clemency plea dated 16 Nov. 1943, from accused.
Incl.8-Ltr. fr. Hon. Hoeven, 22 Nov. 1943.
Incl.9-Ltr. fr. accused dated 23 Nov. 1943.

(Sentence confirmed but forfeitures and confinement remitted. G.C.M.O. 69, 15 Feb 1944)

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

31 MAR 1944 (321)

SPJGH
CM 243287

UNITED STATES	)	92ND INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Fort Huachuca, Arizona, 30 September 1943. Dishonorable discharge and confinement for twenty-five (25) years. Disciplinary Barracks.
Private CHARLES U. POOLE (33516943), Company E, 370th Infantry.	)	

HOLDING by the BOARD OF REVIEW
DRIVER, O'CONNOR and LOTTERHOS, 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 93rd Article of War.

Specification: In that Private Charles U. Poole, Company E, 370th Infantry, did, at Fry, Arizona, on or about 1 September 1943, with intent to commit a felony, viz: murder, commit an assault upon Major William M. Campbell, C.M.P., by willfully, deliberately, unlawfully, and feloniously, with malice aforethought and with premeditation, shooting at the said Major William M. Campbell with a Rifle.

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

Specification: In that Private Charles U. Poole, Company E, 370th Infantry, 92d Infantry Division, did, at Fort Huachuca, Arizona, on or about 1 September 1943, knowingly and willfully misappropriate one United States Rifle, Cal. .30, M1, of the value of seventy dollars ($70.00), and one Bayonet, M1910, of the value of three dollars and twenty cents ($3.20) property of the United States furnished and intended for the Military Service thereof.

The accused pleaded not guilty to and was found guilty of all Charges and Specifications. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for twenty-five years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence is legally sufficient to support the findings of guilty of Charge I and of the Specification thereunder. The only question requiring consideration is whether the evidence is legally sufficient to support the findings of guilty of Charge II and of the Specification thereunder and the sentence.

4. The evidence for the prosecution in pertinent part shows that on 1 September 1943 at about 7:30 or 8:00 p.m. the accused was ejected from a beer parlor in Fry, Arizona by the military police. He returned about 9:30 the same evening with an M-1 Government rifle with fixed bayonet, threatened another soldier and the crowd leaving the beer parlor, and fired a shot from the rifle at Major William M. Campbell, a military police officer who had undertaken to restrain accused. After the shot was fired accused fled and was captured in an adjoining field. He was sober but "didn't act like a very sane human". A check made the following day disclosed that the rifle used by accused "belonged to" a corporal of the same company. The value of the rifle and bayonet was stipulated (R. 6-27, 29).

5. For the defense: Accused made an unsworn statement, the pertinent portion of which is as follows: Accused was put out of a beer parlor by two "MPs" because he did not have a cap and after he was outside one of the military police hit him on the jaw. Accused then went to get "my rifle and came back". When Major Campbell asked to talk to him, accused said he was not talking to anyone and just wanted the man who struck him. He "spied" the man he was looking for by a car. While accused was moving toward this man Major Campbell came between two cars with his "gun up", so "I had the rifle like this (illustrating) and it just went off". Accused then ran over into an adjoining field and "a couple of shots" were fired at him. He "laid down " in the field and was apprehended by soldiers who ran over his leg with a jeep (R.29).

6. a. The evidence submitted by the prosecution shows that the gun used in the shooting was a Government rifle belonging to a corporal of the same company as accused. In his unsworn statement accused said "I went to get my rifle" but he did not state that he actually got it, and his statement is, therefore, consistent with the evidence for the prosecution to the effect that he procured the rifle of another enlisted man. There is no evidence in the record that accused had any rightful supervision, control or custody over the rifle which he carried off of the post.

b. In a similar case (CM 199841, Miotke), where accused was charged with misappropriating a woolen shirt in violation of the 94th Article of War and the evidence showed that the article had been taken by accused from the locker of another to whom it had been issued, the Board of Review held the record of trial legally insufficient to support the findings of guilty. The reasons underlying the holding are stated in the following excerpt from the opinion:

> "* * * Wilful misappropriation of property was an offense unknown to the common law. A careful search of state and federal statutes fails to disclose a single instance where an act of misappropriating property is denounced as an offense where it is not predicated upon some sort of rightful custody, management, care, control, supervision or possession of the property in the person charged. 'Misappropriating means devote to an unauthorized purpose'. Par. 150 i, M.C.M. One cannot misappropriate that over which he has no control or supervision. Neither can one devote property to a purpose where he exercises no lawful authority respecting such property. * * *"

c. If the Miotke case is to be followed the record of trial must be held legally insufficient as to Charge II. The Board of Review, however, has concluded that the Miotke case is not sound and should be overruled. The reasons for this conclusion are as follows:

The 9th paragraph of the 94th Article of War (identical with the 9th paragraph of the 60th Article of War of 1874) is in part as follows: "Who steals, embezzles, knowingly and willfully misappropriates, applies to his own use or benefit * * * property of the United States furnished or intended for the military service thereof".

Larceny and embezzlement have long had fixed and definite meanings. Misappropriation and misapplication are terms which have not acquired narrow and technical definitions in law. Therefore, it is helpful to consider their ordinary use and meaning. The word "misapply" has been defined to mean to "apply wrongly" and to "use for a wrongful purpose"; and the word "misappropriate", to "appropriate wrongly or misapply in use", especially "wrongfully and for oneself" (Webster's New International Dictionary). The two terms are to a great extent of similar meaning, as commonly used.

Winthrop has defined the terms, as used in the 60th Article of War (1874), as follows: "Misappropriation" means "the assuming to one's self, or assigning to another, of the ownership of such property, where the same

is not entrusted to the party in a fiduciary capacity and the act is therefore not an embezzlement. * * * The appropriation, however, need not be for the party's own benefit * * *". "Misapplication" is, strictly, distinguishable from the other term in that it is "properly an appropriation not of the ownership of the property but of its use, and that, by the terms of the paragraph, it must be an appropriation for the personal 'benefit' of the offender * * * whether or not specially entrusted to his charge * * *" (Winthrop's Military Law and Precedents, Reprint, 708).

It is noted that according to this authority the principal differences between the two offenses are that misapplication contemplates "use" rather than "ownership" and applies only where the wrongful use is for the "benefit" of the offender. It is believed that the former point of distinction has never been recognized in practice. The latter difference is based on the words of the statute and has consistently been recognized in the Manual. Misappropriating means devoting to an unauthorized purpose. Misapplication is where such purpose is for the party's own use or benefit. The misappropriation of the property or money need not be for the benefit of the accused (MCM, 1928, par. 150i). Winthrop recognized, as shown by the language quoted, that both offenses might include instances where the property involved was "not entrusted to the party in a fiduciary capacity" or was "not specially entrusted to his charge".

It is recognized that when misapplication is alleged under the 94th Article of War it is not necessary to show that the accused had lawful possession of the property applied to his own use (CM 205327, Patterson). This doctrine is in accord with that followed in the Federal courts. Section 36 of the United States Criminal Code (18 U.S.C. 87) provides that "Whoever shall steal, embezzle, or knowingly apply to his own use, or unlawfully sell * * * property of the United States, furnished or to be used for the military or naval service" shall be punished. In a case where an indictment charged the misapplication and sale of property in violation of this section, and it was contended that a motion should be granted because the indictment "did not state how the property came into the possession of the defendants", the Circuit Court of Appeals for the Second Circuit (Horowitz v. United States, 262 F. 48) held that the contention was not well taken. It was there stated:

> "The statute does not restrict the offense to acts of servants, agents, or bailees, who, coming rightfully into possession of property, subsequently misappropriate it. Any one who does the things specified in the act commits the offense and is liable to punishment. The first word of the section is 'whoever'".

Giving consideration to the comments of Winthrop, to the almost synonymous meanings of the terms in ordinary use, and to what is believed to be the purpose of Congress in including the words in the statute, the Board of Review is of the opinion that an accused may be guilty of either misappropriation or misapplication of property, whether he was in original lawful possession thereof or obtained it by trespass. Both larceny and embezzlement are offenses of strictly limited application, and it is well known that many guilty persons have escaped punishment because charges were laid under one theory and the proof disclosed that the other was applicable. Furthermore, larceny contemplates the intention of depriving the owner permanently of his property, as does embezzlement. It is believed that Congress desired to provide less restricted offenses, along with larceny and embezzlement, to cover those cases where a person subject to military law makes wrongful and unauthorized use of Government property devoted to the military service, without regard to whether such person obtained control of the property rightfully or wrongfully.

In CM 143532, Sutula, and CM 147022, Murphy, it was held that misappropriation is a lesser included offense of larceny, under the 94th Article of War. In both cases, the property involved had been issued to another soldier and was taken by trespass. In CM 193003, Simkins, it was held that misapplication is a lesser included offense of larceny, under the 94th Article of War. In this case there was no initial trespass. In CM 197396, Christopher, a different result was reached, and it was held that misappropriation is not a lesser included offense of larceny, under the 94th Article of War. The initial taking by accused was lawful, and there was no trespass. The Board of Review in that case considered the Murphy and Simpkins cases. CM 207203, Allen, was similar to the Christopher case, except that the charge was not under the 94th Article of War.

In the Miotke case the accused was found guilty of misappropriation, under the 94th Article of War. The proof showed larceny of the property. In holding that misappropriation under the 94th Article of War did not apply to a case where the property was not in the lawful possession of the accused, the Board of Review quoted from the Christopher case, and followed it as a precedent. But the Christopher case is not properly an authority for the rule stated. It simply held that misappropriation is not a lesser included offense of larceny, which is not the same thing as saying that misappropriation cannot exist in the absence of lawful possession. On the question whether misappropriation is in fact a lesser included offense of larceny, it is not now necessary to decide whether the Christopher case or the earlier cases were correctly decided.

In the Miotke case the Board of Review also relied substantially on cases sustaining the fundamental difference between larceny and embezzlement and held that proof of larceny would not sustain a charge of

misappropriation. We think that the conclusion that, in effect, misappropriation is the same thing as embezzlement was not justified. The former is a more general term which includes not only offenses analogous to embezzlement, but offenses similar to larceny. The gist of the offense of misappropriation, and misapplication, is the application of the property to an unauthorized and wrongful purpose.

For the reasons stated, the Board of Review is of the opinion that the Miotke case, and also CM 221537, Hamilton, should no longer be followed.

7. The charge sheet shows that accused is 22 years of age and that he was inducted 13 November 1942, with no prior service.

8. For the reasons stated the Board of Review holds the record of trial legally sufficient to support the findings of guilty and the sentence.

Samuel M. Driver, Judge Advocate

Robert Samier, Judge Advocate

F. J. Lotterhos, Judge Advocate.

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

SPJGK
CM 243294

9 DEC 1943

UNITED STATES v. Private THOMAS M. THOMPSON (33523689), 351st Aviation Squadron.	FAIRFIELD AIR SERVICE COMMAND Trial by G.C.M., convened at Patterson Field, Fairfield, Ohio, 21 October 1943. Dishonorable discharge and confinement for life. Penitentiary

REVIEW by the BOARD OF REVIEW
LYON, HILL 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 Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Thomas M. Thompson, then Private First Class, 351st Aviation Squadron, did at Dayton, Ohio, on or about 21 September 1943 with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Charles W. Powell, Junior, 351st Aviation Squadron, a human being, by stabbing him with a knife.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for life. The reviewing authority approved the sentence, designated the United States Penitentiary, Terre Haute, Indiana, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. Evidence introduced by the prosecution showed that on and about 21 September 1943 accused and the deceased, Private Charles W. Powell, Jr., were both members of the 351st Aviation Squadron, stationed at Patterson Field, Fairfield, Ohio. On the night of 20 September 1943, accused, deceased and "Charles Taylor" went to 421 South Hawthorne Street, Dayton,

Ohio, where they met Jessie Mae O'Neal of Xenia, Ohio (R. 31-33, 44), who was visiting at 421 South Hawthorne Street with her aunt (R. 37). Deceased and accused were friends. Jessie had known deceased for five months and accused for about a month. She had been "going with" accused about a month. He was her "boy friend" (R. 32, 34). On the night in question, Jessie had a date to attend a dance with accused. The "whole group" went to the dance together (R. 32, 44). They remained about an hour and a half, leaving around 12:15 the morning of 21 September. Jessie danced with accused. She did not dance with the deceased. He did not ask her (R. 33, 44). After the dance, accused, Jessie, deceased, and an "Anna Williams" returned to 421 South Hawthorne Street. Sometime before 1 o'clock accused and Jessie O'Neal prepared to leave 421 South Hawthorne Street. Jessie had a "switch blade" knife which she gave to accused, saying: "Thomas, will you carry this knife?" She had not taken it to the dance with her because accused had asked her not to (R. 33, 37, 41, 44). Accused put the knife in his side pocket. According to Jessie, there was no "particular reason" why she asked accused to carry the knife (R. 37). On the stand, she identified Exhibit G as her "switch blade" knife, the one she asked accused to carry (R. 33). Deceased and another girl remained at 421 South Hawthorne Street while accused and Jessie went up to 925½ West Fifth Street, to the apartment of Fannie Allen. This consisted of a second floor living room and bedroom. In the bedroom there was a single bed, also a telephone. The bedroom and the living room were connected only by the landing of a flight of stairs leading up from the street. Separate entrance to each of the two rooms was afforded by this landing. In the living room there was a double bed which was headed against one wall, while at the foot of the bed was a davenport, flush with the opposite wall (R. 7, 8, 34, 45, 46; Exs. A, B, C, D). When Jessie and accused arrived, Fannie Allen was in the bedroom by her telephone and Mabel Dulin was lying on the davenport or couch, in the living room (R. 34, 46, 50, 51). Jessie and accused knocked on the back door and were admitted by Fannie Allen. She said something about the lateness of the hour and accused told her: "We just met an M.P. and he said he (sic) had to get off of the street." He asked: "Could you fix up a place for us to stay until the next morning?" Fannie said: "Come on up." They went to Fannie's bedroom and Fannie said that they could sleep in the living room. Accused objected because Mabel was on the davenport in that room. He telephoned to a taxi company to obtain a cab, but was unable to do so. Thereupon Fannie said that she would sleep in the living room and would let Jessie and accused have her bed. "Then at that time, some one knocked on the front door" (R. 35, 45, 46, 52). It was the deceased. Fannie let him in and "he went back into Fannie's room" where he found "Tommy (accused), Fannie and Jessie" (R. 35, 52). Accused was sitting at the foot of the bed. Deceased had a piece of paper in his hand and said he wanted to use the telephone. He sat down at the head of the bed and was handed the telephone book by accused (R. 35, 46, 47). According to Jessie O'Neal an argument started in the bedroom but there was no fighting there (R. 35, 39). The deceased about this time was sitting on the trunk, and Fannie,

who wanted to make up the bed for accused and Jessie, said: "Rise up, I want to get some bed linen out." Deceased got off the trunk and went into the living room (R. 39). According to Fannie, accused followed deceased into the living room and swore. She said: "that was what drawed my attention". At that point she heard deceased say: "No one is scared of you because you have that knife." She claims that she walked into the room and humored accused so that he went back with her into the bedroom. Asked with respect to accused: "Then what did he do?", she said: "He walked on to the living room and the first thing I knew Thomas (accused) came out with the knife in his hand. He said: 'I did not mean to cut that boy,'" (R. 47). Jessie stated that the argument was over the telephone book. However, she said she heard none of the conversation. In the bedroom she said that she heard the deceased "cussing at Thomas (accused)". She said that they did not stay in the bedroom long but went into the living room. In there, she heard deceased say he was not afraid of accused because the latter "had that little old God damn knife". She did not see the fight in the living room start and was not "in there when the first lick was passed" but when she arrived "they were passing licks". They were standing "sorta" at the foot of the bed struggling. Then they fell on the "couch" and she saw accused on top of deceased. She then heard deceased say: "You tried to kill me". Jessie said that accused "just kept saying that he did not mean to kill him" (referring to deceased), and that accused asked deceased to get up and deceased said: " I can not get up". "After that", accused went down the back stairs. This witness stated that accused was two or three inches shorter than deceased (R. 36, 38-40).

Mabel Dulin, as stated, was lying on the davenport and was in the living room when the fight started there. She testified that Powell, the deceased, came out of the bedroom (alone) and sat on the foot of the bed near the davenport where she was reclining. She said that while he was sitting there accused came in through the door which led to Fannie's room, the bedroom, and that when she looked up accused had a red and white-handled knife in his hand. She identified Exhibit G as the knife. She continued,

> "Then Tommy walked up to Powell and said something - I did not get what it was - I would not try to say. Tommy struck at Powell like that with the knife in his hand (demonstrates) and when he struck at Powell, Powell jumped up and grabbed Tommy by his arms and in the scuffle, they fell on my bed on my head and I jumped up and run over by the closet door."

She said that when she turned around accused had the knife in his hand; that Powell was on the davenport; that accused was "a straddle of" him; and that accused "raised his hand and stabbed Powell". She said that Powell went to get up and fell back. Then he got up and walked toward the front steps and when she "turned and looked at him, blood was streaming from him just like as if you would take a pitcher of water and pour the water into a glass" (R. 52). Fannie Allen looked again, evidently into

the living room, and saw deceased going to the floor. She heard accused say: "Powells, (sic) get on your feet, let me carry you to a doctor." Deceased said: "I can not get up." Accused said: "I did not mean to kill that boy. * * * Please Fannie stick with me, please every one stick with me, don't no one go." Fannie walked to the door and said: "Something has got to be did, something has got to be did." Accordingly, Fannie went up West Fifth Street and called to "Mr. Hogan" (Officer Willard R. Hogan). Hogan "went to the recall box and called up" and returned with Fannie to the apartment. Hogan attempted to give first aid treatment. Fannie testified that three men came and took the body away. She identified a photograph marked Exhibit F as the photograph of the deceased, "Charles Powells (sic)", who was at her apartment on the morning of 21 September 1943 - the man with respect to whom she had testified (R. 15, 47, 48, 49; Ex. F).

Officer Willard R. Hogan testified that he went to Fannie Allen's in response to a call by her between 1:30 and 2:30 a.m. on 21 September 1943. He saw a "soldier boy" lying on the floor bleeding, with a wound in the left side of his neck. He attempted to administer first aid but was unsuccessful. After awhile he was unable to feel any pulse in the wrist or in the neck. In his opinion, deceased was alive for 15 or 20 minutes after first aid was applied and was dead when the body left the room. He said that "Jones' Brothers" ambulance took deceased away (R.11, 13).

Robert Penn of Dayton, Ohio, worked for Jones Brothers Funeral Home, and at about 1:20 on the morning of 21 September he went to 925½ West Fifth Street and "right there at the top of the steps" he found "this soldier". Penn and the driver for Jones Brothers picked the soldier up, put him in the ambulance and took him to the hospital at Patterson Field. Captain Elias D. Peele, Medical Corps, was Medical Officer of the Day at the Station Hospital, Patterson Field, on the morning of 21 September 1943. At 2:25 a.m. that morning he examined a body in the emergency room of the hospital. The body was that of Charles Powell, so identified by Captain Peele by dog tags found in his clothes, a pocketbook containing a pass, and by Exhibit F. He pronounced Powell "dead on arrival" of his body at the hospital. The body arrived at 2:25 a.m. and "death had occurred one hour before his body was received". His examination disclosed a laceration approximately four centimeters in length on the ventral and dorsal surface of the right hand between the thumb and first finger. He said that "there was another laceration of approximately two centimeters over the left lateral neck over inferior third of left sternocleidomastoid muscle, and upon examination of the wound", Captain Peele said, he "found that the left vena jugularis interna had been severed". Based on his past experience as a doctor, the captain stated the cause of death to be "hemorrhage, traumatic - severe, from the left vena jugularis interna" (R. 18, 19, 21).

On the morning of 21 September 1943, Harry W. Green, who worked in the Identification Unit of the Provost Marshal's Office at Patterson Field, went to the Station Hospital and took "some photographs of a colored gentleman by the name of Powell". One of these photographs represented the upper torso and head of a negro. It was received in evidence and marked Exhibit F (R. 14, 15; Ex. F).

Mozel Akridge lived at 931 West Fifth Street, Dayton, Ohio (Fannie Allen lived at 925½ West Fifth Street). About 9:00 a.m. on the morning of 21 September 1943, in the rear of the place where she resided, she found a red and white striped, "candy striped" pocket knife. "It had blood on the blade." She gave the knife to "John Kellum" (R. 22-26). John Kellum of 925½ West Fifth Street, said that he received a "switch" blade knife, with blood stains, from Mozel Akridge at about 10 o'clock on the morning of 21 September 1943. He kept the knife for two hours and gave it to an "M.P." by the name of "Phillips" (R. 23,24). Private First Class Archie T. Phillips, 345th Aviation Squadron, Wright Field, Dayton, Ohio, received a "switch blade" knife, "candy colored", with what looked like "Blood" on it, from John Kellum on the morning of 21 September 1943. Phillips gave the knife to the Provost Marshal at Patterson Field the same day (R. 24, 25). Captain James H. Gardner, Air Corps, Provost Marshal, Patterson Field, testified that on 21 September 1943 he received from Private First Class Phillips a "Candy colored" knife stained with blood. Captain Gardner testified that this knife had been in his possession continuously since its receipt. The captain produced the knife, which was received in evidence and marked Exhibit G. Captain Gardner testified that he had a conversation with accused on 22 September 1943 in the City Police Building, Dayton, Ohio. He stated that prior to any conversation he explained to accused "his rights under A.W. 24 to the best of my ability". The captain stated that he told accused that accused "did not have to make a statement, unless he wanted to, and if he did give a statement, it could be used against him, if he was brought to trial." According to the witness, accused said that he wanted to give a statement. This statement was made and reduced to writing. It consisted of three pages, each one of which was initialed by accused who also signed the statement in the presence of Captain Gardner. The statement was offered and received in evidence and marked Exhibit H (R. 25, 26; Ex. H).

4. Accused took the stand and testified in his own behalf. The story related by him in his testimony is substantially the same as that contained in the statement made by him to Captain Gardner and set forth in Exhibit H. Accused said that he was 36 years old and born in Salisbury, North Carolina; that he had had four years in high school and was single; and that he had been inducted into the service in Richmond, Virginia, on 26 January 1943. According to accused: On the night of 21 September there was a dance in Dayton. Accused, Powell (the deceased), and "Taylor", who "used to run together", decided to go to the dance. They planned to meet at the home of the aunt of Jessie O'Neal where "Taylor's girl" and Jessie were going to spend the night. The girls had a pay day that day so the men asked them to bring whiskey and they procured a pint each. There were only two girls. The deceased was going to go along "for the sole purpose of getting * * * a drink." He did not have a girl. Accused told of deceased pressing his uniform for him and of accused shining the shoes of deceased in preparation for the dance. He related that they had a brand new cake of soap and went over and took a bath together. When they all arrived at 421 South Hawthorne Street "the girls were all ready". There was an extra girl, "Gennell", present. The girls produced

the liquor and, as developed on cross-examination, about three-quarters of two pints was consumed. Gennell decided she wanted to go to the dance so Powell (the deceased) said he would take her. Accused continued, "Jessie had this knife in her pocketbook. I did not know she had it until she opened it. I said: 'Jessie, leave the knife here, we're going to a dance, we don't need a knife.' So, she left the knife with her aunt and we goes on to the dance." During the dance, accused and deceased went back and had a drink, a double whiskey, it developed. While they were there, a military policeman informed them that they would have to leave the dance because of "something" that had happened in Dayton. Taylor was missing "somehow". The others left in a taxi and went back to South Hawthorne Street. Gennell acted "like she had had quite a few drinks". Evidently Gennell was Jessie's cousin, for accused testified that "her mother called to her and wanted her to come on to bed." Accused and Jessie left the house. Powell (the deceased) and Gennell remained. Accused said that before they left Jessie asked him about her knife. He stated that he told her that he did not approve of her carrying a knife and asked her why she did not leave it there. Jessie replied that it would be bad luck for her aunt to keep the knife. Accused said that he then offered to carry it and that he put it in the watch pocket in his sun tans. He related that they got down the street and that "there was an M.P. standing there" who told them they would have to get off the street. Accused's testimony then follows that of the prosecution's witnesses up to the point where deceased unsuccessfully attempted to telephone his wife. According to accused, deceased used the phone again and then went into "another room in the apartment". Accused said that while Fannie was getting the linen, in order to make up the bed which he and Jessie were to occupy, deceased was in the next room and "he was cursing". Accused said:

> "Me and him had always been pretty good friends every since we met, in fact we were good friends. I do not think there were ever any two better friends. We were together all of the time. He was cursing and I told him I would not curse around his wife or girl friend like that. I had this knife in my pocket. He said, 'You had better get the hell away from here.' Then, he hits me and I hit him back. When I hit him back, he pushed me over in the corner beside a ward robe, so I opened the knife, not with the intention of cutting him, but I thought he would not come up on me. I thought I could scare him. If he hadn't known me so well, and been sure that I wouldn't cut him, he wouldn't have walked over and grabbed me by the wrists and tried to take the knife from me. In the struggle, we fell back, him with his legs against the couch. He lost his balance and that threw me on top of him and we laid there about a half of a second. He said, 'I am cut.' I raised up, and he turned my hand loose. He straightened up and I could see he was bleeding around his neck, at the collar. So, I jumped up and told him, 'Powell, I did not go to cut you.' Then they started to hollering in the room and I guess I just ran from one place to another, asking them to do something for me. I even asked them to get a Doctor. Everyone acted

like they seemed to be in a panic, and I got scared and ran out of the house. That is the truth. We came to this camp together. We never had any trouble. Anyone in the camp from the First Sergeant down will tell you we were the best of friends. When I went on my furlough, he called his wife and asked her to loan me $5.00, which money he loaned me to make the trip home. We never had any trouble about a girl. I was not drunk, looking for trouble. If it had been fifteen minutes later, I would have been in bed asleep, when he came, I guess."

On cross-examination accused testified that when they went back to Hawthorne Street he did not remember drinking any more. He was asked if he were drunk and he replied "I had been drinking. I was not completely drunk." Accused was asked to look at Exhibit G and state whether he could identify it. His answer was "Yes." He stated that that was the knife Jessie had given him to keep for her. On cross-examination he explained the reason for deceased's cursing and being angry. He said that it was due to his inability to make telephone connections with his wife. On examination by the court, accused replied that deceased, Taylor and he were good friends and went around together quite a bit. He also said that deceased was about 5 feet 9 inches tall and weighed about 160 pounds, while he, the accused, weighed between 128 and 130 pounds (R. 62-73).

5. In this case it is not the function of the Board of Review to weigh the evidence. We must sustain the conviction if there is any evidence sufficient to support the findings (M.C.M., 1928, p. 216). In the instant case such evidence is present. The record contains testimony to the following effect: While accused was sitting on the bed in Fannie Allen's bedroom, Powell appeared and sat at the head of the bed. He wanted to make a telephone call. An argument started between him and accused, apparently concerning the telephone book, but there was no physical encounter. Subsequently, accused followed Powell into the living room, where Powell was sitting on the bed. Accused had a knife in his hand. He swore at Powell and struck at him with the knife. Powell jumped up and grabbed accused by the arms. A struggle ensued, during the course of which the two participants fell on the davenport. Accused was on top of Powell. Accused raised his hand and stabbed Powell, severing a jugular vein. Powell died from this wound. Without the slighest doubt these facts justified the finding of guilty of murder. There was no justification, provocation, or excuse for accused's act. Insulting or abusive words do not constitute a legal provocation reducing the crime to manslaughter (M.C.M., 1928, p. 166). Neither do the acts of Powell in attempting to defend himself.

Malice aforethought does not require an intent to kill. An intention to inflict grievous bodily harm or mere knowledge that the act done will probably cause death or grievous bodily harm is sufficient (M.C.M., 1928, p. 163). In any event, the facts in the present case warranted the court in inferring an intent to kill. The evidence sustains the findings.

(334) 6. Accused is 36 years of age. He was inducted 26 January 1943 at Richmond, Virginia. There was no prior service.

7. 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 and the sentence. A sentence either of death or of imprisonment for life is mandatory upon conviction of murder in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement by Section 273 and 275, Criminal Code of the United States (18 U.S.C. 452, 454).

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

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

SPJGN
CM 243319

26 NOV 1943

UNITED STATES	)	36TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at APO #36, U. S. Army, 29 September 1943. To be shot to death with musketry.
Private JACK L. TZOUCALIS (12059693), Company G, 141st Infantry.	)	

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

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1. The record of trial in the case of the soldier named above has been examined by the Board of Review 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 75th Article of War.

Specification: In that Private JACK L. TZOUCALIS, Company "G", One Hundred Forty First Infantry, did, at Paestum, Italy, on or about September 9, 1943, misbehave himself before the enemy, by refusing to disembark from U. S. A. T. O'HARA with his command, which had been ordered to do so by Captain Charles M. Beacham, Commanding Co. "G" 141st Infantry, to engage with the enemy, which forces, the said command was then opposing.

The accused pleaded not guilty to and was found guilty of the Charge

and the Specification thereunder. He was sentenced to be shot to death with musketry. The Commanding General, 36th Division, approved the sentence but directed that its execution be withheld. The Commanding General of the North African Theatre of Operations also approved the sentence and forwarded the record of trial for action under Article of War 48. In transmitting the record he wrote,

> "I am cognizant of my authority under Article of War 50 to commute the sentence to one which I have authority to direct to be executed, but I have elected not to commute it."

3. The evidence for the prosecution shows that before dawn on the morning of 9 September 1943, Company G, 141st Infantry, of which the accused was a member, was on board the U.S.A.T. O'Hara, preparatory to landing on the beach near Paestum, Italy. Company G was scheduled to land as a battalion supporting unit 25 minutes after Companies E and F had landed. The condition under which the landing was to be made and the character of the enemy resistance which was expected had been explained to the men of Company G, including the accused, and the information was general that the troops who had already landed were "having a pretty rough time of it" (R. 6, 11, 17).

At the appointed time, Company G was summoned by the ship's loud speaker to boat stations. About five or ten minutes before this summons, the accused informed the corporal of his squad that he had lost his helmet, and that he would not get off the boat without it. About two hours previously, the equipment of all the men in the accused's squad had been checked and the accused had his helmet at that time. When the accused reported the loss of his helmet to his squad leader, his squad leader told him that there was "no time to get his helmet and to put his equipment on". The assistant squad leader, however, told the accused to go to his station and that he, the assistant squad leader, would get a helmet for the accused. About this time a private in the squad said that he had found a helmet and he called the accused's name for several minutes. The accused had, however, disappeared and did not respond to the calling of his name. Before the landing party had disembarked, the assistant squad leader had secured another helmet for the accused but the accused did not return to his squad or boat station and his squad disembarked without him (R. 10, 11-13, 14-15).

About 9 o'clock in the morning, several hours after the landing party in question had disembarked, the accused was seen on board the

O'Hara by the mess sergeant of Company G, who had, together with an officer and ten men of the mess personnel, remained on board the ship. When seen by his mess sergeant, the accused had a helmet. In accordance with the disembarkation schedule the mess detail of Company G left the ship about 3 o'clock that afternoon. When the mess sergeant saw the accused he assumed that the accused would go ashore with the mess detail and he did not talk with the accused. When this detail disembarked, however, the accused was not seen by his mess sergeant and did not come ashore with this last unit of his company (R. 16-18).

After Company G had landed and seven men had been reported as "missing in action", the captain of the company checked the personnel of his organization and concluded that the accused was not one of the seven men missing in action. Thereafter, on 22 September 1943, the accused returned to his organization and reported that he had landed on 10 September, explaining that during the time his company was in contact with the enemy he had attached himself to another organization (R. 7-9).

4. The accused, after his rights relative to testifying or remaining silent had been explained to him, testified that on 9 September 1943, when his squad was called to disembark he did not have his helmet. He notified the corporal of his squad of his loss and was told by him that he, the accused, would have to do the best that he could, that he would have to go anyway. The accused then told his corporal that he was going back to find his helmet but the corporal paid no attention to his statement whereupon the accused then went to the ship's mess hall to look for his helmet (R. 19).

The accused also testified that he was not afraid of anything, and that he would have left the ship without his helmet if he had been ordered to do so. He explained that he had a special reason for wanting to fight the Germans because his father, who is 59 years of age, had come from Greece and had served in the last war. He explained further that his father's people had been killed by the Nazis and his father had told him to shoot the Nazis and get even for his people. He insisted that he wanted to disembark with his organization and that he was willing to fight (R. 19-20).

The accused further testified that he disembarked from the O'Hara on the morning of "D 1" with the 531st Engineers. Thereafter he attached himself to the 359th Port Battalion. He explained that he worked two days with the 531st Engineers under "consistent heavy

bombing and strafing". He next went to the Headquarters 331st Engineers, where they showed him on a map the location of his company. He then started to look for Company G and went to Albanella, where he found the second battalion of the 141st Infantry. After several efforts to find his company he returned to Albanella where he saw a sign "Stragglers Collection Point", explaining, "that is where I walked in and gave myself up" (R. 20).

On cross-examination the accused admitted that he had his helmet two hours prior to the disembarkation of his squad and that he had not been in the mess hall after that time. Despite this statement, he asserted that he looked in the mess hall because he had left his helmet there at supper the night before. He explained that he found his helmet the next morning. He admitted that he was with the mess group as the sergeant stated. The accused admitted further that he had broken off communication both with his squad leader and assistant squad leader just at the time they were telling him what to do about his helmet. He admitted that his conduct did not reflect "a great anxiety" to get off the ship and engage with the enemy, and that when he regained his company it was in a rest area. The accused stated that everywhere he went he saw action and even if he had stayed on the ship he would have seen some action. He asserted that this fact erased the question of whether he wanted to fight or not (R. 21-24).

5. The Specification alleges that the accused did at Paestum, Italy, on or about 9 September 1943, "misbehave himself before the enemy, by refusing to disembark from U. S. A. T. O'HARA" in disobedience of the order of his commanding officer. The Manual for Courts-Martial states that "misbehavior before the enemy",

> "* * * is a general term, and as here used it renders culpable under the article any conduct by an officer or soldier not conformable to the standard of behavior before the enemy set by the history of our arms. Running away is but a particular form of misbehavior specifically made punishable by this article" (M.C.M.,1928, par. 141a).

Winthrop states that mishehavior before the enemy may consist in,

> "Such acts by any officer or soldier, as - refusing or failing to advance with the command when ordered forward to meet the enemy; going to

> the rear or leaving the command when engaged with the enemy, or expecting to be engaged, or when under fire; hiding or seeking shelter when properly required to be exposed to fire; feigning sickness, or wounds, or making himself drunk, in order to evade taking part in a present or impending engagement or other active service against the enemy; refusing to do duty or to perform some particular service when before the enemy (Winthrop's Military Law and Precedents, 2nd Ed., p. 623).

In explaining the above offenses, the Manual states further that,

> "Whether a person is 'before the enemy' is not a question of definite distance, but is one of tactical relation. For example, where accused was in the rear echelon of his battery about 12 or 14 kilometers from the front, the forward echelon of the battery being at the time engaged with the enemy, he was guilty of misbehavior before the enemy by leaving his organization without authority although his echelon was not under fire" (M.C.M., 1928, par. 141a).

In the light of the above definitions, it clearly appears that since the accused's organization was actually disembarking in a combat zone, it was "before the enemy" within the contemplation of Article of War 75.

The misbehavior of the accused is equally clearly established. The accused knew that his squad was scheduled to land under dangerous conditions and advance against stubborn enemy resistance. Despite this knowledge, the accused disobeyed the order of his corporal to prepare for disembarkation, broke off contact with his squad leader and assistant squad leader, failed to respond to the calling of his name, and refused to disembark with his company. Later, after he had secured a helmet, he again failed in duty by avoiding landing with the mess detail of his company. His testimony and contentions concerning the loss of his helmet, although relevant only as a mitigating circumstance are unworthy of belief even for that purpose. This is apparent from the fact that even after he had found his helmet he did not avail himself of the opportunity to land with the mess unit

of his company but lingered on board the O'Hara until the following day. His professed desire to fight the Nazis is sharply contradicted by his craven failure to disembark with his organization. Moreover, his shameful misconduct involves no mere sudden and temporary panic, but rather a deliberate and relatively protracted evasion of a known and imminent danger which his duty as a soldier required him to face. These facts impel the conclusion that the accused is guilty of misbehavior before the enemy within the contemplation of Article of War 75, and justify beyond a reasonable doubt the findings of guilty.

6. The charge sheet shows that the accused is 32 years of age and that he was inducted into the service on 4 March 1942 for the duration of the war plus six months.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence. A sentence of death, or such other punishment as a court-martial may direct, is authorized upon a conviction of misbehavior before the enemy, in violation of Article of War 75.

Abner E. Lipscomb, Judge Advocate.

Gabriel H. Goldberg, Judge Advocate.

Benjamin C. Sleeper, Judge Advocate.

SPJGN
CM 243319

1st Ind.

War Department, J.A.G.O., 19 JAN 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Private Jack L. Tzoucalis (12059693), Company G, 141st Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. The record establishes beyond a reasonable doubt that on 9 September 1943, at Paestum, Italy, the accused shamefully misbehaved himself before the enemy by refusing to disembark with his organization from the U. S. A. T. O'Hara. At the appointed time for debarkation, the accused pretended to have lost his helmet, and although another helmet was promptly procured for him he deliberately avoided debarkation by separating himself from his unit. Later on the same day, he again failed to disembark with a mess detail of his company which had temporarily remained on the transport after the rest of the accused's company had disembarked. The accused disembarked on the day following but remained absent from his organization until he surrendered at a "Stragglers Collection Point" approximately 13 days later. The facts clearly show that the accused's shameful conduct involved no mere sudden or temporary panic but rather a deliberate and protracted evasion of an imminent danger which his duty as a soldier required him to face.

3. The accused is 32 years of age and has been in the military service approximately a year and ten months.

4. The theatre judge advocate recommended to General Eisenhower that the sentence be confirmed but commuted to dishonorable discharge, total forfeitures and confinement at hard labor for life. The commanding general declined, however, to follow this recommendation, stating that although he was cognizant of his authority under Article of War 50 to commute the sentence to one which he had authority to direct to be executed, he "elected not to commute it". The implication is clear from this action that General Eisenhower desired the sentence of death confirmed and ordered executed.

4. Although the offense in question is very grave, it appears to have resulted from a frailty of character and a lack of courage rather than from a criminal mind. Because of this fact, and because

the offense is strictly a military one, only the necessity of maintaining military discipline can justify the confirmation of the death penalty imposed. General Eisenhower, in transmitting the record for the action of the President, does not assert that such a necessity exists either in the 36th Division, the organization with which the accused was serving, or in the North African Theatre of Operations. On the other hand, the fighting spirit and high morale of the 36th Division has recently been praised in the public press. Furthermore, I am convinced that the courage and fighting spirit of the American soldier does not depend for its stimulus upon fear of the imposition of the death penalty. Although the occasion may arise when military necessity and the demands for military discipline may require the imposition of the death penalty for offenses such as this one, there is no affirmative showing that such necessity exists at the present time. It is true, however, that no man is worthy of freedom who deliberately fails in his duty to fight for it. The accused, by his craven "misbehavior before the enemy" has forfeited his right to freedom. Justice requires that he be punished by confinement at hard labor for life. 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 life, and that the United States Disciplinary Barracks, Greenhaven, New York, be designated as the place of confinement.

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

Myron C. Cramer

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

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

(Sentence confirmed but commuted to dishonorable discharge, total forfeitures, and confinement for life. G.C.M.O. 93, 3 Mar 1944)

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

SPJGK
CM 243369

(343)

8 DEC 1943

UNITED STATES	)	NEWFOUNDLAND BASE COMMAND
v.	)	Trial by G.C.M., convened at Fort Pepperrell, Newfoundland, 6,8 October 1943. Dismissal.
Captain RALPH H. SINAY (0-388330), Corps of Engineers.	)	

OPINION of the BOARD OF REVIEW
LYON, HILL 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 Charges and Specifications:

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

Specification: In that Captain Ralph H. Sinay, Corps of Engineers, Base Engineer Detachment, Newfoundland Base Command, Fort Pepperrell, Newfoundland, did, at Fort Pepperrell, Newfoundland, on or about 1 December 1942, knowingly and willfully apply to his own use and benefit four (4) automobile tires, size 600 x 16; four (4) automobile tire inner tubes, size 600 x 16; and four (4) Ford automobile wheels, size 600 x 16, of a total value of approximately Forty-one Dollars ($41.00) United States funds, property of the United States, furnished and intended for the military service thereof.

CHARGE II: (Finding of not guilty).

Specification 1: (Finding of not guilty).

Specification 2: (Finding of not guilty).

He pleaded not guilty to the Charges and Specifications. He was found guilty of Charge I and its Specification and not guilty of Charge II and its Specifications. No evidence of previous convictions was introduced. He was sentenced to dismissal. The reviewing authority approved the

sentence and forwarded the record of trial for action pursuant to Articles of War 48 and 50½.

3. Summary of the evidence.

During the period covered by the allegations and subsequent thereto, accused was Motor Officer of the United States District Engineers' Motor Car Pool at Fort Pepperrell, Newfoundland (R.6-9,22,31). As such, he was responsible for certain property belonging to the District Engineers (R.22). He lived off the post (R.14,15,19). Accused owned a 1934 or 1935 Ford touring car, which he properly registered with the Post Provost Marshal (R.15,16; Pros. Exs. A,B). He was seen frequently driving this car around the post and sometimes off the post (R.7-9,15,16,23,27,31,32). On occasions the car was seen in the vicinity of the Post Theater, near which a quantity of Engineers' equipment was stored (R.9,13). Major Lawrence W. Hall, Corps of Engineers, Base Engineers Detachment, Fort Pepperrell, testified that he transmitted orders from his immediate superior, "Lt. Col. John W. Berretta", to accused, and that he never received or communicated any order forbidding accused to use Government transportation in connection with his duties. However, so far as witness knew, if accused made use of his car for Government purposes, such use was "voluntary" rather than required by authority (R.12,13).

The tires on the car were mounted on wheels and were marked "U.S.E.D." (R.9-12,15,20,22,25,26,31,32; Pros. Exs. C.D.E.F.). These letters signified "United States Engineers' Division" and were commonly used to mark property of that division (R.11,20,33,35).

Major Hall did not know whether the mark "U.S.E.D." was put on the tires to designate actual ownership, and so far as he knew, the mark could have been on privately owned property (R.13). Captain Arch E. Merriott, 805th Military Police Company, Fort Pepperrell, Provost Marshal at the post, testified that he did not know whether any brand was used on Government property. However, he examined a number of cars on the post and discovered that all the tires marked "U.S.E.D." were on cars belonging to the Government (R.20). Prior to the transfer from the civilian engineers (who apparently were on the job previously) to the United States Government, the civilian engineers' cars all had the letters "U.S.E.D." stamped upon them. Witness "believed" that these cars were the property of the "United States Engineers District" (R.20,21).

First Lieutenant Englebert J. Berger, Infantry, Fort Pepperrell, was of the opinion that the tires on accused's car belonged to the United States Government. However, he admitted that he had not seen them on any bill of sale or property record and did not know "what property accounting they had in the Engineers" (R.22,23). Major Charles G. Knudsen, Ordnance

Department, Base Motor Officer, testified that the tires on accused's car were similar to tires furnished and intended for the military service of the United States, and that the same type of tire had been used by the civilian contractors and was in use by the District Engineers. In the absence of the marking "U.S.E.D.", witness could not have told whether the tires and wheels were civilian or Government property (R. 32-35).

The prosecution produced testimony relating to several statements made by accused to various witnesses. Mr. Harry McCaffrey, employed by the McNamara Construction Company, testified that several weeks prior to the trial, during a somewhat jocular conversation about accused's car, accused told witness that the tires did not belong to him (accused), but belonged to the Government (R.23,24). Mr. Spencer W. Griswold, a civilian employee under the supervision of accused, testified that about 9 September 1943 he told accused that he understood that the latter was leaving and he wondered what accused intended to do with his car. Accused said that he hoped to sell it and did not know whether to include the tires in the sale. Witness told accused: "'That would be a very foolish thing to do'", whereupon accused remarked, "'I think I will sell it for $300.00, and let the damn things go'" (R.24-26). Accused did not state directly that the tires belonged to the United States Government (R.26,27).

Captain Merriott conducted an investigation concerning the tires. He "explained" to accused the latter's "rights" under Article of War 24, and accused said that he understood his rights thereunder (R.16). Accused admitted the use of four tires, marked "U.S.E.D.", on his car (R.17,36). He claimed that someone in the Engineers' Department gave him permission to use the tires inasmuch as he used his automobile in the performance of military duties. He said that he would rather not divulge the name of the person who gave him permission. Later in the interview he said that he did not remember the name of the person and that he would rather take the responsibility himself than to give any names (R.17,20). He said that he intended to return the tires and wheels when his service was terminated or when he sold the car (R.17, 19).

Thereafter, accused was sworn by Captain Merriott and changed his testimony "somewhat" (R.17). He said that a quantity of property had been transferred from the civilian contractors to the United States Engineering Department; that there was a lot of this property "down there"; and that nobody seemed to know whether it belonged to the civilian contractors, the District Engineers, or someone else (R.19). He continued that a lot of "stuff", including the tires, was lying around loose, and nobody seemed to know where it belonged or who was responsible for it. He took the tires and put them on his car. He

was Motor Officer for the District Engineers and did not "have in mind" to steal the tires, since one of his duties was to prevent the theft of Government property. He stated to witness that the tires had been "U.S.E.D." property but that at the time he took them he did not know that they were United States Government property. He also said that he did not have permission from anyone to take or use the tires and wheels, but that he asked several people for such permission, only to discover that "nobody seemed to know where they belonged" (R.17,20). Accused asked Captain Merriott whether he should turn in the tires and wheels or continue to use them. The question was not answered (R.18, 19,35,36).

On 14 September 1943, accused turned in the tires and wheels to First Lieutenant Anthony P. Miller, Jr., Assistant Base Ordnance Officer. Accused said that he had been at an investigation during the afternoon and had been advised to turn them in. Accused told witness (Lieutenant Miller) that the tires and wheels belonged to the "Engineers' Department". He made out a receipt and asked witness to sign it. Having no authority to accept the property, witness refused to sign the receipt, although apparently the tires and wheels were left in the custody of witness (R.27-30; Pros. Ex. G). Eventually they were delivered to the Provost Marshal (R.15,16,29,32).

First Lieutenant Berger was the investigating officer. He read Article of War 24 to the accused and explained that accused did not need to make any statement and that anything which he said could be used against him. Accused said that he understood his rights (R.21). Accused then admitted to Lieutenant Berger that between 1 and 10 December 1942 he took four tires, tubes, and wheels and put them on his Ford car, where they remained until 14 September 1943. He told Lieutenant Berger that he took them "from the car pool, which is now the Post Engineers' Garage, from among other Government property", and that the tires were stamped "U.S.E.D.". He said that he did not ask anyone's permission to take the property and that there was nobody to give him permission at the time. Previously he had obtained permission from "Colonel Starlings" to use "bedding, beds, and Quartermaster property". He did not ask Colonel Starlings about the tires because he "took it for granted". Accused did not say that Colonel Starlings had given him the use of any Engineers' equipment (R.22).

The value of the four tires, tubes, and wheels was between twenty and fifty dollars (R.33,34).

Mr. Albert W. Rohde, Field Representative for the Al Johnson Construction Company, testified for the defense. On several occasions he saw personal articles furnished to employees of the Base Contractors marked "U.S.E.D." through error. However, the erroneous mark was corrected later (R.53). He testified that such employees were entitled to buy tires through the commissary operated by the contractors. He did not believe

that any stock of tires remained after the commissary sold out its wares at the time of the contractors' departure. A few civilian cars were left, belonging to some of the contractors, but they were resold to other individuals. On cross-examination Mr. Rohde stated that he never saw any of the contractors' commissary tires marked "U.S.E.D." and that he "would say" that the United States Government acquired the property furnished to the contractors for use on the Base (R.54).

Testifying for the defense, Lieutenant Colonel John W. Berretta, Corps of Engineers, Fort Pepperrell, recalled that on one occasion he gave accused permission to use a Government rowboat for his private activities (R.54). Asked whether he recalled a conversation on or about 15 March in which he told accused to do "whatever was possible to get his job done", witness replied, "I do not exactly recall any conversation except that that was the general policy that we were following. We were trying to get the job done". Witness testified that he had never been connected with the District Engineers (R.54,55).

Mr. Harold Wylie testified for the defense and stated that he was in charge of the Engineers' Property Office, Fort Pepperrell (R.56). Formerly he had been employed by the District Engineers (R.57). He stated further that the only tires which the District Engineers had were acquired by purchase, and that any tires which "came into" the District Engineers would be United States Government property, for which the District Engineers were responsible and accountable (R.58).

Accused testified substantially as follows: Prior to and during December 1942 he was in charge of the District Engineers' Motor Pool and was accountable for six or seven million dollars' worth of property, scattered all over the Base, both on and off the post (R.59,60,64,65,70). Since he did not have control of the "operators" on the equipment, he could not issue individual items to them. He had no orders as to what to do with the property or how to get rid of it, and no instructions concerning the method of keeping records (R.59). Believing that he should check all the equipment as often as possible, he asked for the assignment of a Government car for that purpose. For awhile his requests were not granted, but at length a car was assigned to him. Soon thereafter he was told by Lieutenant Colonel Berretta that Army Regulations prohibited his driving a Government vehicle, whereupon he stopped using the car (R.59,60,70).

After attempting to make the rounds by walking and obtaining rides on trucks, accused bought a Ford car (R.60,67). In addition to the purpose already described, accused bought the car for the purpose of driving to and from his quarters, which were off the post and about 500 yards away from the Base (R.60,66,67). Accused's testimony was rather vague and conflicting with reference to the time when he took the tires and placed them on his car. However, he admitted having stated under oath that the

date was approximately between 1 and 10 December 1942 and he testified that it might have been then or later (R.59,65,67).

Accused admitted that he found the tires with a quantity of Government property at the District Engineers' Motor Pool and that they were marked "U.S.E.D." (R.65,66). He believed they had come from a generator, which had been sent back to the United States (R.69). He knew that the tires did not belong to him, but did not know whether they were Government property (R.65,66). The letters "U.S.E.D." did not necessarily denote Government property, for "anything and everything" was marked with those letters (R.65). He did not deny that they were Government property, but thought that when they were transferred to him, and he was charged with them, they would be his, so that he could use them without permission. However, he admitted that he was accountable for Government property only (R.64,66,68).

He did not know who his "boss" was and did not know to whom to go in order to obtain permission to use the tires, tubes, and wheels (R.64). Lieutenant Colonel Berretta, located at the Base Command Office, had frequently allowed accused to use various articles, such as some chairs which he took home (R.60,61,64). What is more, Lieutenant Colonel Berretta had often told accused to "get the job done no matter what it takes to do it" (R.61,62). Accused interpreted this remark as giving him the privilege of using anything he saw fit in the performance of his duties (R.62). In addition, "Colonel Starlings" had permitted accused to get certain things from the Quartermaster as he wanted them (R.64).

Accused denied having told McCaffrey that the tires belonged to the Government. He "more or less led" McCaffrey to believe this because there were a group of workmen looking at the tires and there had been a great deal of tire stealing thereabouts, the only way to prevent which was to say that the tires were Government property and that the Military Police would be "after them" in case of theft (R.65).

Accused believed that he used the car for Government purposes about 95 per cent of the time and for private purposes less than ten per cent. Because he was busy at the shop during the day, he usually had to do his checking of the equipment during the evening. A steady stream of equipment was deposited near the Post Theater, and he went here and elsewhere on his checking trips. He had been informed by a higher ranking officer that going to and from his quarters in town constituted official business, and he so believed (R.60). Asked whether he had used the car for "pleasure driving", he testified that he thought he had once or twice. He went to Mount Pearl Park, a distance of seven miles, in the spring of 1943, to get some property issued to him personally by the Quartermaster. He did not know whether the trip was considered personal or official. At about the same time, he made another trip of fourteen miles. He also

used the car once or twice on "personal business" (R.67).

Accused admitted the making of the receipt (Pros. Ex. G) in connection with his attempt to turn in the tires, tubes, and wheels to Lieutenant Miller on 14 September. He did not recall whether he had told Lieutenant Miller that they were Engineers' property (R.68,69).

4. The evidence for both the prosecution and the defense conclusively proves that on or about 1 December 1942 accused took four tires, tubes, and wheels, placed them upon his automobile, and used them thereon until the middle of September 1943. The combined value of the property was between twenty and fifty dollars. The tires were stamped "U.S.E.D.", which stood for "United States Engineering Division", and the evidence is sufficient to prove that the property was owned by the United States and furnished and intended for the military service thereof.

Despite accused's contention that he did not know that the property belonged to the United States, the evidence leads unerringly to the inference that he was fully aware of such ownership. He admitted that he found the tires, tubes, and wheels among a quantity of Government property and that previously they had belonged to the United States Engineers' Division. He also believed that they had come from a generator which had been sent back to the United States and which evidently was Government property. He admitted knowing that they did not belong to him. Under the circumstances he could not possibly have believed that they belonged to any person or organization other than the Government. Furthermore, at one point in his testimony he did not deny Government ownership but shifted his defense to the contention that since he was charged with them he could use them without permission. In addition, he told McCaffrey that they belonged to the Government.

To constitute a misapplication under Article of War 94, the property must be used for the personal benefit of the offender (M.C.M., 1928, par. 150 i; Winthrop, Military Law and Precedents, 2nd ed., rev., p. 708). Although the car, and consequently the tires, tubes, and wheels, were used principally on Government business, accused admitted some degree of use for his private purposes and there was nothing to indicate that this use was authorized. In the opinion of the Board of Review he was properly convicted of the offense charged (Ibid.).

5. The defense counsel objected to various rulings by the law member and by the court. Since it clearly appears that accused was not prejudiced by any of the rulings, it is deemed unnecessary to discuss them individually.

6. Attached to the record of trial is a recommendation for clemency signed by two members of the court. Also attached to the record of trial are recommendations for clemency from Major Edward J. Saunders, Chaplain, Newfoundland Base Command; First Lieutenant William S. Bowdern, Catholic

Chaplain, Fort Pepperrell; and the defense counsel and assistant defense counsel.

7. War Department records show that accused is 27 years of age and graduated from Pennsylvania State College. He was appointed second lieutenant, Infantry Officers' Reserve Corps, on 23 May 1940 and entered upon active duty 30 June 1941. He was promoted to first lieutenant, Army of the United States, on 1 February 1942, and to captain on 11 November 1942. Immediately prior to his promotion to captain, his general efficiency rating is shown as excellent.

8. The court was legally constituted and had jurisdiction of the person and of the subject matter. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. Dismissal is authorized under Article of War 94.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 22 DEC 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 Ralph H. Sinay (0-388330), Corps of Engineers.

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 convicted of applying Government tires, tubes, and wheels to his own use. The evidence shows that he used the equipment mainly for Governmental purposes and that his private use was of a minor nature. In view of the circumstances and of his previous good record and the recommendations for clemency by two members of the court and by others, I recommend that the sentence be confirmed but commuted to a reprimand and that as thus commuted, the sentence be carried into execution.

3. Consideration has been given to a letter dated 22 November 1943 from Honorable John D. McWilliams, House of Representatives of the United States, and to a letter from the accused, dated 27 November 1943. These letters accompany the record of trial.

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

Myron C. Cramer

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

5 Incls.
Incl.1-Record of trial.
Incl.2-Draft of ltr. for sig. Sec. of War.
Incl.3-Form of Ex. action.
Incl.4-Ltr. fr. Hon. McWilliams.
Incl.5-Ltr. fr. accused.

(Sentence confirmed but commuted to reprimand. G.C.M.O. 34, 15 Jan 1944)

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

SPJGN
CM 243384

11 NOV 1943

UNITED STATES	ANTILLES DEPARTMENT
v.	Trial by G.C.M., convened at APO 851, c/o Postmaster, New York, New York, 15 October 1943. Dismissal.
First Lieutenant RAYMOND W. ROWLEY (O-432022), Air Corps.	

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that 1st Lt. Raymond W. Rowley, 417th Bombardment Squadron, did, at APO 848, c/o Postmaster, New York, New York, on or about 4 September 1943, feloniously take, steal, and carry away, one (1) diamond ring, value of about one hundred twenty-six dollars and fifty cents ($126.50), the property of the Post Exchange, APO 848, c/o Postmaster, New York, New York.

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

3. The evidence for the prosecution shows that the accused on or about the afternoon of Saturday, 4 September 1943, appeared at the Post Exchange, APO 848, where he requested the jewelry saleslady to show him the diamond rings which were on display. He had the odor

of "drinking" on his breath but did not appear intoxicated and, after inspecting the rings, he advised the saleslady that he did not wish to make a purchase and departed. Subsequently, while preparing the rings for safekeeping, the absence of a gold ring, size 5½, set with a large diamond, was discovered. The saleslady next saw the ring a few nights later upon the finger of Miss Lucille Josephine Grassey, also known as Miss Donna LuPae, an entertainer at a local hotel, who on such occasion was being escorted by the accused at a dance. The saleslady identified a ring shown her as the one missed from the exchange and as the one she had seen upon Miss Grassey's finger at the dance. The ring's value was stipulated to be $126.50 and was admitted into evidence after it was shown to be the property of the exchange. Miss Grassey, before the conclusion of the trial, was called by the court as a witness and identified the ring, which had been admitted into evidence, as the one which the accused had given her during the first week of September, 1943, as an engagement ring (R. 6-10, 11-12, 22-23, 28-30; Ex. A).

Major Clarence R. May identified a purported written confession which had been secured from the accused by the then post commander, after a protracted interview in which two members of the Federal Bureau of Investigation also participated, while the witness waited in an adjoining room. He was called in, however, prior to the accused's signing the confession, and heard him warned of his rights. Although the accused was apparently in a state of shock, he proceeded to sign the confession, whereupon Major May signed as a witness to his signature. The confession was thereupon admitted into evidence over the objection of the defense (R. 12-15; Ex. B).

4. The evidence for the defense shows that the accused was addicted to the excessive use of alcoholic beverages, drinking from one to two 4/5 quarts of rum a day, that he was not discriminating in his choice of female companions and that on the day preceding the theft of the ring he had been drinking heavily although still able to perform his duties. The exchange officer testified that officers were permitted to take out rings on approval by signing a receipt and making a deposit but that the accused was not so permitted as he was not interested (R. 16-21, 21-22).

Major May, recalled by the defense, testified that during the procurement of the purported confession the accused was pale, under a strain and "almost gasped for breath." The former post commander, "at that time, or subsequently or before", told the witness that the accused had been told that he could submit his resignation which the former post commander would approve. The accused had submitted his resignation and the former post commander had approved it (R. 23-25).

The accused, at the request of the defense which was granted by the court, made a sworn statement limited to what the former post commander had told him prior to his signing the purported confession. In substance, this was that

"if I would sign said confession he would have arrangements to have me resign my commission and do his best to have it accepted, thereby keeping me from being cross-examined by the FBI or tried by General Court Martial."

The investigating officer had not asked him if he had signed a confession but such officer, called by the court, testified that he had shown the accused a copy of the purported confession which the accused stated was the same he had given to the former post commander instead of to the FBI (R. 25-27, 27-28).

5. The Specification alleges that the accused, at a designated place on or about 4 September 1943, feloniously took, stole and carried away one diamond ring, valued at about $126.50, the property of a described post exchange. The offense charged is that of larceny which is defined as follows:

> "Larceny is the taking and carrying away, by trespass, of personal property which the trespasser knows to belong either generally or specially to another, with intent to deprive such owner permanently of his property therein. (Clark.)" (M.C.M., 1928, par. 148g)

The evidence is uncontroverted that the ring in question was missed shortly after the accused had access thereto and that it was within a few days thereafter located and identified while being worn by the accused's lady companion who admitted its receipt from the accused about the time it was stolen. The evidence for the defense relative to the accused's intoxication during the time he had access to the ring falls wholly short of creating even a suspicion that he was not fully possessed of his faculties, and the defense's own witness, the post exchange officer, conclusively testified that the accused's taking of the ring was felonious. The accused's possession of the ring shortly after its theft, implicitly shown by the testimony of his donee, raises the unrebutted presumption that it was stolen by the accused. Particularly is this so because the corpus delicti was conclusively established and the accused's gift of the ring not only shows that he was conscious of its possession but also that he intended to deprive the owner permanently of its possession (CM 226734 (1942) Bull. JAG (1942), Vol. I, page 364). The evidence for the prosecution, exclusive of the accused's purported confession hereinafter commented upon, therefore, establishes beyond a reasonable doubt every element of the offense charged and amply supports the findings of guilty of the Charge and its Specification.

6. The testimony of the accused, corroborated in part by that of Major May, creates sufficient doubt about the manner in which the purported confession was secured to necessitate its elimination from

consideration. Its procurement, at best, was not wholly free from the extension of hope of benefit and consequently it was improperly admitted into evidence (CM 152444 (1922) Dig. Ops., J.A.G., 1912-1940, par. 395 (10), page 206). However, since the other evidence adduced, exclusive of the purported confession, establishes the commission of the alleged offense beyond a reasonable doubt, its admission into evidence did not injuriously affect the substantial rights of the accused (CM 160986 (1924), CM 192609 (1930), CM 206090 (1936), Dig. Ops., J.A.G., 1912-1940, par. 395 (10), page 206).

7. The accused is about 26 years of age. The War Department records show that he had enlisted service from 18 February 1941 until 4 December 1941, that he was commissioned a second lieutenant on 5 December 1941 and has been on active duty as an officer since such date and that he was promoted to first lieutenant on 30 June 1942.

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 of the Charge and its Specification and the sentence, and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 93.

Abner E. Lipscomb, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

SPJGN
CM 243384

1st. Ind.

War Department, J.A.G.O., 16 NOV 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 Raymond W. Rowley (O-432022), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence as approved by the reviewing authority, and legally sufficient to warrant confirmation thereof. I recommend that the sentence of 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 foregoing recommendation, should such action meet with approval.

Thomas H. Green

T. H. Green,
Brigadier General, U.S. Army,
Acting The Judge Advocate General.

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

(Sentence as approved by reviewing authority confirmed.
G.C.M.O. 397, 22 Dec 1943)

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

SPJGQ
CM 243456

13 NOV 1943

UNITED STATES	)	SECOND AIR FORCE
v.	)	Trial by G.C.M., convened at Army Air Base, Kearney, Nebraska, 7 October 1943. Dismissal, total forfeitures and confinement for six (6) months. Disciplinary Barracks.
Second Lieutenant ALAN D. BERNSTIEN (0-809507), Air Corps.	)	

OPINION of the BOARD OF REVIEW
ROUNDS, HEPBURN and FREDERICK, Judge Advocates.

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

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Second Lieutenant Alan D. Bernstien, Air Corps, 583d Bombardment Squadron (H) Provisional Group Q, did, at Army Air Base, Kearney, Nebraska, on or about September 7, 1943, feloniously take, steal and carry away about $166.00 lawful money of the United States and a billfold value about $1.00, the property of Second Lieutenant James R. Liddle.

Specification 2: In that Second Lieutenant Alan D. Bernstien, Air Corps, 583d Bombardment Squadron (H) Provisional Group Q, did, at Army Air Base, Moses Lake, Washington, on or about September 1, 1943, feloniously take, steal and carry away about $20.00 lawful money of the United States, the property of Second Lieutenant William G. Sweeney.

Specification 3: In that Second Lieutenant Alan D. Bernstien, Air Corps, 583d Bombardment Squadron (H)

Provisional Group Q, did, at Army Air Base, Moses Lake, Washington, on or about September 1, 1943, feloniously take, steal and carry away about $20.00 lawful money of the United States, the property of Second Lieutenant James G. Watters.

He pleaded guilty to and was found guilty of all Specifications and of the Charge. No evidence of previous convictions was introduced at the trial. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and "to be confined at such place as the reviewing authority may direct for six (6) 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 Article of War 48.

3. In brief summary, the evidence produced by the prosecution discloses that accused was a navigator of a combat crew in the 583rd Bombardment Squadron (R. 6a). While stationed at the Army Air Base, Moses Lake, Washington, he became acquainted with Second Lieutenant William G. Sweeney and Second Lieutenant James G. Watters, members of the 582nd Bombardment Squadron (R. 6b, 6f). On 1 September 1943 accused, whose personal effects had not yet arrived, came into the room shared by Lieutenant Sweeney and Lieutenant Watters, presumably to borrow shaving equipment and a towel (R. 6f). Sweeney had $140.00 in a wallet which he had taken to bed with him and which he left there when he went to the latrine on the morning of 1 September 1943 (R. 6c, 6d). Watters also had money in a wallet and knew the exact amount because he had counted it when he woke up on the morning of 1 September 1943. He left the wallet containing this money in his room when he went out to take a shower (R. 6f). Upon their return to the room both Sweeney and Watters discovered that $20.00 was missing from the wallet of each. This was shortly after accused had been in their room. The money was later returned to each of them by accused through third parties (R. 6c, 6e, 6f).

On 7 September 1943 Second Lieutenant James R. Liddle, who was the pilot of the combat crew in which accused was the navigator, discovered that his wallet containing $166.00 was missing from the hip pocket of his trousers hanging on the end of his bed. Apparently accused roomed in the same quarters, for it was when he arose that morning and "noticed that his money was gone and started looking for it" that Liddle checked on his money and found it had been stolen. He reported his loss but had no knowledge of who had taken the wallet and money (R. 6a, 6b).

Three signed confessions of accused were introduced in evidence without objection after it had been stipulated between the prosecution, defense counsel and accused that each had been "freely and voluntarily obtained." (R. 6f, 6g; Pros. Ex. 1, 2, 3). In the first one accused admitted taking a billfold containing $166.00 from Lieutenant Liddle on the night of 7 September 1943 but denied connection with any other thefts of which he was then accused. In the second confession he corrected his prior statement and confessed taking $20.00 from Lieutenant Watters and $20.00 from "Second Lieutenant Harry Lerner" at Moses Lake, Washington, on 1 September 1943. In the third confession he corrected the second and admitted taking $20.00 from Lieutenant Sweeney instead of Lieutenant Lerner. In the first confession he offered as an excuse for his theft of Liddle's money the fact that he needed money to send home in place of a similar amount which he had lost in gambling.

4. Accused, as a voluntary witness under oath, admitted taking the money as alleged in each of the three Specifications and offered in extenuation the fact that he needed the money because he had promised to send his mother, whom he said was dependent upon him, a large sum of money which he had acquired from base pay and travel expense allowances but which he had "lost" while travelling. He stated that his father was a physician, had been an officer in the last war, and that his mother was employed in the Navy Department (R. 6g, 6h).

5. Since accused voluntarily confessed the commission of the offenses charged, pleaded guilty to each Specification and the Charge, and again admitted his guilt as a witness under oath at the trial, the record is unquestionably legally sufficient to support all of the findings.

The sole question which requires discussion arises out of the failure of the court to designate that the confinement imposed as a portion of the sentence should be "at hard labor". Paragraph 103i, Manual for Courts-Martial, 1928, provides that "confinement 'without hard labor' will not be imposed." Article of War 37 specifically provides, also, that

> "the ommission of the words 'hard labor' in any sentence of a court-martial adjudging imprisonment or confinement shall not be construed as depriving the authorities executing such sentence of imprisonment or confinement of the power to require hard labor as a part of the punishment in any case where it is authorized by the Executive order prescribing maximum punishments."

Obviously, it is the limits of punishment prescribed in the table which apply only to enlisted men (par. 104a, M.C.M. 1928). There are no limits to the punishment that may be imposed upon a convicted officer except such as may be contained in the Articles of War defining offenses and prescribing punishments, and as to an officer, conversely, the limits of punishment contained in the table do not apply. But, respecting the grade and classification of crimes and the quality of punishments therefor, the table has always been deemed a source of reference and it has been utilized as a guide for courts sitting in trials of officers as well as of enlisted men. Article of War 37 is general in character and exceedingly broad in scope and the reference therein to the Executive order prescribing maximum punishments was for the sole purpose of indicating the offenses for which confinement at hard labor is authorized and could properly be imposed and was in no way intended to limit the application of its general provisions to enlisted men only.

It follows that the authority executing the sentence in the instant case has the power to require hard labor as a portion of the sentence to confinement notwithstanding the court's failure to include it therein.

6. According to records of the War Department, accused is 19 years and 6 months of age. He was born in the City of New York and after graduation from high school became a portrait photographer. He enlisted on 24 June 1942, was transferred to the Enlisted Reserve Corps until 7 January 1943, when he commenced active duty training which resulted in his being commissioned a Second Lieutenant, Air Corps, on 14 August 1943.

7. The court was legally constituted and had jurisdiction of accused and the offenses charged. No errors injuriously affecting the substantial rights of accused were committed at the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. A sentence of dismissal is authorized upon conviction of a violation of Article of War 93 and there is no limit to the period of confinement which may be imposed in addition thereto.

William A. Pounds, Judge Advocate.

Paul Hepburn, Judge Advocate.

Herbert R. Frederick, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 16 NOV 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 Alan D. Bernstien (O-809507), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed and carried into execution, and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

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

Thomas H. Green.

T. H. Green,
Brigadier General, U. S. Army,
Acting The Judge Advocate General.

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

(Sentence confirmed. G.C.M.O. 10, 6 Jan 1944)

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

16 MAR 1944 (365)

SPJGH
CM/243466

UNITED STATES v. Captain GEORGE C. CALDER (O-300668), Corps of Engineers.	THIRD SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Carlisle Barracks, Pennsylvania, 30 September and 1 October 1943. Dismissal.

OPINION of the BOARD OF REVIEW
DRIVER, O'CONNOR and LOTTERHOS, Judge Advocates

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Captain George C. Calder, C.E., Marietta Holding and Reconsignment Point, Marietta, Pennsylvania, did on or about 27 June 1943 present for approval and payment a claim against the United States by causing to be presented to Colonel F. J. Keelty, Finance Officer at Philadelphia, Pennsylvania, an officer of the United States, duly authorized to approve and pay such claims, in the amount of sixty-three dollars and seventy-five cents ($63.75), for services alleged to have been rendered to the United States by Cooper's Garage, Salunga, Pennsylvania, which claim was false and fraudulent in the amount of forty-three dollars ($43.00) in that said amount of forty-three dollars ($43.00) was not for actual services rendered to the United States, and was then known by the said Captain George C. Calder to be false and fraudulent.

Specification 2: In that Captain George C. Calder, C.E., Marietta Holding and Reconsignment Point, Marietta, Pennsylvania, did at Marietta, Pennsylvania, and at Salunga, Pennsylvania, on or about June 18, 1943, agree and conspire with one John Hollister of Columbia, Pensylvania; Charles Jensen of Marietta, Pensylvania; and John Cooper of Salunga, Pennsyl-

vania, to defraud the United States by aiding and obtaining the allowance and payment of a false and fraudulent claim against the United States in the amount of forty-three dollars ($43.00) for services alleged to have been furnished to the United States by Cooper's Garage, Salunga, Pennsylvania, which claim was false and fraudulent in that such services for said sum were not furnished, and was then known by the said Captain George C. Calder to be false.

Specification 3: In that Captain George C. Calder, C.E., for the purpose of obtaining approval, allowance and payment of a claim against the United States, by presenting to Colonel F. J. Keelty, Finance Officer at Philadelphia, Pennsylvania, an officer of the United States duly authorized to approve, pay and allow such claims, did at Marietta, Pennsylvania, on or about June 27, 1943, advise the making and using of a certain paper to wit: Receiving Report dated June 7, 1943, Voucher No. 1154 which contained a statement "Services rendered in welding pipe in Central Heating Plant —$35.00" which statement was false and fraudulent in that the amount for said services was falsely made and not the true amount and was then known by the said Captain George C. Calder to be false and fraudulent.

Specification 4: Similar to Specification 3 except that it alleges accused advised making and using Receiving Report dated 13 June 1943, Voucher No. 1156 containing the false and fraudulent statement, "Services rendered in welding Bull dozer — $28.75".

Specification 5: Similar to Specification 3 except that it alleges accused advised making and using Public Voucher dated 1 July 1943, in favor of Cooper's Garage, containing the false and fraudulent statement, "W2239 E-532, 6/7/43, See attached invoice - Voucher No. 1154 — $35.00; W2239 E-541, 6/13/43, See attached invoice - Voucher No. 1156, $28.75; Total, $63.75".

Specification 6: In that Captain George C. Calder, C.E., Marietta Holding and Reconsignment Point, Marietta, Pennsylvania, being authorized to make and deliver a paper certifying the receipt of services for the United States furnished and intended for the military service thereof, did at Marietta, Pennsylvania, on or about 27 June 1943, make and cause to be delivered to Colonel F. J. Keelty, Finance Officer at

Philadelphia, Pennsylvania, a writing in words and figures as follows:
"W2239E-532 6/7/43 See attached invoice - Voucher No. 1154 - 35.00;
W2239E-541 6/13/43 " " " "
No. 1156 - 28.75; account verified correct for 63.75;" being on a Public Voucher for Purchases and Services from Cooper's Garage, Salunga, Pennsylvania, without having full knowledge of the truth of the statements therein contained and with intent to defraud the United States.

Specification 7: Similar to Specification 6 except that it alleges accused, on or about 24 June 1943, made and caused to be delivered Receiving Report bearing Voucher No. 1154, dated 24 June 1943, in the following language: "Services rendered in welding pipe in Central Heating Plant $35.00".

Specification 8: Similar to Specification 7 except that it alleges accused made and caused to be delivered Receiving Report bearing Voucher No. 1156 dated 24 June 1943, in the following language: "Services rendered in welding Bulldozer $28.75".

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. The evidence for the prosecution is substantially as follows:

As post engineer at Marietta Holding and Reconsignment Point, Marietta, Pennsylvania, accused was the head of the real estate, repairs, and utilities sections. He had one assistant, a first lieutenant. Accused had procurement authority, and bills approved by him were forwarded to the Finance Office in Philadelphia for payment. Among civilian employees under accused were Charles Jensen, superintendent of construction; Joseph H. Rowe, chief clerk; Mrs. Esther M. Wenzel, purchasing clerk; Raymond J. Freiler, storekeeper, and John J. Hollister, foreman of the mechanical section (R. 16-17, 32, 37-38, 40, 50, 56).

Mr. Hollister testified that accused telephoned him and asked if he could get two pre-war, first-grade tires for the automobile of accused. Hollister took the car to Cooper's Garage for a tire inspection, and then took the tire certificate to accused, who signed it. Hollister then took the certificate to the rationing board, which approved the certificate. Based on the certificate, Mr. John Cooper,

operator of the garage, procured the tires. When Hollister learned that Cooper had the tires, he notified accused, who sent him to the garage with the car to get them. Hollister and a helper put them on the car. Accused had not given Hollister any money to pay for the tires, Cooper expected payment at the time, and Hollister stated he would see Cooper in a day or two. Cooper gave Hollister a bill and carbon copy (undated) showing sale of two tires to accused for $43. Hollister placed the original bill in an envelope "with the ration certificate" and left the envelope on the desk of accused. Accused did not at any time mention the bill or ration certificate to him (R. 17-20).

Hollister walked up to accused "one day in front of the Main Building" and asked "How about the tires?" Accused replied "Don't you know what to do about them?" Later Hollister told Mr. Jensen what accused had said. Mr. Jensen stated that "he would see about it". Hollister did nothing further until he saw accused and Mr. Jensen together. He asked accused "about the tires" and received "the same answer as previously". Mr. Jensen stated "I'll see you later". When Hollister was in the office accused told him to "see the purchasing agent about paying for the tires". When Hollister saw Mr. Jensen he asked "Do you know what the hell the Captain is going to do about the tires?" and Mr. Jensen replied "He said he wanted it put on some equipment". Mr. Jensen asked "How about putting it on the crane?" and Hollister replied "I better hadn't put it on the crane because that is broken down anyway". When Hollister suggested that they "put it" on a bulldozer, Jensen asked whether Cooper "would do it", and asked Hollister to see Cooper about paying for the tires that way. Jensen mentioned adding something to the "boiler-room job" and "putting some" on the bill for work supposed to have been done on the bulldozer. When accused asked Hollister "about it" Hollister told him what Jensen had said. Accused told him to "see the purchasing agent" and prepare the necessary papers. Hollister then went to see Mrs. Wenzel, the purchasing agent, and "she didn't want to do it at first". When Hollister told her "The Captain's the boss", Mrs. Wenzel "talked to Mr. Rowe about it for a while", and when she came back Hollister told her about "putting the price of the tires" on the boiler room job and on the bulldozer. At the suggestion of Mrs. Wenzel, Hollister telephoned Cooper and obtained his consent. Mr. Cooper did not do any work on the bulldozer nor any additional work in the heating plant (R. 20-22).

On cross-examination Hollister testified that accused sent him a "slip" to show how he wanted his tires changed, and later Hollister telephoned accused and told him that two of the tires were bad. Mr. Jensen asked Hollister to have the tires inspected at Cooper's Garage. Hollister suggested that the tires be purchased from Cooper. The tires were inspected on 13 May. Hollister did not sign anything when the tires were put on the car. From the time the tires were put on the car, it was about two days until the first questions were asked about payment for the tires. Hollister started the conversation with accused, who was in front of the office, in his car, and was getting ready to leave.

The next time Hollister said anything to accused about the tires was about two days later, outside in the car, when Jensen was present. Hollister asked "about the tires", accused stated "Don't you know what to do about it?" and Jensen said "I'll see you later". The third time Hollister saw accused about the tires was in the office, about a week after they were put on the car. Accused told him to "see the purchasing agent" and "Isn't there something around here you could put it on?" Then Hollister and Mrs. Wenzel figured out how to change the bills. Hollister did not tell anyone in authority about the "padding of the bills" until "Major Bohannon" came to see him about a month and a half later, after Hollister had quit his job. Hollister gave notice on 1 August that he would quit on 15 August, then actually quit on 5 August, and as a result accused refused to allow him leave pay. After that was when Hollister first told about the padded bills. As to a statement which he had made to the investigating officer, Hollister stated that the words "deponent later went to see said Captain Calder again who then asked deponent to put the price of the tires on some job", referred to the time he saw accused in the office. Accused "never mentioned anything about how to pay for the tires until I went into the office". Mr. Jensen first suggested it. Hollister "never said a word" to accused about paying for the tires, but he was after accused for the money two days after he got the tires. When Hollister left the original of Cooper's bill, the tire certificate and other papers on the desk of accused, he kept the carbon copy of the bill because he "had an idea how the bill would be paid off". By this he meant, "I had his car fixed one time before". However, up to that time accused had "never suggested anything like that". Hollister kept the carbon copy in his desk until he quit and then had "one of the fellows" get it for him. He kept the copy because he "expected payment for the tires", and expected to have it marked "paid" when the tires were paid for. He told Mr. Cooper not to date the bill because he wanted to wait until Mr. Cooper was paid for the tires (R. 23-30).

In response to questions by the court Hollister testified accused customarily had Government employees take his car for tire inspections and had his repair work done in the Government shop (R. 31).

Photostatic copies of the following documents were introduced in evidence: undated bill from Cooper's Garage to accused for two tires, amount $43 (Ex. 1); Office of Price Administration tire inspection record showing inspection on 13 May by John Cooper and that two tires "should be replaced" (Def. Ex. A); and Office of Price Administration certificate (Def. Ex. B) dated 31 May 1943, authorizing accused to purchase two tires, on the reverse side of which appears a "Purchaser's Endorsement", dated 16 June 1943, and reciting the sale of two tires (described) at the "Unit Price" of $21.50 by "John Cooper" (signed) of Salunga, Pennsylvania, as "seller" to "John J. Hollister" (signed) as "Purchaser or his agent" (R. 14, 25).

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Mr. Cooper testified that in May, when Hollister brought the car of accused to his garage, he inspected the tires and recommended that two be replaced. They filled out an application for two new tires, which he "believed" was signed by Hollister although he was not "sure". Mr. Cooper heard nothing more about the matter for two or three weeks. Then he advised Hollister by telephone that he "had the certificate to get the tires". Mr. Cooper had trouble getting the kind of tires desired and Hollister called him two or three times during the month. When Cooper got the tires, Hollister brought the car over, the tires were put on, and Hollister and Cooper signed the certificate. Mr. Cooper then "issued" a statement for $43 for the two tires, made out to accused (Ex. 1), and gave a copy to Hollister. "They were supposed to return" his copy of the bill but did not. There were three copies of the bill in all. Cooper had one copy in the register, gave one copy to the rationing board, and gave one to Hollister. As to why the bill was not dated, he stated "I must have made out the bill in a hurry. I suppose it was just carelessness on my part". Up to that time Cooper thought it was a cash transaction. When Cooper asked about getting paid, Hollister stated that he would see that Cooper got the money for the tires. Mr. Cooper did not know accused at all until sometime later (R. 8-10).

The next thing Cooper heard about the tires was two or three weeks later, when Hollister said "something" to the effect that "the Army was going to put the tires on the car" for the use of accused. When the tires were put on the car, Cooper had just sent in a bill for some welding in the boiler room at the post, in the amount of $20.75. Hollister gave Cooper instructions for preparing a new bill adding an amount to the original bill so as to show a charge of $35. No additional work was done in the boiler room. Hollister also instructed him to submit a bill for work on a bulldozer in the amount of $28.75. No work was done on the bulldozer. Cooper signed and returned the bills as instructed. When Hollister was instructing Cooper over the telephone, Cooper could hear him consulting with "a woman" and could hear Hollister and the woman "figuring out how they would arrange this". The $43 added was for the tires, and Cooper thought the car "was going to be used around the post" as it had a siren on it and a "Fire Marshal's sign". Cooper later received payment of the bills as submitted in the amount of $63.75 by Government check from Philadelphia. Later on, "Major Bohannon" called on Cooper and told him the transaction was improper. Cooper immediately issued a check to the Government for $43 and inclosed it in a letter to the commanding officer at Marietta. Two or three days later Cooper received a check for $43 from accused. On cross-examination Cooper stated that all of his transactions were with Hollister and that he had never talked to accused about the tires at any time. Subsequent to the sale of the tires he had gone to the post to make a bid on truck repairs and had talked to accused, Hollister having pointed accused out, but the tires were never mentioned. (R. 10-16).

Photostatic copies of the following papers were introduced in evidence: Bill of Cooper to post engineer, dated 14 June, for $20.75 for welding in boiler room (Ex. 4); bill of Cooper to post engineer, dated 18 June, for $35 for welding boiler (Ex. 9); bill of Cooper to post engineer, dated 18 June, for $28.75 for welding bulldozer (Ex. 10); letter dated 16 August from Cooper to commanding officer at Marietta (Ex. 2); check dated 16 August from Cooper to Treasurer of the United States in the amount of $43 (Ex. 3); and bill of Cooper to accused for two tires, in the amount of $43, dated 17 August, and marked "Paid" (Def. Ex. C). On Exhibit 4 the following words are written "Void. See new order for 35.00 attached. OKed by Mr. Rowe" (R. 14, 25, 46).

Mrs. Wenzel testified that Hollister came to her desk in the post engineer's office, wanted to use the telephone, said "something about calling in regard to billing for a welding job", and "instructed that we should prepare some papers toward a request for work that was to be done". There was a purchase request and order for welding in the amount of $20.75, which was supposed to be voided. Hollister said "there was some additional welding done", and that $43 was to be put on two bills, for tires for the car of accused. Mrs. Wenzel and Hollister divided the $43 and put part on a bill for welding at the central heating plant and part on one for welding a bulldozer. Hollister did not state whether any welding had been done on the bulldozer. Hollister telephoned Cooper's Garage about it. Mrs. Wenzel objected to the procedure, and as soon as Hollister left she went to the chief clerk, who instructed her to process the papers. She mailed the papers, including a completed copy of the purchase order, to Cooper's Garage for signature. When they returned, she prepared the "receiving report" and voucher, and sent the papers to accused for his signature. She identified as her own, the handwriting voiding the original Cooper bill for $20.75 and the purchase order in the same amount. The purchase request, which was made by Mr. Freiler who gets his information and authority from Mr. Jensen, was changed by Mrs. Wenzel, after it had been approved by the fiscal clerk and accused. After it was changed it was attached to the purchase order for $35 and returned to accused for approval. She identified the initials of herself and accused on the $35 purchase order. When she finished her work, she initialed it to tell accused that it was ready for his signature if he approved. His initials indicated that he had approved and signed the original copies. She also identified her initials on the bulldozer purchase order in the amount of $28.75. All of the papers were attached together when they went into the office of accused (R. 40-47).

On cross-examination she stated that her initials were on the file copies, and that when the papers went to accused "one of the file copies" extended beyond the original, so that all he had to do was sign the original and initial the file copy. Accused did not ask her to make the changes. She believed that when Hollister asked her to make these changes he said "It looks like the Captain wants to pay for his tires". She

knew that the proceeding was irregular, but did not ask accused about it. When the papers were ready she gave them to the chief clerk. She knew of a regulation that when the post engineer had approved a purchase and the amount was raised by more than ten percent of the original price, the purchase would not be put through unless accused was advised, but stated that it was not carried out. In such cases, Mr. Rowe was supposed to call the attention of accused to the increase in excess of ten percent. After she voided the first voucher which had been approved by accused, it was attached to the new papers that went to accused. On redirect, she stated that her initials on papers showed that proper processing had been followed. The corrected papers were attached to the file, she did not speak to accused about them, and he signed the papers (R. 47-50).

Photostatic copies of the following papers were introduced in evidence: Purchase order dated 17 June to Cooper's Garage in the amount of $20.75, marked "Void see new Order for 35.00 OKed by Mr. Rowe" (Ex. 5); purchase request dated 16 June in the amount of $20.75, signed by Mr. Freiler, and marked "Change to 35.00 OKed By Mr. Rowe" (Ex. 6); purchase request dated 13 June in the amount of $28.75 for welding bulldozer, signed by Mr. Freiler (Ex. 7); incoming tally sheet dated 7 June signed by Mr. Freiler, showing welding services on heating plant in the amount of $20.75, changed to $35 (Ex. 8); receiving report signed by Mr. Freiler and accused on 24 June, showing receipt of welding services on heating plant on 7 June in the amount of $35 (Ex. 9); receiving report signed by Mr. Freiler and accused on 24 June showing receipt of welding services on bulldozer on 13 June in the amount of $28.75 (Ex. 10); purchase order dated 19 June for $35 in accordance with informal bid of 16 June (Ex. 11); purchase order dated 19 June for $28.75 in accordance with informal bid of 13 June (Ex. 12); and copy of voucher (Ex. 13) to Cooper's Garage for $63.75 (R. 46).

Mr. Jensen testified that he was not present at any time when the purchase of tires for the car of accused was mentioned, and that he was asked nothing about the payment for any tires. He did not recall being present when tires were mentioned by accused or Hollister. He had heard Hollister say accused wanted him to get two tires. He at one time heard Hollister mention "to someone, I believe it was the Captain, about putting something on some welding". Jensen remarked that he did not "give a good goddam where he puts it". He thought this conversation started when Hollister came into the purchasing agent's office and said "He wants me to put it on the welding job for the boiler room". Accused did not at any time speak to Jensen about "fixing the bill" and Jensen had no conversation with either accused or Cooper about paying for the tires. Jensen did not make a suggestion to Hollister as to the payment for the tires. His only knowledge of the matter was from the remark by Hollister, which he "assumed" referred to payment for the tires. He heard part of a conversation between accused and Hollister, outside, about

the tires. Accused said "something about the tires". The car was moving, so that Jensen did not hear much. Hollister did not ask Jensen "What should I put it on?" Accused and Jensen decided not to allow Hollister's leave pay when he quit. Later, on account of the illness of Hollister's wife, accused decided that probably they should allow his leave pay (R. 32-37).

Mr. Freiler identified an incoming tally sheet (Ex. 8) which he prepared and signed. At that time the "corrections" were not on it and no consignor was shown. He also identified a purchase request (Ex. 6) prepared and signed by him. At that time the "corrections" were not on it. The corrections were made by someone else after these papers left the storehouse. He identified another purchase request (Ex. 7) which he prepared. His information for "these reports" came from the office, sometimes from Mr. Rowe and sometimes from Mrs. Wenzel. He did not recall the source of information for these particular "reports". He did not know accused was getting some new tires and had no direct conversation with accused about the "tally-in sheet" or purchase receipt (R. 37-40).

Mr. Rowe testified that he had never heard the purchase of tires for the car of accused discussed by anyone other than Mrs. Wenzel. He talked with Mr. Jensen about an invoice in the amount of $20.75 to find out whether the work had been done, before the purchase request was made out. The bill was returned and a new bill submitted. Mr. Rowe did not speak to Mr. Jensen about the new bill and did not recall talking to anyone about the bill on the bulldozer. When changes were made in the bills, Mrs. Wenzel brought "the matter" to Rowe's attention, and he instructed her to make the "change in the old purchase request". Mrs. Wenzel did not think it was right, so Rowe spoke to "Colonel Bonner" about it and asked his opinion. Colonel Bonner stated that he "saw no reason why I shouldn't do as instructed and submit the larger amount". The purchase request on the "two bills" was approved for payment. A voucher was prepared, sent to the Finance Office in Philadelphia, and paid. Mr. Rowe's office was concerned with the correct preparation of the bills, and not whether the actual service was performed. If anything was wrong, it was customary for accused to consult Mr. Rowe. Accused did not consult him on this occasion. The request to make the changes was not made by accused. Mrs. Wenzel came to Rowe and asked if it would be all right. Mr. Rowe did not see accused about it and did not call his attention to the irregularity. He could not recall an office order on increases in amount, but if there had been a large change in the bill he would have called it to the attention of accused. The only question he had in his mind about the propriety of the change was "from what Mrs. Wenzel said about the conversation she overheard". Mrs. Wenzel said she got her instructions from Hollister. The new order went to the desk of accused, and Rowe believed that a copy of the old one was attached to the file. The authority of Rowe to change the bill came from the initials of accused on the purchase request, which "they" changed over "the Captain's approval". The changed purchase request was attached to the new purchase

order. The original purchase request for $20.75 was approved by accused. When Rowe placed the papers on the desk of accused the two orders, for $35 and $28.75, were on top. The papers for signature were on top and a file copy, initialled by Mrs. Wenzel, was sticking out. The other papers were attached to the file. There was nothing on the top paper to indicate that a change had been made. Accused was usually "pretty careful" and did not make a habit of signing things without reading them (R. 50-56).

Major Victor H. Kupferer was present in the office of "Colonel Douglas", the commanding officer, about 17 August, when accused and his counsel came in. There was "considerable controversy regarding this matter". Accused, "on prompting from his counsel", stated that he wished to retract his statement made to Colonel Douglas that afternoon that "he paid Hollister for the tires". During the conversation, Colonel Douglas told accused and his attorney "of the evidence he had in connection with the purchase of these tires", that he thought he had "enough information to press charges", that he did not want to urge the resignation of accused, but that he thought it would be easier for accused if he would resign, and that if a resignation were submitted he would approve it. Colonel Douglas also said "something to the effect that 'you have let this man Hollister get you over a barrel'". Major Kupferer later saw a resignation submitted by accused, which was subsequently withdrawn (R. 56-58).

4. For the defense, Dr. George S. Wagner, Lancaster, Pennsylvania, 76 years of age, who had known accused "since he was a little boy" and was a friend of the family of accused, testified that his reputation for honesty was good. Dr. James Appel, Lancaster, Pennsylvania, who "grew up" with accused, had never known anything against the character of accused, who had always been "perfectly upright and honest". Captain Thomas E. Steuart, who was assistant to accused when he was post engineer at Bolling Field, formed the opinion that accused was "honest and very exacting". Although a post engineer is supposed to check personally all purchases and payments, it is "quite a problem" to do so. Major Ewing H. Buysse, who was the superior officer of accused from November 1940 to March or April 1941 and saw him quite frequently until he went to Marietta, stated that his reputation for honesty was of the "very best", and that accused is a wealthy man. About two or two and a half months before the trial, Major Buysse, accused and their wives went out to dinner in Washington, and the subject of tires was mentioned. Accused remarked that he "had gotten a new pair of tires but that he was having a hell of a job to pay for them". Major Buysse "inferred" that accused was having "some little difficulty in getting the bill". (Accused remembered going out to dinner, but did not recall the conversation about tires (R. 89)). Lieutenant Colonel Edward A. Bonner, second in command at Marietta under Colonel Douglas, could not question the "honesty and integrity" of accused, and the present charges were the first thing he had ever heard other than that accused was "completely honest". As post engineer accused devoted considerable time to outside work. Colonel Bonner did not recall a conversation with Mr. Rowe about welding on the bulldozer and in the central heating plant (R. 60-66).

Accused testified substantially as follows:

He is a graduate engineer from Lehigh University, is married, is not dependent on his salary as a captain for maintenance but has an independent income, went on active duty in August 1940 as a second lieutenant, was on duty at Washington until March or April 1941, then went to Fort Belvoir as acting post engineer and executive officer to the post engineer for about a year, was at Bolling Field until 22 December 1942, and then came to Marietta. As post engineer at this station, he was responsible for maintenance and repair of all facilities, maintained road systems, electrical operations, operation of utilities and heating plants, fire department "and so forth". At first he had no assistant. He had about 150 civilian employees in December 1942. During the first three months a large number of projects were set up, and in the spring of 1943 he had about 250 civilian employees. In June and July the work began to drop off, but he had about 250 employees in June. His office was divided into four branches - administrative under Mr. Rowe, construction and repair, engineering, and operations. His office spent about $100,000 a quarter on maintenance and operation of utilities, and they had 100,000 square feet of warehouse space and 28 miles of roads. In addition he had charge of flood-lighting the entire place, fire department, heating plant, coal distribution, garbage collection, and pumping station. In June they were negotiating a new contract with the water company and were carrying on a number of small construction jobs in addition to the regular work. Accused did not have an office job and was out most of the time, usually until 5:00 p.m. He had some work off the post (R. 67-71).

In May 1943 Mr. Hollister advised accused that two of his tires were in bad condition, accused asked him if he knew where the tires could be inspected with the object of having the bad tires replaced, and Hollister said a friend of his had a garage where they could be inspected. On 13 May, Hollister took the car over for inspection and, when he returned, stated that two tires had been condemned and that he had taken the application for new tires to the ration board. Hollister brought no papers to accused. About 1 June accused received a certificate authorizing purchase of two tires. Previously there had been some discussion of the brand of tire to purchase. Accused preferred Goodyear but Hollister recommended McCreary. Accused gave the certificate to Hollister, and after further checking on brands available told Hollister to get the McCreary tires, which had to be ordered. On 16 June the tires were ready, and Hollister took the car over for them. When accused returned to his office later that day, he found his tire inspection record and a copy of the tire ration certificate (Def. Exs. A and B) on his desk. No other papers were with them. He did not see Hollister that day. A day or two later accused called Hollister into his office, and got out his check book with the intention of paying for the tires. Hollister stated that he did not know definitely how much the tires cost as he had not "gotten the bill yet" but that he would get the bill in a few days. About 1 July accused happened to see Hollister outside, the question of the tires came up, and accused asked about the bill. Hollister stated that

he had not had an opportunity to see Cooper yet, but would do so in a few days. Hollister had not asked accused about paying for the tires. About the middle of July when accused was getting in his car, Hollister came up and asked "something about the tires", something about "wasn't he to get the bill for the tires", and accused replied "Certainly". Accused denied that he instructed Hollister or anyone else to charge the tires on Government billing, and denied any conversation with Hollister about the tires shortly after they were put on, except the one in which he got out his check book. Accused at all times intended to pay for the tires. He denied talking to Mr. Jensen, Mr. Cooper, Mrs. Wenzel, Mr. Freiler or Mr. Rowe about the tires or method of paying for them (R. 71-73, 78-80).

The first time he knew the tires had been paid for by the Government was on the afternoon of 17 August, when Colonel Douglas called accused to his office. At that time Colonel Douglas said something about accused getting some tires on Government purchase order, "flashed" two papers bearing the signature of accused, but gave no details. He stated that he was going to have accused "discharged", that he was contemplating court-martial, and that the best thing to do was to get out of the Army. He stated that if he were "in my shoes" he would resign, that if accused would submit a resignation he would recommend acceptance, and that resignation would be the "same as an honorable discharge". The "Colonel was very excited and shouting" and accused "was not in complete possession" of his senses. Accused stated to Colonel Douglas that he "had received the tires but that they had been paid for by Hollister". This statement was not correct and accused made it because he was excited, did not know what he was accused of, and "in order to gain time". That evening, when Major Kupferer and the attorney of accused were present, accused corrected the statement. Colonel Douglas at that time repeated his statements about resignation, stated that he did not believe accused was guilty of conspiracy, and commented that accused had let Hollister get him "over a barrel". Colonel Douglas stated that he was relieving accused from duty the next day, as his signature on the papers was sufficient to cause such action. Colonel Douglas wanted accused to resign the first thing the following morning. Accused handed in his resignation without the words "for the good of the service". Later he learned from Army personnel what was involved in his resignation, and withdrew it (R. 73-74, 76-78).

Accused admitted that the signatures on exhibits which purported to be his, were in fact his. At the time when accused initialled the purchase request (Ex. 6) it had not been raised to $35. Accused had not previously seen the bill from Cooper's Garage for $20.75 (Ex. 4), nor the purchase order for $20.75 (Ex. 5) with a place for the signature of accused but not signed. He did not see a slip of paper attached to this purchase order until the investigation. Accused had not seen the "tally-in sheet" for $20.75 (Ex. 8). As to the purchase request for work on the bulldozer (Ex. 7) prepared by Mr. Freiler and initialled by accused, he did not recall it coming through, but stated they had found

it necessary to do considerable work on the bulldozer. He examined file copies of purchase orders for welding in the heating plant and on the bulldozer (Exs. 11 and 12), and stated that since his initials were there he must have signed the originals. Mrs. Wenzel's initials were on the margin. The practice was that after accused had approved a purchase request, Mrs. Wenzel prepared the purchase order and voucher, placed the "signed copies" on top, and left the "file copy" extending beyond the margin with her initials on it. The papers in evidence were submitted to accused in this way. When accused signed these papers, he had no knowledge that the services had not been rendered, did not know the charges were excessive, believed that the services had been rendered, and had no intent to defraud the Government. Mrs. Wenzel's initials indicated that there was a purchase request signed by the storekeeper and that all the proper papers were there. It was not customary for accused to go through the file when small amounts were involved. All he looked for were the initials of Mrs. Wenzel. She was authorized to exceed the estimated price only by ten percent. When he signed these papers he had no knowledge or cause to believe that the amounts included the price of his tires. When accused learned from Colonel Douglas what had happened, he sent his personal check to Cooper that evening. At all times he had money to pay for the tires (R. 74-76, 79-81).

On cross-examination accused stated that he considered Mrs. Wenzel an expert on purchasing. His one assistant was new, and spent most of his time getting acquainted with the work. Accused suggested that Hollister have the tires inspected. He denied that Hollister left a bill for the tires on his desk. Accused did not think it unusual that Cooper did not present a bill for two months, because Hollister had said he would get the bill and that Cooper was a friend of his. On the occasion when accused was about to leave in his car, Hollister said "something about paying for the tires", which accused thought ridiculous since he had twice previously asked Hollister for the bill. Accused did not say to Hollister "Don't you know what to do about it?" He denied asking Hollister whether he had a job he could put the tires on. He did not recall that Hollister said he could put part on the boiler room job and part on the bulldozer. He denied that he told Hollister to go see Mrs. Wenzel and prepare the necessary papers. Accused retracted his statement to Colonel Douglas because it was incorrect and on advice of counsel. Accused had had "more or less continuous" arguments and disagreements with Colonel Douglas. When accused signed the voucher for "$63.00" he did not look at the other papers in the file. Hollister did not at any time threaten accused (R. 82-88, 91).

Accused also testified that when Hollister quit his job accused, after consulting with Jensen, recommended that Hollister's leave pay be forfeited. When Jensen later stated that Hollister's wife was sick, accused had already signed the recommendation. Accused recounted several difficulties he had had with Colonel Douglas. He could give no explanation of why some of the employees would be willing to conspire with another man to put tires on his car without his knowledge (R. 88-91).

(378) 5. The evidence for the prosecution establishes that accused, post engineer at Marietta Holding and Reconsignment Point, Marietta, Pennsylvania, requested a civilian employee, John J. Hollister, foreman of the post mechanical section, to procure two new tires for the automobile of accused. Hollister had the old tires inspected, secured a certificate for two new tires from the ration board, and purchased them at the garage of John Cooper. Cooper supposed it was a cash transaction but when the tires were placed on the car Hollister instructed him to make out a bill to accused and he would see that Cooper was paid. Cooper made out the bill to accused for the two tires in the sum of $43 and also filled out the indorsement on the reverse side of the ration certificate reciting the sale on 16 June 1943 of two tires, described, at the unit price of $21.50, by John Cooper, Salunga, Pennsylvania as "seller" to John J. Hollister as "Purchaser or his agent". Hollister left the bill, the indorsed certificate and the tire inspection report on the desk of accused.

Hollister testified he saw accused about two days after the tires were purchased and asked, "How about the tires?" to which accused replied, "Don't you know what to do about them?" Hollister saw accused about two days later and when he again asked about the tires accused made the same reply as on the preceding occasion. Charles Jensen, superintendent of construction at the post, was with accused at the time and he told Hollister, "I'll see you later". Hollister saw Jensen and they discussed various jobs to which the price of the tires could be charged. When Hollister saw accused a third time, which was a week subsequent to the purchase of the tires, accused asked him if there was some job the tires could be charged to and Hollister told him of his conversation with Jensen. Accused then told Hollister to see his purchasing agent, Esther M. Wenzel.

Hollister went to Mrs. Wenzel and instructed her to prepare the necessary papers so that the purchase price of the tires would be paid by the Government. Mrs. Wenzel was reluctant but after consulting the chief clerk, Joseph H. Rowe, she consented. Rowe testified he consulted "Colonel Bonner", the "second in command" at the post, about the matter and was instructed to proceed. (Colonel Bonner, a character witness for accused, testified he did not "recall" any such conversation with Rowe). There was in the office at that time a bill from Cooper for $20.75 for welding he had done in the post heating plant and it was decided to raise this bill to $35 to cover part of the cost of the tires and to have Cooper submit a fictitious claim for "welding a bulldozer" for $28.75, the balance of the price of the tires. Hollister called Cooper on the phone from Mrs. Wenzel's office and he agreed to send in two new statements in the sums of $35 and $28.75.

A purchase request for the welding done by Cooper in the sum of $20.75, which had already been approved by accused, was raised to $35 and the notation made upon it, "Change to 35.00 OKed By Mr. Rowe"; and

a purchase order in the sum of $20.75 was marked "Void" as was Cooper's original bill in that amount. A new purchase order in the sum of $35 was made out and also a receiving report. To accompany the fictitious bill for welding the bulldozer in the sum of $28.75, a purchase request, receiving report, and purchase order were made out, together with a voucher in the sum of $63.75 for the two bills. The entire file consisting of the new, the altered and the voided forms were then sent in to accused for his signature. The forms bore Mrs. Wenzel's initials which indicated they were correct as to form. Accused signed the voucher, the purchase orders and receiving reports, and initialed the new purchase request as well as the copies of the various forms. The voucher and invoices were then sent to Colonel F. J. Keelty, Finance Officer at Philadelphia, who made payment to Cooper about 1 July 1943.

Sometime prior to 5 August 1943, when Hollister left his employment at the post, Cooper talked to accused concerning a bid on truck repairs but the subject of tires was never mentioned. Around 15 August Hollister and Cooper were questioned by an investigating officer concerning the tire transaction and Cooper thereupon refunded $43 to the Government. Accused was called into the office of Colonel Douglas, the post commander, on the afternoon of 17 August, questioned, and he told Colonel Douglas that he had received the tires but that Hollister had paid for them. On the evening of that day, accused, accompanied by civilian counsel, went to Colonel Douglas' office and retracted his statement that Hollister had paid for the tires. Colonel Douglas suggested to accused that under the circumstances it would be easier for him if he tendered his resignation which accused did the following morning. He subsequently withdrew his resignation. Following his talk with Colonel Douglas accused sent Cooper his check for the price of the tires.

The evidence for the defense consisted of the testimony of several character witnesses and the testimony of accused. Accused testified that he had asked Hollister to procure two new tires for his car but he had no intention of charging the purchase price to the Government nor any knowledge whatever of the scheme by which it was done. He stated that he had an independent income and was not dependent on his salary for maintenance. The day the tires were placed on his car he found a ration certificate and tire inspection report on his desk but no bill for the tires. He saw Hollister about two days later and took out his check book to pay for the tires but Hollister said he had not yet received the bill. Accused denied he ever said to Hollister, "Don't you know what to do about it?" or ever discussed any method of paying for the tires except by himself. He did not discuss the matter with Jensen or Cooper. The next time he saw Hollister was around the first of July and in reply to an inquiry by accused Hollister said he had not secured the bill but would do so in a few days. About the middle of July Hollister came up to accused and said, "wasn't he to get the bill for the tires", and accused replied, "Certainly". Accused heard nothing further about the tires until 17 August 1943 when Colonel Douglas called him into his office. The colonel was excited and shouting and made several threats, whereupon

accused became excited and made a statement that Hollister had paid for the tires. He retracted that statement later on in the day. Under pressure from Colonel Douglas he submitted his resignation the next morning but withdrew it when he learned what it involved. Accused admitted signing or initialing the various papers by which the price of the tires was paid by the Government but asserted that he did so without reading them. He stated that his many duties did not allow him time to read or investigate claims in which relatively small amounts were involved. He did not know at the time he signed the papers that the services had not been rendered and had no knowledge or cause to believe that the amounts included the price of his tires.

Although a witness for the prosecution, the testimony of Jensen was generally favorable to the accused. Jensen denied that he had ever discussed with Hollister or accused a method of charging the price of the tires to welding jobs or to anything else. He testified that he had heard Hollister say, "He wants me to put it on the welding job for the boiler room" and assumed Hollister was referring to accused and the tires, but made no suggestions to Hollister in that connection.

The undisputed evidence in this case establishes that the cost of the two tires purchased for the personal car of accused was added to a Government voucher purporting to represent a public obligation and that the voucher was presented to a finance officer and paid by the Government. It is likewise undisputed that papers were prepared to support the fraudulent voucher in which a legitimate bill was expanded beyond the actual cost of services rendered and another wholly fictitious bill was made for services never rendered, and that the voucher and supporting papers were approved and signed by accused before being forwarded to the finance officer. Furthermore, it is undisputed that the fraudulent papers were prepared by the purchasing clerk at the post, Mrs. Wenzel, who acted under instructions from Hollister, a foreman at the post, who had previously purchased the tires at the request of accused.

Hollister testified that he carried out the fraud with the knowledge of accused and at his request. If his testimony is believed the case presents the not unusual situation of a subordinate doing a dishonest act for a superior for the apparent purpose of keeping in his good graces. But accused denies that he was a party to or aware of the fraud. If his testimony is accepted it must be assumed that Hollister, knowing accused was indebted for a small, personal bill, concocted a scheme to have the Government pay it, thereby benefiting the accused and defrauding the Government; did not reveal the scheme to accused and by evasive pretenses kept him completely ignorant of it although disclosing it to several other piople, among them employees closely associated with accused; falsely led these employees to believe that accused was aware of the fraud and procured the making of the necessary papers to carry it out knowing that these papers required approval and signing by accused before the fraud could be effected; and that in doing these

things Hollister acted for no known cause. The assumption is improbable. Such actions could possibly be the work of a man motivated by jealousy, revenge or some similar sinister purpose, but there is nothing in the record to support this implication. The record does suggest that Hollister may have become angered at accused over a question of leave pay when he left his employment at the post on 5 August but this obviously had no bearing on his actions in June. Furthermore, the open manner in which Hollister carried out the fraud effectually negatives any suggestion of "frame-up". It may be noted, for whatever inferences that may be drawn, that although the fraudulent scheme was known to Jensen, the superintendent of construction, Mrs. Wenzel, the purchasing clerk, Mr. Rowe, the chief clerk, and possibly to Colonel Bonner, the "second in command" at the post, none of these people discussed the matter with accused or questioned that Hollister was acting under the direction of accused.

Corroborative of the testimony of Hollister that accused was aware of the fraud is the undisputed fact that accused approved and signed the voucher and supporting papers by which the price of the tires was charged to the Government. Accused testified that he signed without reading them and gave other testimony implying that if he had read them he would not have discovered the fraud as they were regular on their face. Unless the signature of accused on the voucher and supporting papers be considered a mere formality signifying nothing it must be assumed that as the accountable officer accused had the duty to not only read what he signed but to assure himself that the goods or services covered by the voucher had been received. It may well be that his many duties as post engineer rendered such action very difficult but if he assumed to act without proper knowledge he did so at his own peril and he should not complain because the natural inferences that follow from the act of an officer approving the papers by which a fraud is carried out to his benefit are now drawn against him. The contention that there was nothing in the nature of the papers approved to place him on guard is very questionable. The file contained the original, legitimate bill for $20.75 for welding in the boiler room and accompanying purchase order marked "Void. See New Order for 35.00 attached. OKed by Mr. Rowe" and the new bill and order for the same services on the same date in the larger amount. Such a situation should have caused a man of reasonable prudence to make some further inquiry. Accused in his testimony attempts to minimize the extent of the action he took on the file. It appears, however, that the signature of accused was required on a voucher, two purchase orders, two receiving reports and his initials on one purchase request and various copies of the forms. It is obvious that accused must have given the file more than passing attention.

It is appropriate to inquire why accused, if not a party to the fraud and entirely unaware that the cost of his tires was being charged to the Government, did not pay for them himself during the two months that elapsed between 16 June, the date of the purchase, and 17 August, when he was questioned about it. Accused testified he did not find on his desk the bill which Hollister testified he left there on the day of the

purchase and that he never received a bill at any time although always ready and willing to pay. He further testified that on three occasions, two days after the purchase, the first of July and the middle of July, he talked to Hollister about securing the bill. The plausibility of this testimony must be considered against the undisputed evidence that accused knew that the tires were purchased from Cooper, that on the day of the sale he received a completed tire ration certificate which contained Cooper's name and address as the "seller" of the tires as well as the purchase price, and the further fact that sometime between 16 June and 5 August accused talked to Cooper, concerning a bid on truck repairs, and never broached the matter of payment for the tires. Inasmuch as Hollister left his employment at the post on 5 August under circumstances making their further relationship unfriendly accused could not have expected that Hollister would bring him the bill but nevertheless accused made no effort to secure it himself.

Consideration must also be given to the fact that when questioned by Colonel Douglas about the fraud accused lied and stated that Hollister had paid for the tires and the further fact that he submitted his resignation the next day. Accused testified that he did these things because he was excited and under "pressure" from Colonel Douglas but his actions are also susceptible of another and less favorable interpretation.

It is shown by the evidence that accused is a man of some wealth and not dependent upon his Army pay and allowances for maintenance, by virtue of which his counsel argued to the court that it was improbable that he would engage in a petty fraud of this character. Such evidence indicates that accused was not motivated by financial necessity but it cannot be taken as proof that he did not commit the offense against compelling evidence to the contrary.

In accordance with the principle that on the question of credibility, the findings of the trial court, which enjoyed the opportunity both to see and hear the witnesses, while not conclusive, are entitled to considerable weight (Dig. Ops. JAG, 1912-40, Sec. 395 (56); CM 153479), the Board of Review attaches importance to the fact that the court in this case has, by its findings, accepted the testimony of the witness Hollister, and rejected the conflicting testimony of accused. As it is the function of the Board of Review to weigh the evidence in Presidential cases the position of the Board in such cases is in some respects analogous to the position of appellate courts in equity, where it is generally held that the findings of the trial court, while not conclusive, are entitled to great respect and deference on appeal. (Federal cases are collected in 4 F. Dig. 944). The reason for this rule is given in 5 Corpus Juris Secundum 758 (sec. 1663) as follows:

> The rule of deference is to a great extent but a rule of necessity or convenience invoked because of the difficulties encountered by the appellate court in getting at the true facts and the superior position or advantage of the trial court in this respect. This is clearly shown by the fact that the term-

inology sometimes used to express the rule of deference is that the appellate court in determining the facts will make due allowance for the more advantageous position occupied by the trial judge, in that he has had the opportunity to observe the conduct and appearance of the witnesses while testifying. It is to be expected, therefore, that the deference and weight accorded the fact findings of the chancellor will vary somewhat according to the degree in which difficulty is encountered by the appellate court in getting at the true facts or in which the advantages often possessed by trial courts are present or lacking - and such is the situation.

In view of the foregoing considerations and accepting as substantially true the testimony of the witness Hollister, the Board of Review concludes that the evidence is sufficient to establish beyond a reasonable doubt that accused conspired with John Hollister and others to defraud the United States by means of a false and fraudulent claim (Spec. 2), that he caused the false and fraudulent claim to be presented to a finance officer for approval and payment (Spec. 1), and that he advised the making and caused the delivery to the finance officer of the various papers by which the fraud was carried into execution (Specs. 3 to 8), all in violation of Article of War 96.

6. The Board has given careful consideration to a brief prepared by accused, attached to the record, and a letter dated 15 November 1943, from Brigadier General Fred W. Llewellyn (Ret.), counsel for accused, presenting argument in his behalf.

7. The accused is 36 years of age. The records of the Office of The Adjutant General show his service as follows: appointed second lieutenant, Corps of Engineers-Reserve, 13 September 1932; accepted 20 September 1932; active duty, 2 August to 15 August 1936; reappointed 13 September 1937; active duty 7 July to 20 July 1940 and from 12 August 1940; promoted to first lieutenant, Corps of Engineers-Reserve 2 December 1940; and temporarily promoted to captain, Army of the United States, 17 June 1942.

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

Samuel M. Driver, Judge Advocate

T. Robert Garmor, Judge Advocate

H. Lotterhos, Judge Advocate

1st Ind.

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

6 APR 1944

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Captain George C. Calder (0-300668), Corps of Engineers.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. The accused while serving as post engineer, purchased some new tires for his private automobile and conspired with the foreman of the post mechanical section and others to defraud the United States by having the purchase price of $43 included in a false and fraudulent claim (Spec. 2), caused the false and fraudulent claim to be presented to a finance officer for approval and payment (Spec. 1) and advised the making and caused the delivery to the finance officer of the various papers by which the fraud was carried into execution (Specs. 3 to 8). I recommend that the sentence to dismissal be confirmed and carried into execution.

3. Consideration has been given to a request for clemency by the accused with accompanying letters from Lieutenant Colonel A. T. Quick, Corps of Engineers, Lieutenant Colonel E. A. Bonner, Quartermaster Corps and Lieutenant Colonel F. W. Staiger, Corps of Engineers, attached to the record of trial, and to a letter dated 10 November 1943 from Honorable Joseph F. Guffey, United States Senator and a letter dated 23 October 1943 from the Honorable J. Roland Kinzer, Member of Congress.

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 carrying into effect the recommendation made above.

Myron C. Cramer

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

5 Incls.
Incl.1-Rec. of trial.
Incl.2-Drft.ltr. for sig. S/W.
Incl.3-Form of Action.
Incl.4-Ltr. fr. Sen. Guffey, 10 Nov. 43.
Incl.5-Ltr. fr. Hon. Kinzer, 23 Oct. 43.

(Sentence confirmed. G.C.M.O. 274, 8 June 1944)

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

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CM 243488

16 NOV 1943

UNITED STATES v. Major CHARLES E. BUNKER (0-302700), Air Corps.	CARIBBEAN WING AIR TRANSPORT COMMAND Trial by G.C.M., convened at Morrison Field, West Palm Beach, Florida, 23 October 1943. Dismissal.

OPINION of the BOARD OF REVIEW
ROUNDS, HEPBURN and FREDERICK, 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 Major Charles E. Bunker, 408th Base Headquarters and Air Base Squadron, Army Air Base, 36th Street Airport, Miami, Florida, did, in a public place, to wit, the Seminole Bar, at or near Hialeah, Florida, on or about 12 September 1943, wrongfully drink intoxicating liquors with Private Sanford M. Massey and Private James E. McWhorter, enlisted men of the United States Army.

Specification 2: In that Major Charles E. Bunker, 408th Base Headquarters and Air Base Squadron, Army Air Base, 36th Street Airport, Miami, Florida, did, in a public place, to wit, the Seminole Bar, at or near Hialeah, Florida, on or about 12 September 1943, while drinking with enlisted men, wrongfully order Sergeant Bruce W. Humphrey, a non-commissioned officer of the United States Army, to go to the bar and get three drinks of intoxicating liquor, and serve such drinks to said Major Charles E. Bunker and said enlisted men.

Specification 3 to Specification 18 inclusive: Finding of not guilty.

He pleaded not guilty to the Charge and all of the Specifications. He

was found guilty of the Charge and Specifications 1 and 2, and not guilty of the remaining Specifications. No evidence of previous convictions was introduced at the trial. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

3. The competent evidence produced by the prosecution in support of the Specifications of which the accused was found guilty may be summarized as follows: The accused during the occurrences hereinafter related was subject to the jurisdiction of the court (R. 20). In the early evening of 12 September 1943, he was at the Seminole Bar in Hialeah, Florida (R. 7, 10, 14, 16). This bar is frequented by officers, enlisted men and civilians (R. 9, 11, 14). They often sat at the same tables (R. 9). It required the services of two bartenders and a waitress (R. 14). It is the only bar in that locality that sells intoxicants stronger than beer.

The accused was playing an undescribed gambling machine when two enlisted men, Privates McWhorter and Massey, dressed in fatigue clothes or coveralls, came into the bar and stood and watched him for a while. The accused then offered to buy them a drink which he did and the three sat down at a table close to the front door (R. 16). The accused was in his uniform as a major of the United States Army (R. 7, 10). The three sat at the table for several hours and had a "few" drinks (R. 14, 17). At least 25 civilians came in and out of the bar during this time (R. 14). The drinks they consumed were of scotch and soda.

While they were seated at the table Sergeant Bruce W. Humphrey and a corporal came through the bar. As they passed the table occupied by the accused and the two soldiers Humphrey spoke to the two soldiers. Being unable to find the person they were seeking, Humphrey and the corporal again passed the table on their way out, and again Humphrey spoke to the two soldiers seated there. Then the accused called the sergeant over to the table and asked him, "Sergeant, will you get three drinks for us"? Humphrey stood at attention and stated that he would like to go as he had someone waiting for him outside. The accused stood up, and looked at Humphrey for a minute or two, and then asked him if he liked his stripes and if he would like to keep them. Humphrey said he liked them and wanted to keep them. The accused then told him that he could have them taken away from him and that a man of his rank "should have service as he orders it". He also told the sergeant that he was the most "son of a bitching" soldier that he had ever seen. Thereupon the sergeant went to the bar where three drinks were sitting, picked them up and placed them on the accused's table. He was given a five dollar bill by McWhorter with which to pay for the drinks. He used it for that purpose, laid the change on the table, and asked permission of the accused to go. They shook hands. The accused said, "yes" and Humphrey then left the bar (R. 7-8, 10). The two soldiers at the table

with the accused were known to Humphrey as they were from the same "outfit" (R. 9). There were "quite a few" people in the bar during the occurrence (R. 9). The bartender saw the accused sitting at the table with two men in overalls or coveralls whom he "believed" were soldiers with drinks in front of them on the table (R. 14).

McWhorter testified that the accused paid for the drinks (R. 18). The three of them each had two drinks together while sitting there at the table (R. 18).

4. The accused elected to testify under oath. After relating at length his military career he testified that he went to the Seminole Bar on Sunday afternoon, 12 September 1943, which was the only place in the vicinity that sells any intoxicants stronger than beer. He was playing the slot machine. The place is frequented by both officers and enlisted men. The two enlisted men, McWhorter and Massey, came in and watched him play the machine. He asked them if they would like to have a drink. They said, "yes" and the drinks were ordered. It was pretty crowded around there so he suggested that they sit down at a table next to the machine and close to the bar. Just before Sergeant Humphrey came in accused had ordered three drinks. There was a crowd around the bar so the accused asked Humphrey if he would get him the three drinks. Humphrey said there was someone waiting for him outside and would like to run along (R. 48). He did not intend his request to be an order (R. 48-49).

> "At that time I stood up and not in any 'dressing down' tone, he was not admonished by me, I asked him if he would get me three drinks. I was not taking advantage of his being a non-commissioned officer or trying to throw my weight around - that was not the manner in which it was intended at all. Sergeant Humphrey was standing at attention and he was a very neat soldier and when I made that remark about his being a 'son of a bitching' soldier I had only reference to his being a good soldier. We were not at all unfriendly and I did not threaten him; perhaps because of my rank he thought it was an order. I am sure there is a question in his mind and I definitely did not intend it to be an order. He got the drinks and put them on the table and asked if he could run along and I said 'sure'. We shook hands and parted friends."

It was not an unusual sight to see officers and enlisted men together at this bar and at the tables (R. 49).

Defense counsel also offered in evidence his efficiency rating card (Def. Ex. A) showing a rating of Excellent except for the period covered by these charges, and also letters from 19 persons including

officers, noncommissioned officers and civilians expressing their faith in the ability, efficiency, honesty and gentlemanly qualities of the accused (Def. Ex. B).

5. The accused was found guilty of conduct unbecoming an officer and a gentleman. The conduct contemplated is "action or behavior in an official capacity which, in dishonoring or disgracing the individual as an officer, seriously compromises his character and standing as a gentleman, or action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the individual personally as a gentleman, seriously compromises his position as an officer and exhibits him as morally unworthy to remain a member of the honorable profession of arms. (Winthrop.)" (MCM, 1928, par. 151, p. 186)

The conduct of the accused complained of in the Specifications of which he was found guilty did not occur in an official capacity but occurred in an unofficial capacity. It was, therefore, incumbent upon the prosecution to prove beyond a reasonable doubt (1) that the accused did conduct himself in the manner alleged in the Specifications and (2) that such conduct so disgraced the accused personally that he was no longer morally fit to remain an officer in the Army of the United States.

As to (1), it was clearly shown by the evidence, and also admitted by the accused, with reference to Specification 1, that he did, in a public place, namely, the Seminole Bar at Hialeah, Florida, on 12 September 1943, drink intoxicating liquors with two enlisted men of the United States Army, exactly as alleged in the Specification.

Also as to (1) it was shown beyond a reasonable doubt that the accused did, at the same time and place, order Sergeant Bruce W. Humphrey to go to the bar and get three drinks of intoxicating liquor, and serve them to the accused and the enlisted men with him, as alleged in Specification 2.

With reference, however, to (2) above there is nothing dishonorable or disgraceful per se on the part of an officer to sit at the same table with and/or to orderly drink an intoxicating drink with an enlisted man or men. Such conduct could not so disgrace the accused that he would no longer be fit to remain an officer. It therefore follows that the facts alleged in Specification 1 do not of themselves constitute a violation of the 95th Article of War.

The same conclusion seems inescapable with reference to Specification 2 of the Charge. The conduct of the accused in compelling a noncommissioned officer, with threats of demotion, to act as a waiter in a public barroom and to wait not only on an officer of field grade but also upon his drinking companions, two enlisted men of inferior rank, although reprehensible, did not offend so seriously against law, justice, morality, or decorum so as to expose the offender to disgrace, socially or as an officer. Therefore, the 95th Article of War was not violated.

With reference, however, to the same facts considered as a violation of the 96th Article of War, it has long been recognized as a custom of the service that an officer should not fraternize with enlisted men to the extent that it will affect or prejudice good order or military discipline. Such familiarity has frequently been held to be a violation of the 96th Article of War. Drinking intoxicating liquor with another is one form of social intercourse or fraternization.

In order to constitute a military offense in violation of Article of War 96 additional circumstances other than the bare act of drinking liquor with an enlisted man must be shown to prove that good order and military discipline was in fact affected or prejudiced.

In the following pertinent cases, wherein it was shown that the accused officer drank intoxicating liquor with enlisted men, it was further shown that the officer, at the time, was either drunk or disorderly and The Judge Advocate General held the conduct of the officer to be a violation of the 96th Article of War: CM 229412; CM 216732; CM 230222; CM 233766; CM 234558; CM 235295; CM 236209; CM 239172.

In CM 124799 (1919) the additional fact that possession on a military reservation of intoxicating liquor at that time (the prohibition era) was illegal, was sufficient in itself to establish the act of drinking with enlisted men a violation of the 96th Article of War.

In addition to drinking intoxicating liquor with two strange enlisted men in a public bar, the accused officer also humiliated and degraded a noncommissioned officer in their presence by compelling him, by threats of demotion, to act as a waiter and wait upon the enlisted men who were of inferior rank. Such conduct was beyond argument prejudicial to good order and subversive of military discipline. All of the circumstances of the case must be borne in mind when applying the above rules to both Specifications. It therefore follows that the competent evidence of record is sufficient to sustain a finding of guilty of the two Specifications and to support a finding of guilty of a violation of Article of War 96, but not of a violation of Article of War 95. The two Specifications arise out of the same occurrence, but as the punishment imposed is supported by a violation of either Specification, no substantial right of the accused

has been violated.

6. The record shows the accused to be 33 years of age. He graduated in 1928 from high school and the University of Maine in 1933. While attending school and college he took ROTC training and was commissioned second lieutenant in the Reserve 27 May 1933. He engaged in athletics in college and was a member of one of the fraternities. He was called to numerous 14-day tours of active duty from time to time with his component, the Infantry. In 1937 he was promoted to first lieutenant of Reserves. He was employed by the New England Telephone Company from 1935 until June 1941 when he was ordered to active duty. During 1941 he attended the Air Corps Supply School at Patterson Field, Ohio, for sixty days and after satisfactorily completing the course was assigned to the First Air Force Command at Mitchel Field, New York, in the Materiel Section. This organization was inactivated and in May 1942 he was assigned to the Army Air Base at Miami, Florida, as Commanding Officer of the 337th Base Headquarters and Air Base Squadron. In March 1942 he had been promoted to captain. Having served three months as a captain, in the following June of 1942 he was promoted to major. He commanded the 337th Squadron until it was absorbed by the 408th. He became Executive Officer of the latter, as well as Adjutant and Statistical Officer. In October 1943 he was transferred to Morrison Field. His rating card shows that his commanding officers rated his manner of performing his duties from 22 May 1942 to 20 June 1943 as Excellent but from 1 July 1943 to 24 September 1943 as only Satisfactory.

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 finding of guilty of Specifications 1 and 2 as violations of Article of War 96, and also legally sufficient to support the sentence and to warrant confirmation thereof. A sentence of dismissal is authorized upon conviction of violation of Article of War 96.

William A. Pounds, Judge Advocate.

Earle Hepburn, Judge Advocate.

Herbert B. Ledbetter, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 22 NOV 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 Major Charles E. Bunker (0-302700), 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 and 2 thereunder as involves findings of guilty of those Specifications in violation of Article of War 96, legally sufficient to support the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but commuted to a reprimand and forfeiture of $50 pay per month for six months 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.
1 - Record of trial.
2 - Dft. ltr. for sig. S/W.
3 - Form of action.

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but commuted to reprimand and forfeiture of $50 pay per month for six months. G.C.M.O. 13, 6 Jan 1944)

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

N.D.

-1 DEC 1943

(393)

SPJGH
CM 243492

UNITED STATES	)	90TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Maneuver Area, Salome, Arizona, 30 October 1943. Dismissal, total forfeitures and confinement for three (3) years.
Second Lieutenant RAYMOND C. BALTISBERGER (O-1299177), Infantry.	)	

OPINION of the BOARD OF REVIEW
DRIVER, LOTTERHOS and LATTIN, Judge Advocates

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

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

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

Specification: In that Second Lieutenant Raymond C. Baltisberger, 358th Infantry, did, without proper leave, absent himself from his organization at Camp Granite, California, from about September 26, 1943, to about October 7, 1943.

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

Specification 1: In that Second Lieutenant Raymond C. Baltisberger, 358th Infantry, with intent to deceive his Regimental Commander, did, on or about 25 September 1943, procure Second Lieutenant Byron J. Clark, 358th Infantry, to execute for him a false official statement on the Officers' Register, at 358th Regimental Headquarters, by making an entry therein to indicate the return of the said Lieutenant Raymond C. Baltisberger, from leave to duty, he not having at that time returned from leave to duty, and well knowing said statement to be false.

Specification 2: In that Second Lieutenant Raymond C. Baltisberger, 358th Infantry, with intent to deceive his Division Commander,

did, on or about 25 September 1943, procure Second Lieutenant Byron J. Clark, 358th Infantry, to execute for him a false official statement on the Officers' Register at Headquarters, 90th Infantry Division, by making an entry therein to indicate the return of the said Lieutenant Raymond C. Baltisberger, from leave to duty, he not having at that time returned from leave to duty, and well knowing said statement to be false.

He pleaded guilty to and was found guilty of all Specifications and Charges. He was sentenced to dismissal, total forfeitures and confinement at hard labor for fifteen years. The reviewing authority approved only so much of the sentence as provides for dismissal, total forfeitures and confinement at hard labor for three years, and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution shows that accused, a member of Company M, 358th Infantry, was due back from official leave at or before midnight, 25 September 1943. On the night of 25 September, Second Lieutenant Byron J. Clarke, tent mate of accused, received a telephone call from accused, who requested that Lieutenant Clarke "sign him in from leave to duty on the register of the 90th Div and 358th Infantry". In compliance with the request, Lieutenant Clarke on 25 or 26 September made an entry on the officers' register of the 358th Infantry (Ex. C) and an entry on the officers' register of the 90th Infantry Division (Ex. D), both showing accused from leave to duty. On Sunday, 26 September, accused was not present in the company. An extract copy of the morning report of Company M, 358th Infantry (Ex. B) showed accused from leave to absent without leave at 0001, 26 September 1943, and from absent in arrest in the hands of military authorities to arrest in quarters, 8 October 1943. On 7 October, Second Lieutenant Walter D. Osborne, who had been assigned to attempt to locate accused, found him in "J. V.'s Cafe", took him into custody, and the next day returned him to Camp Granite. At the time of his apprehension, accused had been drinking but was not intoxicated, and was in uniform (R. 7-13).

4. Captain Robert F. Burns and Lieutenant Clarke, both of whom had known accused since 21 August 1943, testified that his reputation as an officer was good and his reputation for truth and veracity was good or excellent. Captain Burns would like to have accused as a member of his command. By stipulation the efficiency record of accused (Ex. E) was introduced in evidence, and showed that between 25 November 1942 and 31 July 1943 he had received three ratings, each of "Excellent" (R. 13-15).

5. Captain John W. Marsh, commanding Company M, 358th Infantry, as a witness for the court, testified that accused was not present for duty between 26 September and 7 October 1943, and that he did not see accused during that period (R. 7, 15).

6. The evidence shows and the pleas of guilty admit that accused was absent without leave as alleged, and that he requested and procured his tent mate, Second Lieutenant Byron J. Clarke, to make a false entry, that accused had returned to duty from leave, in the officers' register of the 358th Infantry Regiment and of the 90th Infantry Division. His conduct in procuring the making of false entries as stated was clearly dishonorable and in violation of the 95th Article of War.

7. The accused is 33 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 4 April 1941; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School, and active duty, 11 November 1942.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 61st Article of War, and mandatory upon conviction of a violation of the 95th Article of War.

Samuel M. Drivers, Judge Advocate

H. Lotterhos, Judge Advocate

Norman D. Lattin, Judge Advocate

1st Ind.

War Department, J.A.G.O., 18 DEC 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 Raymond C. Baltisberger (0-1299177), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. The accused, with intent to deceive, procured another officer to execute false entries in the officers' registers at division and regimental headquarters, showing accused from leave to duty (Specs. 1 and 2, Chg. II), and was absent without leave for about eleven days (Spec., Chg. I). Although accused was guilty of serious offenses, his past record appears from the evidence to be good. I recommend that the approved sentence to dismissal, total forfeitures and confinement at hard labor for three years be confirmed, that the confinement and forfeitures be remitted, and that the sentence as thus modified be carried into execution.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action carrying into effect the recommendation made above.

Myron C. Cramer

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

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

(Sentence confirmed but confinement and forfeitures remitted. G.C.M.O. 53, 2 Feb 1944)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington 25, D.C.

(397)

24 NOV 1943

Board of Review

CM 243500

UNITED STATES v. Private OPAL L. KEEN (18053278), 313th Airdrome Squadron, Hunter Field, Georgia.	THIRD AIR FORCE Trail by G.C.M., convened at Hunter Field, Georgia, 16 September 1943. Dishonorable discharge and confinement for five (5) years. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
DRIVER, LOTTERHOS and LATTIN, Judge Advocates.

The record of trial in the case of Private Opal L. Keen (18053278), the soldier named above, has been examined and is held by the Board of Review to be legally sufficient to support the sentence.

Samuel M. Driver, Judge Advocate

F. J. Lotterhos, Judge Advocate

Norman D. Lattin, Judge Advocate.

1st Indorsement

War Department, J.A.G.O. 7 DEC 1943 To the Commanding General, Third Air Force, Tampa, Florida.

1. In the case of Private Opal L. Keen (18053278), 313th Airdrome Squadron, Hunter Field, Georgia,

attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, and Executive Order No. 9363, dated July 23, 1943, you now have authority to order the execution of the sentence.

2. As indicated in the letter of Lieutenant Colonel Ira M. Tipps, Acting Staff Judge Advocate, to The Judge Advocate General dated 5 November 1943, the Eastern Branch, United States Disciplinary Barracks, Beekman, New York, should be designated as the place of confinement. However, it will not be necessary as suggested in paragraph 2 of that letter to first publish a General Court Martial Order designating the place of confinement in accordance with the action taken and thereafter publish a second corrective General Court Martial Order. It will be sufficient to publish a General Court Martial Order designating the place of confinement as stated above.

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

(CM 243500).

James E. Morrisette,
Colonel, J.A.G.D.,
Assistant Judge Advocate General
In Charge of Military Justice Matters.

DEC 9 1943 AM

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