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Volume XXIX

including

CM 244760 to CM 246125

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

SPJGK
CM 244760

10 JAN 1944

UNITED STATES	)	INFANTRY REPLACEMENT TRAINING CENTER
	)	
v.	)	Trial by G.C.M., convened at Camp Fannin, Texas, 10 November 1943. Dismissal.
	)	
Second Lieutenant CARL CIHOS (0-1308208), Infantry.	)	

OPINION of the BOARD OF REVIEW
TAPPY, 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. Accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 95th Article of War.

Specification 1: In that Carl Cihos, 2nd Lieutenant, Infantry, was on or about 17 October 1943, at or near the Wagon Wheel Cafe, on Highway 80, about three miles east of Gladewater, Texas, a public place, drunk and disorderly while in uniform.

Specification 2: In that Carl Cihos, 2nd Lieutenant, Infantry, did, at or near the Wagon Wheel Cafe, on Highway 80, about three miles east of Gladewater, Texas, on or about 17 October 1943, wrongfully strike Juanita Daniel in the face with his hand.

Specification 3: In that Carl Cihos, 2nd Lieutenant, Infantry, did, at or near the Wagon Wheel Cafe, on Highway 80, about three miles east of Gladewater, Texas, on or about 17 October 1943, engage in a fight with his fists with one Private George E. Walsh, an enlisted man, Army of the United States.

Specification 4: In that Carl Cihos, 2nd Lieutenant, Infantry, did, in the Wagon Wheel Cafe, on Highway 80, about three miles east of Gladewater, Texas, a public place, on or about 17 October 1943, drink beer with enlisted men, Army of the United States.

He pleaded not guilty to the Charge and Specifications. He was found guilty of Specification 1 of the Charge except the words "and disorderly", guilty of Specifications 2,3, and 4 of the Charge, and not guilty of the Charge, but guilty of violation of the 96th Article of War. Evidence of one previous punishment under Article of War 104 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. Summary of the evidence.

The incidents alleged in the Specifications of the Charge occurred at the Wagon Wheel Cafe, which is about two and one half miles beyond the city limits of Gladewater, Texas, on Highway No. 80, between Gladewater and Longview, Texas (R.39,40). The cafe is a place where beer and soft drinks are sold; it has a mechanical record playing machine and a dance floor (R.41).

Mrs. Unis Bess Harmon, who lives in Gladewater, Texas, testified that on a Sunday afternoon in October (actually 17 October 1943) she met accused in the Log Cabin in Gladewater (presumably a public place), where she, some soldiers, and some civilians were sitting together at a table and some one was playing a piano (R.35). Some of the civilians asked accused over to the table. Later, accused and witness left the place together. Witness testified that in their party when they left were a "Sergeant Littles", Sergeant Dawson who testified and another person whom she did not remember (R.35). Sergeant Odie Dawson, Military Police Detachment, 3861st Service Unit, Camp Fannin, Texas, testified that he did not join the group until a later hour and at another place. His story was that he had been in Martin's Cafe on Main Street at approximately 6 o'clock that afternoon. A Private Templin came in, talked to him, and insisted that he go out and meet "the folks" (R.28,32). Dawson went outside and met accused and Mrs. Harmon sitting in the front seat of Mrs. Harmon's car (R.28,32,33). They stopped for a while at the Wagon Wheel Cafe, after first having stopped at some other place, where they "had a few" drinks (R.29,35).

Mrs. Harmon stated that as they were leaving the Wagon Wheel a girl named Juanita Daniels came to the door and asked her if she and three soldiers who were with her might accompany them. Mrs. Harmon gave her consent, so the four new members of the party got into the back seat of Mrs. Harmon's car (R.35). With Juanita Daniels were Privates Frank Cizmadja, Martin Fernandez, and George Walsh, all of Company B, 57th Training Battalion, Camp Fannin, Texas. The soldiers were in uniform (R.10,11,15,16,29,37), as was accused (R.10,22,30). The time of this meeting was fixed by several witnesses at about 6 o'clock p.m. (R.15,23, 24). Mrs. Harmon, Sergeant Dawson, and accused rode in the front seat of the car (R.36). They drove to a place, called "Dreamland", where

Mrs. Harmon expected to find some friends. Not finding the friends at the Dreamland, they went across the road to Cunningham's Cafe. Here they talked and drank some beer (R.36). Sergeant Dawson stated that they remained at Cunningham's for about 45 minutes, during which time they had two rounds of beer (R.29).

The party then left Cunningham's and returned to the Wagon Wheel (R.23,29,36). They ordered more beer, and remained at the Wagon Wheel approximately an hour. The beer was sold in quarts (R.11,29,30,31). Private Walsh estimated that they ordered two or three rounds of beer, for which the members of the party paid in turn. He could not remember whether accused paid for any (R.21). Two tables had been drawn together to make room for the whole party. Mrs. Harmon, Sergeant Dawson and accused sat on one side, and Miss Daniels and Privates Walsh, Cizmadja and Fernandez on the other (R.13). Mrs. Harmon, Sergeant Dawson, and Privates Walsh, Cizmadja and Fernandez all testified that accused drank beer with them at the Wagon Wheel (R.11,17,23,24,31,36).

During the evening some argument arose between Miss Daniels and accused. Private Walsh stated that accused and Miss Daniels said something to each other and that Miss Daniels left the table and went to the counter. Exactly what was said the witness did not know (R.11). Miss Daniels "seemed as though she was insulted or aggravated by some statement he had made" (R.11). Private Fernandez stated that the language spoken between accused and Miss Daniels was "kind of rough", but also stated that he was seated at the far end of the table from them and could not recall what was said by either (R.26). He stated that accused was "annoying" Juanita, and that she "had to leave the table to go to the bar" (R.23), but upon cross-examination he admitted that he drew this conclusion from the fact that Juanita left the table and went to the bar (R.26). Sergeant Dawson stated that Miss Daniels, accused, and the three enlisted men were arguing at the table. The witness was unable to say what the argument was about (R.30). It was "apparent" to him that "the lady didn't like the lieutenant and he did not like her" (R.30,33). Mrs. Harmon stated that there were no disputes among them while they were at the table, but that the members of the party were "just talking" and that Juanita Daniels "kept calling the lieutenant [accused] a shavetail and said she didn't like him". Witness "called her down for it and said she had to respect his rank" (R.36). Mrs. Harmon also stated that Miss Daniels had twice left the table and bought some more beer for herself, going up to the counter to drink it. Witness told her she was drinking too much (R.36). Each of the three privates stated that Juanita Daniels called accused "shavetail", "shavetail Charlie", and "Charlie" (R.14,17, 18, 26). Private Walsh stated that she called accused "shavetail Charlie" "any number of times" (R.14). Privates Fernandez and Cizmadja stated that when Juanita got up from the table and walked to the counter, accused

followed her. They were at the counter for a few minutes; then Juanita came back, looking angry. Accused also came back. The party sat there a few minutes more, then got up to leave (R.16,17,23,26,27). It appears that accused and Mrs. Harmon left first, followed by Juanita, Privates Walsh and Cizmadja, with Private Fernandez and Sergeant Dawson bringing up the rear (R.27,36). Mrs. Harmon stated that Juanita was right behind her and accused as they went out of the door, and that Juanita again called accused "shavetail" (R.36).

Mr. Hubert Myers, a civilian, stated that he is the owner of a gasoline filling station next door to the Wagon Wheel, about 70 or 75 feet distant from it. The cafe had been left under his general care, and that when he heard a noise through the open window of his station he got up and stepped outside. He saw Juanita Daniels coming out of the Wagon Wheel (R.40). The first thing he heard was Juanita saying, "'He's a God damn lying son of a bitch'" (R.40,44). Witness rushed over to tell her "to get away and stay away from the place" (R.40). Several other persons stepped up and told her to leave. Mrs. Harmon said, "'Come on, let's go, get away. No need having no trouble out here'" (R.40). Myers stated that accused then said that, "There wasn't no damn woman * * * call him a son of a bitch and get by with it". Juanita followed accused about twenty feet, and then said that accused "was every damn thing that she said he was or worse" (R.40,43,44). At this point accused slapped Juanita. Mrs. Harmon, Sergeant Dawson and Private Cizmadja did not see him do so (R.16,18,30,36,39), but Walsh, Fernandez, and Mr. Myers each testified that he saw accused slap her (R.11,23,27,28,40,42) in the face with his open hand. When accused slapped Juanita, Private Walsh said, "'You can't hit my woman'", rushed at accused, and they started fighting. Walsh stated that he saw the slapping just as he came around the corner of the building (R.23,27), and that he did not remember whether he or the accused struck the first blow (R.13). Mr. Myers stated that not many blows were struck between them (R.41). Sergeant Dawson testified that the fight was not a "severe one" (R.31). Walsh knocked accused down with a blow that landed on accused's face (R.20). Two of the enlisted men got accused on the ground; one was grappling with him, while the other was in a crouching position. A third enlisted man may have taken part, but Dawson was not certain of this. It was necessary to use force to separate the combatants. Dawson pulled the men off accused and warned the others to stay back (R.30,31,32). Walsh's version of the fight is that he and accused exchanged blows, were separated, and then started fighting again. He testified that accused said, "'I'll kill the dago son of a bitch'", and that they then fought a second time, each landing blows upon the other. Accused was knocked to the ground (R.12,13). Both used their fists (R.14). Fernandez said that he and Cizmadja broke up the fight by pulling accused and Walsh apart (R.25) and that accused's words were, "'Let me at him. I'll take that son of a bitch'" (R.23).

Mr. Myers stated that some soldier protested about two "double teaming" and jumping on one. However, he said he saw only one man strike accused (R.41,42). Sergeant Dawson stated that accused was scratched on the side of the face (R.31). Witness told the rest of the party to leave, which they did. Dawson went into the building, wet his handkerchief, came back to the front of the tavern, and washed accused's face. He told some woman to call the military police (R.31). Mr. Myers also called the police (R.41). One of accused's bars was missing and his clothing was dusty (R.41). It also developed that his cap had been knocked off in the struggle and that Mrs. Harmon had picked it up and carried it off with her when she left with the others in her car (R.11,13,37,41). Sergeant Dawson bought a bottle of beer for himself and one for accused which they drank. Soon the military police arrived and Dawson left about 15 minutes later (R.31).

J. H. Leach, constable of Gladewater, Texas, testified that he was called out to the Wagon Wheel and saw accused outside (R.45). In his opinion accused was drunk. He had a skinned place - a red streak - on the right side of his face. He did not stagger, but he did not talk normally. His cap and one bar were missing. Accused said, "'I still could whip anybody in the house'". Accused may have cursed, but he was not causing any disorder when the witness saw him (R.46,47,48). Witness told accused he was under arrest and took him into town to the City Hall. Technical Sergeant Woods L. Martin, Military Police Detachment, Camp Fannin, Texas, accompanied them (R.46). Sergeant Martin corroborated Mr. Leach's testimony, adding that when they reached accused he seemed intoxicated and his blouse was unbuttoned (R.49). He also stated that when they reached the City Hall accused would not tell him anything, nor give his name or organization, although Martin was wearing his Military Police badge. Accused began to cry. Witness asked accused if he would stay home if they took him home and accused said that he would. Accused then gave his name and they took him home (R.46,50,51,52).

There is considerable variation in the testimony of the other witnesses as to whether or not accused was drunk. Private Walsh testified that in his opinion accused was drunk. Walsh admitted that he was drunk himself (R.12,13). He also said that Juanita Daniels was drunk (R.14). Private Cizmadja testified that accused had had "quite a lot" to drink, but that he "couldn't say whether accused was drunk" (R.17). In the opinion of Cizmadja, Juanita Daniels was not drinking very much and she was not drunk (R.17). Private Fernandez testified that in his opinion accused was drunk (R.24). He stated that he had had "about 8 or 9" drinks of beer but that he was "not so drunk" (R.28). Juanita Daniels was drunk too, "but not so drunk" (R.24). Sergeant Dawson stated that accused was drunk, that Juanita was drunk, and that the three soldiers were "drinking" (R.33,34). Mr. Myers stated that accused was "awful tight, if he wasn't drunk" and that Juanita was "drunker" than accused (R.43,44). Mrs. Harmon

testified that accused was not drunk, that the soldiers were "really tight", particularly Private Fernandez, and that "Juanita Daniels was tighter than anyone" (R.37).

Several witnesses testified that the Wagon Wheel was a "public place" (R.16,19,24,29,38,41,50,51). The fight took place a short distance from the front door, around the corner of the building (R.12,16,18,20,38). There were lights 15 or 20 feet out in front of the place where the scuffle occurred and this was perhaps sixty feet from the road (R.42). Mrs. Harmon saw no civilians outside while the fight was going on. Quite a few came outside afterwards (R.38). Civilians were inside the Wagon Wheel while the party was in there drinking (R.24,38).

For the defense.

Accused, Mrs. J. G. Halstead, and C. D. Bell testified for the defense. Mrs. Halstead testified that she is a sister-in-law of the witness, Mr. Hubert Myers, that her husband is a lieutenant-colonel in the Army, and that she is familiar with the standard of conduct expected of officers (R.65,66). She saw accused in the Wagon Wheel on the night in question and she was present when the trouble started, having come in about an hour before (R.66,67). At no time did she see accused sitting with the enlisted men but she did see him sitting at a table talking to her own niece, whom she did not name. She saw nothing unbecoming an officer and a gentleman in accused's conduct while he was in her presence (R.66,67). Later accused sat at the bar and talked to Mrs. Halstead. It appeared to her that accused was trying to avoid the group at the table. She thinks that he had left their booth and had come up to the bar (R.66,67). Accused was not drinking at the bar (R.67). Mrs. Halstead further testified that Juanita Daniels came up and started trouble. She stated Juanita was intoxicated at the time that she hit at accused and called him "a name". Witness told her to get out. Mrs. Halstead said that Juanita "was trying to entice the lieutenant to go outside and she would show him what she could do". She called accused names. She took hold of his collar and said, "Come out here and I will show you what I can do. I'll show you that you're not any better than I am" (R.66,67). Accused did not argue with Miss Daniels in the cafe (R.66). Mrs. Halstead stated that accused was not disorderly, but that she did not talk to him enough to be able to say whether he was drunk (R.67).

C. D. Bell, Assistant Chief of Police of Gladewater, Texas, testified that he is custodian of and responsible for the jail record of the City of Gladewater (R.62,63). The jail record showed that on January 12, March 24, and May 16, 1943, Juanita Daniels was arrested and jailed for intoxication. On each occasion she forfeited bail by failing to appear for trial. On the second occasion she remained in jail all night

and on the third occasion for two days. The witness testified that Miss Daniels had a bad reputation in the community of Gladewater for becoming intoxicated and fighting when in that condition (R.63,64).

Accused testified in his own behalf. He stated that on the afternoon of 17 October 1943 he was "introduced to" Mrs. Harmon about 3 o'clock at the American Cafe in the City of Gladewater where they had supper together (R.55,56,62). After supper, Mrs. Harmon invited him to accompany her in her car and together they visited various places (R.55,62). At the last place, before arriving at the Wagon Wheel, Juanita Daniels asked Mrs. Harmon if she and the three soldiers might ride with them (R.55). They got in and rode in the back seat. This was at about 7:30 or 8 in the evening (R.56). Somewhere along the route to the Wagon Wheel Mrs. Harmon had picked up Sergeant Dawson and Private Templin (R.60). They were invited by Mrs. Harmon, not by accused (R.61). Accused did not drink at all the places which they visited prior to their arrival at the Wagon Wheel (R.61). He drank not more than five pint-sized bottles of beer and no other intoxicating liquor (R.59). He did not drink with enlisted men at the other places (R.61). While in the car he sat in the front seat with Mrs. Harmon (R.55).

After arriving at the Wagon Wheel some tables were pulled together and the members of the party sat down. Accused stated that he realized his position as an officer and did not want to sit with the enlisted men, but that he did so at Mrs. Harmon's request (R.55). He drank "possibly one glass" of beer at the table (R.61). He stated that Juanita Daniels began calling him "shavetail Charlie", to which he objected quietly. He told her that "it wasn't quite the thing to do". This made her more abusive and insolent (R.55). He left the table, went to the counter, and Miss Daniels followed him. She again called him "shavetail Charlie" and then said, "You are no better than any other son of a bitch". While they were at the bar she struck him, but he did not strike back (R.57). Accused went over to Mrs. Harmon and told her that he would like to leave the place. She agreed. His reason was that he sensed impending trouble with Miss Daniels (R.59,60). On their way out to the car, Juanita Daniels came up behind accused and Mrs. Harmon and called accused a "God damn lying son of a bitch", and several other "names of a vile nature". He "tried to shut her up", but she persisted, they "got into a scuffle" and he slapped her in the face (R.55,57,61). Accused continued: "The next thing I knew I was beat * * * by some of her friends". Private Walsh struck him and one of the other privates assisted Walsh. Accused stated that he was struck a number of times, and that he had no chance to get away or to cease fighting. He was knocked to the ground, his ear was bleeding, and he became very dazed. He did not recall getting up and trying to continue the fight after he and Walsh were separated (R.55,57-58, 59).

After the fight the others left and accused went back to the door

of the cafe, where Sergeant Dawson cleaned the blood off his face with a handkerchief (R.55,56). Soon the police officer (Mr. Leach) and Sergeant Martin of the Military Police came and got him. They took him to the police station, asked him his name, rank, serial number, and organization, asked him if he would stay at home if they took him there, and eventually they did take him (R.56).

Accused contended that he did not invite the soldiers to join the party, to sit with him or to drink with him (R.58). He did not "invite" the group to call him "shavetail Charlie" (R.60). He admitted that he slapped Miss Daniels and that he "fought with enlisted men outside the door of the Wagon Wheel Cafe".

4. In brief recapitulation, the sequence of events is as follows: Accused, a second lieutenant in the Infantry, met a Mrs. Harmon in a cafe in the town of Gladewater, Texas, on the afternoon of Sunday, October 17, 1943. After dining together, she invited him to accompany her in her car. They visited several other cafes, and en route Mrs. Harmon invited a Sergeant Dawson and Private Templin to ride with them. Later in the evening one Juanita Daniels asked Mrs. Harmon if she and three soldiers, privates, Walsh, Fernandez and Dizmadja, might ride with them in Mrs. Harmon's automobile. Mrs. Harmon consented. Accused had nothing to do with inviting any of the enlisted men to accompany him and Mrs. Harmon. The accused admitted that during the course of the afternoon and evening he drank at least five pint bottles of beer. According to a majority of the witnesses who had an opportunity to observe him, including Sergeant Dawson,-the one most likely to be impartial, - accused was drunk.

The party of seven or eight arrived at the Wagon Wheel about 9 o'clock in the evening and all sat down at two tables which were drawn together. Accused was reluctant to join them because of his position, but did so.

Some witensses testified that accused annoyed Miss Daniels, but in the light of the obvious partiality of those witnesses, their inability to give any details of the conversation or actions of accused and Miss Daniels, the latter's reputation and police record, and the testimony of Mrs. Halstead, an unbiased witness who was not a member of the party, it is much more reasonable to believe that Miss Daniels was annoying, insulting, and abusive towards the accused.

Accused left the party and sat at the bar, or counter. Miss Daniels followed him, continued her abuse, and struck accused. Accused went back to Mrs. Harmon and requested that they leave the premises. On their way out, they were followed by Miss Daniels and her three friends, Miss Daniels continuing to revile accused.

Accused, provoked by her continued course of misconduct, slapped Miss Daniels in the face with his hand. He was immediately set upon by

Private Walsh and possibly another of Miss Daniels' friends. Walsh knocked accused down and grappled with him on the ground. They were separated by Sergeant Dawson, who told the rest of the party to leave. Dawson and accused waited until the civil and military police arrived. After a brief argument with the constable, accused was arrested and taken to the Gladewater city jail. Here he refused to give his name, rank and serial number or organization, but finally did so, and upon his promise to stay at home, he was taken to his quarters.

5. Accused admitted that he had had at least five pints of beer during the course of the afternoon and evening. This admission, together with the testimony of a majority of the witnesses that accused was drunk, justified the court in finding accused guilty of Specification 1 of the Charge except the words "and disorderly". The admissions of accused with respect to the allegations of the remaining Specifications supported the evidence introduced by the prosecution in essential details and justified the findings of guilty of these Specifications, as well as Specification 1, all in violation of Article of War 96, as found by the court.

6. Accused testified that he was given no opportunity to cross-examine witnesses for the prosecution during the preliminary investigation (R.8,9,54,55). He stated that he did not know who the investigating officer was until after he was confronted with the sworn statements of the witnesses for the prosecution. This officer did not ask him if he wanted to cross-examine any of them at that time, but only if accused had any witnesses he wanted called. Accused also testified that the investigating officer and a Colonel Regnier attempted to persuade him to resign from the service (R.54), and that a Lieutenant Benson brought him a typed copy of a letter of resignation for accused's signature (R.55).

Defense counsel twice moved for dismissal on the ground that this opportunity was denied, and that such denial was contrary to the provisions of Article of War 70. Both motions were denied by the court.

In this the court ruled correctly. Although the action of the investigating officer was undeniably arbitrary and capricious, defense did not show that its case before the court was prejudiced by such refusal. The defense does not appear to have been taken by surprise at the trial, nor to have been unable to meet any evidence adduced by the prosecution merely because accused was not present and could not cross-examine witnesses at the investigation. (CM 185756, Paddock; 229477, Floyd; 238138, Brewster.) The court's ruling involved no error.

7. At the end of the trial, after the court had properly reached the unannounced findings of guilty, the trial judge advocate introduced a certificate of punishment under Article of War 104. It bore a date approximately three months prior to the commission of the offenses for which accused was tried, and was for drunkenness in uniform in a public place.

The reception by the court of evidence of punishment under Article of War 104 was improper and erroneous. But the court having properly reached its findings prior to the reception of the incompetent evidence, the rights of the accused insofar as the findings are concerned were not prejudiced. Where the evidence in question did not prejudice the rights of the accused, and where the sentence imposed was within the legal limits, the error is harmless and not prejudicial (CM 232160, McCloudy and CM 243015, Fisher).

8. War Department records show that accused is 35-9/12 years old and is married. He enlisted in the Regular Army on 5 December 1927, and served in almost consecutive subsequent enlistments until 7 January 1943, when he was discharged to accept an appointment as second lieutenant, Army of the United States. He served four years in the Canal Zone, and four years as a Reserve Officer Training Corps instructor at the University of Minnesota. His rank at the time of his discharge to accept a commission was staff sergeant. Accused's application to attend Officer Candidate School mentions two attached letters of commendation, but they are not found in his W.D., A.G.O. file.

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

Thomas H. Jaffy, Judge Advocate.

Amy E. Fox, Judge Advocate.

John Rosenfield, Judge Advocate.

(On Leave), Judge Advocate.

1st Ind.

War Department, J.A.G.O., 12 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 Second Lieutenant Carl Cihos (0-1308208), 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 Board of Review is of the further opinion that the court erred in admitting evidence of previous punishment under Article of War 104 after it had properly reached its findings but before it imposed sentence, which error does not, however, affect the legality of the findings or the sentence. In view of the provocation to which accused was subjected and in view of his 14 years of honorable service as an enlisted man, I recommend that the sentence be confirmed but commuted to a reprimand and forfeiture of $25 of his pay per month for four 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.
Incl.1-Record of trial.
Incl.2-Draft of ltr. for sig. Sec. of War.
Incl.3-Form of Ex. action.

(Sentence confirmed but commuted to reprimand and forfeiture of $25 pay per month for four months. G.C.M.O. 141, 27 Mar 1944)

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

SPJGN
CM 244792

7 DEC 1943

UNITED STATES	)	NEW ORLEANS PORT OF EMBARKATION
	)	
v.	)	Trial by G.C.M., convened at New Orleans Staging Area, New Orleans, Louisiana, 18 November 1943. Dismissal.
	)	
Second Lieutenant JAMES R. HEAD (0-1172064), Casual Officers Detachment, First Provisional Battalion.	)	

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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 Specifications:

CHARGE: Violation of the 95th Article of War.

Specification 1: In that Second Lieutenant James R. Head, Casual Officers Detachment, First Provisional Battalion, Jackson Barracks Area, New Orleans, Louisiana, representing himself to be Second Lieutenant William D. Burns, did, at New Orleans, Louisiana, on or about 16 October 1943, with intent to defraud, wrongfully and unlawfully make and utter to the Roosevelt Hotel, a certain check, in words and figures as follows, to wit:

Lawton, Okla., Oct. 16, 1943, No. 28

THE CITY NATIONAL BANK
United States Depositary
Pay to the order of: CASH $25.00
Twenty Five and no/100 ----------Dollars

Stamped: "NO Pro" /s/ William D. Burns
0-1172576

and by means thereof, did fraudulently obtain from the Roosevelt Hotel, the sum of $25.00, he the said Second Lieutenant

(14) James R. Head, pretending himself to be Second Lieutenant William D. Burns, then well knowing that he did not have and not intending that he nor the said Second Lieutenant William D. Burns, should have any account with The City National Bank, Lawton, Oklahoma, for the payment of said check.

Specification 2: Same form as Specification 1, but alleging check drawn on same bank dated 18 October 1943, payable to the order of Cash, made and uttered to The New Hotel Monteleone at New Orleans, Louisiana, and fraudulently obtaining thereby $25.00.

Specification 3: Same form as Specification 1, but alleging check drawn on same bank dated 19 October 1943, payable to the order of Cash, made and uttered to The New Hotel Monteleone at New Orleans, Louisiana, and fraudulently obtaining thereby $25.00.

Specification 4: Same form as Specification 1, but alleging check drawn on same bank dated 30 October 1943, payable to the order of Cash, made and uttered to The New Hotel Monteleone at New Orleans, Louisiana, and fraudulently obtaining thereby $25.00.

Specification 5: Same form as Specification 1, but alleging check drawn on same bank dated 31 October 1943, payable to the order of Cash, made and uttered to The New Hotel Monteleone at New Orleans, Louisiana, and fraudulently obtaining thereby $25.00.

Specification 6: Same form as Specification 1, but alleging check drawn on same bank dated 7 November 1943, payable to the order of Cash, made and uttered to The New Hotel Monteleone at New Orleans, Louisiana, and fraudulently obtaining thereby $25.00.

Specification 7: Same form as Specification 1, but alleging check drawn on same bank dated 29 October 1943, payable to the order of Cash, made and uttered to The Saint Charles Hotel at New Orleans, Louisiana, and fraudulently obtaining thereby $25.00.

Specification 8: Same form as Specification 1, but alleging check drawn on same bank dated 31 October 1943, payable to the order of Cash, made and uttered to The Saint Charles Hotel at New Orleans, Louisiana, and fraudulently obtaining thereby $25.00.

He pleaded 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 Article of War 48.

3. The evidence for the prosecution, supplementing the accused's plea of guilty, shows that prior to 16 October 1943 the accused had procured an identification card bearing the name of Lieutenant William D. Burns which the accused altered in certain respects including the attachment

thereto of his own picture. With the aid of this altered identification card between 16 October 1943 and 7 November 1943 under the name of William D. Burns he made and uttered eight checks in the amount of $25 each upon The City National Bank, Lawton, Oklahoma, which he cashed at three different hotels in the city of New Orleans. The accused, after full explanation of his right to speak or remain silent, admitted the foregoing facts to the investigating officer to whom the altered identification card was surrendered. The card and the eight dishonored checks, showing refusal of payment because of "no account", were admitted into evidence and by stipulation it was shown that the accused had no account at the named bank either in his own name or that of William D. Burns upon the dates of the aforementioned checks (R. 8-11, Exs. I - X).

4. The evidence for the defense was elicited from the testimony of the accused, who, after explanation of his rights as a witness, testified that he was 23 years of age, married and the father of a 16 month old girl and the expectant father of another child, that he had enlisted on 21 November 1938 serving as an enlisted man until being commissioned a second lieutenant after completing Officers Training School, that he had intended to make the Army a career, that he was the sole support of his family to whom he had allotted $125 of his monthly pay and that he had on 17 November 1943 redeemed the eight checks for cash receiving receipts for such payments which were admitted into evidence. He stated that he had no particular need for the money he had thus acquired but offered no reason for his conduct (R. 12-16; Exs. A-C).

5. Specifications 1 through 8, inclusive, allege that the accused under the name of William D. Burns, who he pretended to be, at specified times and places with intent to defraud, wrongfully and unlawfully made and uttered eight described checks in the amount of $25 each which he fraudulently cashed with named parties when he well knew that neither he nor the said William D. Burns had or intending that either of them should have an account in the named bank for the payment of the checks. Such alleged conduct is manifestly unbecoming an officer and a gentleman and is so condemned by controlling applicable authority (M.C.M., 1928, par. 151).

The admissions made by the accused to the investigating officer, the checks themselves, the altered identification card and the stipulated evidence that no account existed in the bank upon which the checks were drawn, either in his own or the used name, impel the conclusion that his proven actions resulted from fraudulent intent and abundantly supplement the accused's pleas of guilty. Restitution does not obliterate the commission of the offenses. Consequently, the findings of guilty of the Charge and all of its Specifications are warranted beyond a reasonable doubt by the evidence and the accused's guilty pleas.

6. The accused is about 23 years of age. The War Department records show that he has had enlisted service from 22 November 1938 until 22 October 1942 when he was commissioned a second lieutenant upon completion of Officers Training School and that he has been on active duty as an officer since the latter date.

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

Abner E. Lipscomb, Judge Advocate.

Fabian H. Golden, Judge Advocate.

Benjamin P. Sleeper, Judge Advocate.

SPJGN
CM 244792

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 Second Lieutenant James R. Head (0-1172064), Casual Officers Detachment, First Provisional Battalion.

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

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the foregoing recommendation, 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. 64, 9 Feb 1944)

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

SPJGK
CM 244795

4 JAN 1944

UNITED STATES	)	NEW YORK PORT OF EMBARKATION
v.	)	Trial by G.C.M., convened at New York Port of Embarkation, Brooklyn, New York, 20 November 1943. Dismissal, total forfeitures, and confinement for one (1) year.
Second Lieutenant CHARLES J. MILBROOK (0-1944753), Transportation Corps.	)	

OPINION of the BOARD OF REVIEW
TAPPY, 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 Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that 2nd Lieutenant Charles J. Milbrook, Transportation Corps, Officers' Transport Detachment, New York Port of Embarkation, did, while acting in the capacity of Transport Sales Commissary Officer of the S. S. "Mexico", on or about 23 April 1943, at New York City, New York, wrongfully and unlawfully convert to his own use and benefit, the proceeds of a check, property of the United States, the said check having been issued by the Coca-Cola Bottling Company of New York, Inc., to "Lt. Charles J. Millbrook, Sales Officer, U.S.A.T. Mexico", in the sum of $113.28, and representing a refund on 5,664 empty Coca-Cola bottles.

Specification 2: In that 2nd Lieutenant Charles J. Milbrook, Transportation Corps, Officers' Transport Detachment, New York Port of Embarkation, did, while acting in the capacity of Transport Sales Commissary Officer aboard the S. S. "Mexico", from about 30 April 1943 to about 20 August 1943, wrongfully and unlawfully sell and cause to be sold through the sales commissary of the said transport S. S. "Mexico", to authorized purchasers, goods, wares, and merchandise at prices in excess of prices authorized by paragraph 21, AR 35-6660 and paragraph 3, AR 30-2290.

Specification 3: In that 2nd Lieutenant Charles J. Milbrook, Transportation Corps, Officers' Transport Detachment, New York Port of Embarkation, did, while acting in the capacity of Transport Sales Commissary Officer aboard the S. S. "Mexico", from about 30 April 1943 to about 20 August 1943, wrongfully and unlawfully convert to his own use and benefit the sum of about $1500.00, lawful money of the United States, derived from sales of goods, wares, and merchandise through the sales commissary of the said S.S. "Mexico" at prices in excess of prices authorized by paragraph 21, AR 35-6660 and paragraph 3, AR 30-2290.

He pleaded not guilty to the Charge and all Specifications. He was found guilty of Specifications 1 and 2, and guilty of Specification 3 except the figure "$1500.00", substituting therefor the figure "$400.00", of the excepted figure, not guilty, of the substituted figure, guilty, of the Charge, guilty. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

Captain Charles G. Haney, Transportation Corps, Water Division, New York Port of Embarkation, Brooklyn, New York, testified that he was in charge of the sales commissaries on board all ships of the New York Port of Embarkation, and that accused was assigned to duty aboard the S.S. Mexico, as transport sales commissary officer, from 24 February 1943 to 4 September 1943. Prior to his assignment, accused, along with several other officers, was given a course of instruction with respect to his duties as sales commissary officer and was told the prices that were to be charged for goods, wares and merchandise sold through the sales commissary on board any ship to which he might subsequently be assigned. This course of instruction lasted about a week or ten days. Accused was also given a price list, issued by the superintendent of the Army Transport Service, New York Port of Embarkation, showing the prices to be charged for merchandise on board all transports operating from such port, and a copy of Office Order No. 93, dated 23 November 1942, containing further instructions relative to his duties. A copy of Office Order No. 93 (Ex. 4) as well as a copy of the price list (Ex. 2) was found among accused's effects aboard the S.S. Mexico when he was relieved as its commissary officer (R.15,40-41,44; Exs, 2 and 4). Also included among accused's effects was a copy of AR 35-6660, entitled "Sales of Property", paragraph 21 of which among other things provides for the establishment of price lists of goods to be sold by sales officers and the method to be used in computing prices (R.42-43; Ex. 3).

During the time accused was assigned to the S.S. Mexico as its sales commissary officer, the ship made three voyages. The first voyage was made between 5 March and 5 April, the second between 30 April and 28 May, and the third between 11 June and 22 August, all in 1943. Prior to the first voyage a quantity of bottled coca-cola was placed aboard the ship, and was sold to the troops and occupants of the transport. Accused was not aboard the S.S. Mexico on its return from the first voyage as he had gone ashore at the port of its outbound destination and was prevented by bad weather from boarding the transport before it sailed. In his absence on the return trip the sales commissary was operated for accused by Technical Sergeant William J. Doherty, also described as sergeant major aboard the S.S. Mexico. Sergeant Doherty had served in this capacity aboard the S.S. Mexico for fifteen months and was accused's assistant on the outbound journey of the voyage. Before Sergeant Doherty undertook to operate the sales commissary he took inventory with the transport chaplain and turned over to the chaplain the money, the inventory, and the keys to the sales commissary. Accused reached the United States prior to the ship's arrival and went aboard when it docked. He checked the sales commissary and told Sergeant Doherty there was a shortage and said something about missing $120.00. Accused took another inventory and said he was short a little more. He also said that the sum of $100 which he had left in the top drawer of his desk was missing.

Accused instructed Sergeant Doherty to get rid of the empty Coca-Cola bottles to help cover the shortage in the sales commissary. The empty bottles were removed from the ship and placed on the dock at pier 36 the day after the S. S. Mexico docked. Sergeant Doherty telephoned the Coca-Cola Bottling Company about four times about the 6th, 7th and 8th of April and asked to have someone call for the empty bottles. Coca-Cola was delivered to the S.S. Mexico on 23 April and on the same date a check was drawn by the Coca-Cola Bottling Company, of New York in the sum of $113.28 representing refund payment for 5,664 empty Coca-Cola bottles, which had been picked up on the S.S. Mexico on 22 April. The check was made payable to the order of accused, as "Sales Officer, U.S.A.T. Mexico" (R.24,29,30-32; Ex. 1). On 26 April accused presented the check identified as prosecution's Exhibit I to the cashier of the Hotel Picadilly, New York, in payment of his hotel bill. He indorsed the check in the presence of the cashier and after deducting the amount owed by accused to the hotel, he was given the difference in cash, amounting to $82.65 (R.33-38).

On the third day of the outbound journey of the second voyage accused had another conversation with Sergeant Doherty in which accused said he was about $400 short from the previous trip and that he was going to make up the shortage by increasing the prices on all articles in the sales commissary (R.145-147).

For this second voyage, which began on 30 April, accused had two

assistants (T/4 L. J. Casse and Pfc. B. J. McCann) to sell goods at the commissary store. Accused issued to each of them a one-page, typewritten price list of various articles on sale in the commissary store, and instructed each of them to sell the articles at the prices indicated thereon. The price list was posted on the door leading into the commissary and these prices prevailed for the duration of that voyage, viz., 30 April to 28 May 1943, and for the outbound journey of the third voyage beginning 11 June 1943. The prices charged during this period were as follows: (the lawful price according to prosecution's Exhibit No. 2 appears in parenthesis): popular brands of cigarettes, Camels, Lucky Strikes, Chesterfields, Old Golds, Pall Mall, 50¢ per carton (45¢); candy bars, Baby Ruth, and Hershey almond bars, 4¢ a bar (3¢); Butterfingers, 4¢ a bar (3¢); Life Savers, 4¢ a roll (2¢); Necco Rolls 4¢ a roll (3¢); Peter Paul Mounds, 4¢ a bar (3¢); Sour Balls, 15¢ a package (11¢); Tootsie Rolls, 4¢ a roll (3¢); Simplex razor blades, 6¢ and4¢ a package (3¢); Prophylactic tooth brushes, 10¢ (8¢); Philadelphia brand cigars, 5¢ (4¢); Dutch Master cigars, 9¢ (7¢); playing cards, 25¢ (16¢); pocket comb, 4¢ (2¢); chewing gum, 4¢ a package (3¢); salt water soap, 6¢ a bar (4¢); and peanuts, 15¢ a can (10¢). (R.61-76; 85-98). On the inbound or return trip of the third voyage a different price list was given to the two assistants by accused and the prices of merchandise listed thereon were lower than on the previous list. During the second voyage some of the ship's personnel complained to the commissary clerks of being overcharged for the merchandise purchased, and they conveyed this information to accused. Accused stated that personnel of the ship had been told at the beginning of the trip that prices were being raised to make up a shortage on the previous trip, and instructed the clerks to refer all such complaints to his office and he would speak to them (R.70-72; 94-95). On 10 June 1943, and during the outbound trip of the third voyage, the commander of the S.S. Mexico had a conversation with accused and advised him that he could not charge any prices except those prices listed in the official Quartermaster Price List, which had been given him by the Port authority. He told accused to be very careful in the future and not to deviate at all from that price list. Accused seemed to agree at the time that he could not charge any prices other than those listed in the official Quartermaster Price List (R.100-101). Despite the warning thus given accused, further complaints were received and the transport commander checked the sales commissary and found that accused was making an overcharge on some small items (R.106-107). Accused told the transport commander that he was short several hundred dollars during the first voyage, and was overcharging to make up this shortage. Again the transport commander admonished him that such overcharges were contrary to custom and regulations of the service (R.107-108).

The accounts rendered to the finance officer by accused, covering the operations of the sales commissary aboard the S.S. Mexico during the period of time when he was sales commissary officer were introduced in evidence (R.114-120, 129; Exs. 5,6,7). An accountant testified that he

had examined accused's accounts (Exs. 5,6,7) and determined the quantity of each item of merchandise sold by accused through the sales commissary on board the S.S. Mexico during the periods from 30 April to 28 May (2nd voyage) and from 11 June to 22 August 1943 (3rd voyage).

By applying to certain items the prices at which they were allegedly sold, the accountant could determine the total amount of money which should have been received from the sale of those items. By again applying to those items the prices at which they were authorized to be sold, according to the official price list, he could determine the amount which accused should have received from the sale of those items. The difference between the two amounts represented an increment which was not reflected in accused's accounts. For the voyage of 30 April to 28 May 1943, the total as a result of overcharges was in excess of $1152.45 and for the voyage of 11 June to 22 August 1943 the total as a result of overcharges was in excess of $1147.62. This last figure is further based upon the assumption that overcharges were made for the entire voyage (R.130-139).

Evidence for the defense is substantially as follows:

Major Kemble Widmer, Transportation Corps, Water Division, New York Port of Embarkation, testified that accused had been assigned to his organization for eight and one-half weeks and was working in the warehouse under Captain J. J. Longobardi. His duties in the warehouse had been performed very satisfactorily (R.152-153).

It was stipulated that if Captain J. J. Longobardi were present and sworn as a witness, he would testify that he was accused's immediate superior, and that accused performed his duties in the warehouse in a very satisfactory manner.

Accused was sworn as a witness at his own request. He testified, in substance, that he was a member of the National Guard and became a member of the Army of the United States in December 1940 as a private. He attended Officers' Candidate School and received a commission as second lieutenant in November 1942, at which time he was assigned to the Officers' Transport Detachment, New York Port of Embarkation. Prior to his entrance in the Army, he was employed by the Mental Hygiene Department of the State of New York and had not had any experience in selling merchandise. He was assigned as Transport Sales Officer on the S.S. Mexico in the middle of February, 1943 (R.154-156). On the first trip aboard the Mexico he took inventory of the commissary stores which had been supplied at the time he joined the ship. He had no regular assistants, but procured "help out of the troops" being carried as passengers (R.156). During two or three days of the first trip, accused became ill and the commissary was handled for him by a Sergeant Doherty (R.157). After arriving at port, following the outbound voyage, it was necessary for him to go ashore

in order to have a shipping ticket signed by the Port Quartermaster to whom accused had sold goods (R.158). He left the ship hurriedly, leaving the cash register, the keys and some cash, amounting to about $170 or $180. He had placed the cash in a drawer of his desk before leaving the ship (R.159). After reaching shore, a storm arose rendering it impossible for accused to return to the ship and it ultimately became necessary for him to fly back to the United States (R.159). He arrived in the United States prior to the return of the Mexico and boarded her upon her arrival. He found his desk empty and everything was packed. The Chaplain gave accused the key as well as the money from the sales taken in on the trip. Accused then took inventory and discovered shortages in merchandise and the loss of the money he had left in his desk drawer. He did not request a Report of Survey (R.160). Accused informed his superior of the losses but did not tell him how much. He did, however, ask permission to turn in Coca-Cola bottles and take the money and turn it in on (his) shortage, which request was granted by his superior, Captain Haney. He received a check from the Coca-Cola Bottling Company, but in the meantime he had made good his shortages by using his own money and money he had borrowed. He, therefore, used this check to pay (his) bills at the hotel. In order to settle his accounts, accused was required to pay $533 out of his own money which he furnished from accumulated pay checks and from money borrowed from his mother (R.161). On 30 April 1943, he made a second trip on the Mexico and undertook to recover the $420 he lost on the first trip. He figured on raising the prices enough to take care of these losses and then to reduce those prices. He raised the prices one cent here and there until he figured he had enough to take care of the $400 and some odd dollars. He figured on raising them about $200 a trip. On that trip accused had two regular sales clerks. At the conclusion of the second voyage, he withdrew $200 from the funds derived through sales at the commissary, and when he settled his accounts, he was over a few dollars, around $2.53. He thereupon applied the $200 to the amount of his previous shortage (R.162-163). Accused made a third voyage and as a result of increased sales made on the outbound journey he withdrew $200 from the commissary funds. All the items as enumerated during the trial were sold at increased prices on the outbound voyage on the third trip (R.164). Upon the completion of his second and third voyages, in order to cover the expenditure of $420 made by him previously he withdrew a total of $400 (R.165). However, upon the completion of this third voyage, his commissary accounts were short $16.70 (R.165). Since his return from the third voyage, accused has been relieved as commissary officer and is now assigned to the Water Division, Supply Branch. When asked whether he would be willing to refund to the Government $400 which he obtained from commissary sales funds, accused replied, "I believe I would" (R.166-167).

On cross-examination, accused testified that he maintained no records to reflect his shortages or to record amounts received through overcharges. He had no set plan for the sale of goods to accomplish his purpose to repay himself $200 from each trip but it just came out that he got $200 each time, except that on one voyage his accounts were $2 over and on another were $16.50 short. He realized that his acts constituted violations of

regulations and instructions (R.170-171). Accused himself requested that the check (Pros. Ex. No. 1) be drawn payable to him as "Sales Officer of the S.S. Mexico" (R.172). Captain Haney had given him permission to use the check to apply to the shortage. He admitted specifically selling goods in excess of prices authorized by regulations (R.173), and that between 30 April and 20 August 1943, he derived $400 from sales of goods at excessive prices. The $400 thus obtained was not turned over to the Government (R.173-174).

Captain Charles G. Haney, Transportation Corps, New York Port of Embarkation, to whom accused referred in his testimony as the person authorizing the disposition of Coca-Cola bottles and the application of the proceeds thereof to his shortages, testified that he did not give such authority (R.176). Accused did not report to Captain Haney that he had a shortage but reported that he thought he might have a shortage (R.177). Captain Haney admitted stating to the investigating officer on 1 November 1943 that he might or might not have told accused that it would be all right to use such a check in reducing any shortages in his accounts. On the trial, Captain Haney said that,realizing that such action would be a violation of Army Regulations, he would not tell a sales officer that he might apply the proceeds of the check in the manner suggested (R.178).

4. It is deemed unnecessary to restate the evidence. Suffice it to say that the evidence shows that on 23 April 1943, accused was an officer of the Army of the United States and as such was assigned to duty as Transport Sales Commissary Officer aboard the S.S. Mexico. On or about the same date, accused received and within a few days cashed a check dated 23 April 1943 in the sum of $113.28, made payable to him as "Sales Officer, U.S.A.T. Mexico", the check representing a refund on 5,664 empty Coca-Cola bottles which had been removed from the Mexico on 22 April 1943. The empty bottles had been left behind on the ship by purchasers who had bought the bottles and their contents at the ship's commissary. The proceeds of the check constituted property of the United States as alleged, and accused's act in converting the money to his own use was wrongful and unlawful. The finding of guilty of Specification 1 of the Charge is fully sustained.

The evidence is also sufficient to support the finding of guilty of Specification 2 of the Charge. In fact, it is established by the testimony of accused that he charged prices on articles sold through the commissary of the S.S. Mexico in excess of prices authorized, as alleged, with the full knowledge that his actions were contrary to regulations.

The finding of guilty of Specification 3 of the Charge, viz., that accused converted $400 to his own use rather than $1500 as alleged, is supported by accused's own testimony. The prosecution's evidence as to the amount allegedly converted by accused was based in part upon a formula and an assumption. The court's reliance on the only positive

evidence, - accused's sworn admissions - was proper. In the opinion of the Board of Review the evidence establishes accused's guilt, as found by the court, beyond a reasonable doubt.

5. War Department records show that accused is 36 years of age. He graduated from high school and pursued a course in mental hygiene at a New York State hospital, lasting 21 months. He served as an enlisted man from December 1940 to 3 February 1943, when, upon graduation from Army Administration Officer Candidate School, State College, Mississippi, he was appointed a second lieutenant, Army of the United States.

6. The court was legally constituted and had jurisdiction of the person and 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 the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of the 96th Article of War.

Thomas N. Jaffey, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

(On Leave), Judge Advocate.

1st Ind.

War Department, J.A.G.O., 14 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 Charles J. Milbrook (0-1944753), Transportation Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. The accused was found guilty under three specifications in violation of Article of War 96 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 one year. I recommend that the sentence be confirmed and carried into execution, and that the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, be designated as the place of confinement.

3. Consideration has been given to the attached Report of Investigation, dated 18 December 1943, to the Commanding General, New York Port of Embarkation, from Colonel Le Roy Barton, Inspector General's Department, approved by Major General Homer M. Groninger, Commanding, with inclosures, from which it appears that subsequent to the dates of the offenses for which accused was tried, he accepted from one Private Domenic C. Rainone at an overseas station an uncensored letter written in Italian to be delivered upon accused's arrival at New York to Costanzo Rainone, 34 Concannon Street, Providence, Rhode Island, in violation of paragraph 30, AR 380-10, and that accused also received from Private Rainone at an overseas station the sum of one thousand dollars for delivery to Costanzo Rainone upon accused's return to New York, which money accused failed to deliver and which he fraudulently converted to his own use.

4. Consideration has also been given to the inclosed file containing accused's tender of his resignation for the good of the service, with fourth indorsement by Homer M. Groninger, Major General, U. S. Army, Commanding, recommending that in view of the fact that at the time the resignation was submitted accused was under sentence, that the sentence had been approved by the reviewing authority and the record of trial forwarded for action under Article of War 48, the resignation be not accepted. Under such circumstances the resignation should not be accepted as it would permit the accused to avoid serving the sentence to confinement which has been imposed upon him. I recommend that accused's resignation be rejected and that the sentence be confirmed and carried into execution.

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 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-Report of Investigation dated 18 Dec. 1943.
Incl.5-File containing accused's resignation.

(Sentence confirmed. G.C.M.O. 113, 10 Mar 1944)

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

SPJGK
CM 244815

22 DEC 1943

UNITED STATES v. First Lieutenant HEYWOOD J. KNIGHTON (0-467724), Coast Artillery Corps.	)	NORTHERN CALIFORNIA SECTOR WESTERN DEFENSE COMMAND Trial by G.C.M., convened at Fort Winfield Scott, California, 12 November 1943. Dismissal.

OPINION of the BOARD OF REVIEW
TAPPY, 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 95th Article of War.

Specification: In that 1st Lieutenant Heywood J. Knighton, 6th Coast Artillery, was, at San Francisco, California, on or about 27 October 1943, in a public place, to wit: The Lido Club, drunk and disorderly in uniform.

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

Specification: In that 1st Lieutenant Heywood J. Knighton, 6th Coast Artillery, was, at San Francisco, California, on or about 27 October 1943, disorderly in the Central Military Police Station at 655 Merchants Street, San Francisco, California.

He pleaded not guilty to the Charges and Specifications. He was found guilty of Charge I and its Specification except the words "and disorderly", and guilty of Charge II and its Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Summary of the evidence.

At about 11:45 p.m. on the evening of 27 October 1943, accused entered

the front door of the Lido Club, a night club in San Francisco, California, accompanied by a naval cadet (R.7,8,18,87). Witness Felix Garces, manager of the club, was standing at the door of the lobby of the club, talking to a naval officer and an enlisted man in the naval Shore Patrol (R.8,17). Accused, without provocation, came over to the naval officer, and "told him he didn't like him", and that "he was going to knock his head off" (R.8,23).

The Shore Patrol enlisted man said to accused, "'Now you be a good boy; you come on out'" (R.8). Accused "jumped on" the Shore Patrol enlisted man, and shoved him into a corner. The naval officer told accused to behave, and the officer and Shore Patrolman went on about their business. The time consumed by this incident covered probably 3 minutes (R.8,9,18).

Accused then walked across the lobby to the bar and dining room of the club. Witness Garces testified that at the time these incidents occurred, accused was "apparently drunk" (R.9,10,15). Witness went back to a phone booth in the lobby, a distance of from 10 to 15 feet from accused and the bar, in order to telephone to the Military Police (R.10,18,22,24). He did not, however, ask accused to leave the premises (R.10).

Accused walked over to the bar. On his way to it, he bumped against people and was unable to walk straight (R.29). When he got there, he grabbed a drink from a civilian who was sitting there (R.10,28). There were three men and three women, all civilians, sitting at the bar at the place where this occurred (R.11,12,21).

The civilian from whom accused grabbed the drink had done nothing to provoke accused's conduct, and objected. Accused's words in reply, as related by Garces, were, "'Well, if you don't like it, all you have to do is say so, you son-of-a-bitch, and I will knock you across the bar'". Accused also told the civilian that he would punch him in the nose (R.11,12).

The six civilians left the bar and went to a table (R.12). During this time there were a number of people in the room; witness estimated that there were "probably around seventy-five persons" (R.24). The bar was "completely filled up; standing double" (R.24). Accused's act of taking the drink, however, attracted the attention of only the six or eight people who were in that part of the bar (R. 85).

When Mr. Garces left the telephone he signaled the bartender not to serve accused any more drinks. Garces stood in the doorway leading from the lobby into the bar, pointed at accused with his hand and made some sign that accused was not to be served (R.83,84,87).

Another naval officer was sitting on a stool at the bar to the left of where the six civilians had been, talking to some other civilians (R.23,85). Garces testified that this officer tried to calm accused,

but accused replied, "'You mind your business, you bald-headed son-of-a-bitch" (R.12). Accused then demanded a drink from the bartender, saying that the bartender was "either going to give him that drink or he would crack him over the head with a beer bottle" (R.13).

The barkeeper refused the drink, and accused called him a son-of-a-bitch and a bastard. This was all the conversation Garces heard, for he went to see whether the Military Police had arrived (R.13). Witness was within two or three feet of accused and the bartender when this conversation took place, but it does not appear that any other civilians were nearby (R.11,13,14,15,16).

The bartender, Louis Cresini, was also a witness for the prosecution. He testified that accused came up to the bar and ordered a ginger ale highball (R.33). Garces, the manager, had ordered Cresini not to serve accused, before accused got to the bar (R.36,37,38,94). This witness had not observed accused before the warning not to serve any drinks. He saw accused walk 15 or 20 feet, and accused was staggering (R.35,36,37).

Cresini testified that he told accused, "'No.'" "'It was out of the question, * * * no more drinks for you. * * * You are under the influence of liquor; you are in bad shape'" (R.33,34). Accused then called Cresini a son-of-a-bitch. Accused started to pick up a beer bottle at the bar, and got his left hand on it. Witness took it away from accused as accused started to swing. There were a number of men and women at the bar at that time (R.34).

The witness walked away from accused, and there was no further conversation between them (R.34,35,39,91,92). Accused, together with the naval cadet who had entered with him, walked back and sat down on a divan which was "right back of the bar" (R.14,38,91). Some civilians were also sitting on the couch at the time (R.21). Accused started to drink a couple of drinks which belonged to someone else there (R.38,94).

At this point the Military Police came in, and went up and talked with accused (R.14). Eventually he left with them. They had hold of him when he left, and he was resisting them. It was then about twelve o'clock (R.15, 29).

Lieutenant John Joseph Dowd, United States Maritime Service, testified for the prosecution concerning accused's conduct in the Club Lido. He was the bald-headed lieutenant who was sitting on a stool at the bar in the club (R.54,64). He testified that an Army lieutenant, accompanied by a maritime cadet, passed by him as he sat there. The officer sat down on the stool next to witness (R.54,55,62).

The witness overheard him say, "'I told him that and he didn't make any move'". That is all that Dowd distinctly understood. He did not pay any

particular attention to the officer while they were at the bar (R.55,56, 58,61). Although witness was unable to identify accused (R.54), he identified Lieutenant Reger, the Military Police officer with whom "the lieutenant" left the club (R.57,58).

Accused had been there for approximately 20 minutes when the Military Police arrived. At this time accused was sitting close to the witness on the divan. Accused went out with the Military Police. A few sailors from the bar attempted to interfere, but witness told them to "lay off". Dowd did not hear any profanity; there was a lot of loud conversation at the bar between the lieutenant and the maritime cadet, but he did not observe "any particular physical disturbance" (R.56,58,59,60,62,63).

In Dowd's opinion, accused was drunk (R.64).

Second Lieutenant Nathan C. Reger, Company A, 749th Military Police Battalion, testified for the prosecution. He and an enlisted man went to the Club Lido in answer to a call received from the manager (R.40). They arrived before midnight, and this was the only occasion on which they visited the Club Lido that evening (R.44,65).

When the witness arrived, accused was sitting quietly on a divan facing the bar at the end farthest from the entrance of the club. At this time there was no one on the couch with him (R.40,97). When the witness started to talk to accused, a naval cadet came over and sat down with them. He wanted to take accused to his hotel room, but wanted to finish his own drink before doing so. Lieutenant Reger refused to permit this (R.44,45,97). Accused was in uniform and the uniform was in good condition (R.46). Witness did not see any drink which might have belonged to either accused or the naval cadet (R.98).

Witness said to accused, "'Let's go outside and get some air'". Accused attempted to brush Lieutenant Reger to one side, and swore in a low voice. Reger thought that he said, "'God damn'". Accused started to tell witness how long he had been in the Coast Artillery and in the service. He answered no questions which witness asked, and refused to cooperate in any way (R.41).

When asked what was accused's condition as to sobriety, witness answered, "I would say he was very drunk" (R.41). There was a stale odor of whiskey on his breath. His vision was bad. He could not focus his eyes very well; they had a blank, dull stare (R.48). He was far more drunk than the naval cadet who was with him. Other than his actions when Lieutenant Reger questioned him, and his being drunk, witness observed no misconduct on accused's part (R.99,100).

Witness and the enlisted driver who was with him removed accused from the club, the lieutenant supporting him on the right side and the enlisted

man on the left. Accused offered "passive resistance", bracing himself and pressing his feet against the floor so that it was not easy to take him out. He cursed once or twice in a low voice, but this did not attract much attention. It was not necessary to carry him (R.41,42,46,48), but they "almost carried him" (R.41).

Witness and his driver took accused outside and to the Military Police station at 655 Merchant Street. They "almost carried him inside", and put him in a wooden lock-up behind the office. The door was closed with a hasp, a staple, and a small latch (R.42). Two enlisted men went back to the Lido Club for accused's short coat and cap. They also took from him his pocketbook, in order to get his W.D.,A.G.O. card (R.98).

Once inside the lock-up, accused began kicking the door, running from one wall to the other, jumping against the door, and attempting to open it. This was observed by Lieutenant Reger, and also by Captain Jackson O. Heine, Company A, 749th Military Police Battalion. Accused kept yelling at the top of his voice; he would hit the door with his shoulder, fall down, get up, and try it over again (R.42,50).

While he was doing this, accused was profane and abusive to all who were present. He called the enlisted men, Lieutenant Reger, and Captain Heine "sons-of-bitches", "MP sons-of-bitches" and "God damned sons-of-bitches" (R.42,50).

Lieutenant Reger entered the lock-up and started to handcuff accused, and accused struck Reger lightly in the forehead with his right fist. The men held accused, while Reger put handcuffs on him. The kicking and cursing continued. Reger went back in, loosened one handcuff, and handcuffed accused's hands behind his back (R.42,43).

Accused continued kicking the door and cursing. Lieutenant Reger returned to ask accused who his battery commander was. Accused had in some way got his hands in front of him again. Captain Heine asked accused the number of his battery. Accused called the Captain a son-of-a-bitch, and beckoned and called to him to "'come in and fight. I will fight any of you'" (R.43).

Captain Heine said, "'maybe General Haines will hear of your conduct'", to which accused replied, "'General Haines is a son-of-a--'", not finishing the sentence (R.43).

This went on for about one and a half hours (R.50). Thereafter, Captain Heine saw accused sleeping on the floor of the lock-up (R.51). About two hours after accused had been brought to the station, his battery commander and another lieutenant arrived (R.43). At this time accused was sitting on a bench (R.52).

When "Captain Barrett", his battery commander, arrived, accused recognized him and called him by name. Accused stood up while talking to him.

Accused was released to him, and after a short argument over who had accused's watch and wallet, accused left with Captain Barrett and the lieutenant (R.43,52,53).

For the defense, accused, Naval Air Corps Cadet Irwin Shaff, and Lieutenant Colonel John Schonher, commanding officer of accused's battalion, testified.

Cadet Shaff met accused in the vicinity of the St. Francis Hotel, outside of a restaurant, about 9:30 that evening. They struck up a chance acquaintance, and at Shaff's invitation, they went to the Bal Tabarin. There they had some drinks, "not too many", and left about 11:15 to go to the Club Lido (R.66,67).

At this time accused was "pretty well in his cups" (R.67). He did not have "all the reactions a sober man might", but was not "dead on his feet". Witness described accused as "inebriated" (R.73).

Witness testified that he and accused entered the Club Lido together, but denied that they were stopped at the door, or that there were any Shore Patrolmen at the entrance or inside when they went in. Neither Mr. Garees nor any member of the Shore Patrol spoke to witness or accused at any time (R.67,68).

Witness and accused checked their hats and coats at the checkroom, walked to the divan near the bar, and sat down. Accused did not get up from the divan at any time while they were there. The bar and the space in front of it were crowded, but witness observed accused at all times while witness was at the bar, except for the moment when witness asked the bartender for drinks (R.68,69,71.72).

The bartender did not refuse to sell drinks, nor make any objection to selling them (R.68,76). Witness bought two drinks, one for himself and one for accused, and brought them back to the couch, where he and accused consumed them (R.68.74). Later, each had another drink (R.75). Accused was never at the bar, and bought no drinks (R.74,78).

The witness did not see accused go to the bar, grab a bottle and threaten the bartender with it, nor threaten anyone else (R.69). Accused was loud, and his conversation could be heard by others than the witness. Witness could not recall accused's conversation, but stated that "there was nothing I would be ashamed of hearing" (R.73). He did not hear accused using any obscene or profane language. "He may have let one or two words slip out, but nothing directed at anybody", and he might have been a little raucous, but nothing out of the ordinary (R.69.70). Witness did not remember hearing accused make any remark about Lieutenant Dowd, who was the bald-headed lieutenant (R.77).

Witness had just come back from the bar with a drink, and was standing close to the divan where accused was seated, when the Military Police arrived (R.70. They asked accused to leave and take a walk. He did not want to go at first, but they convinced him that he should, and promised to bring him back. He left peaceably with them (R.71,74,75). Witness accompanied them through the lobby, and did not hear accused use any loud or insulting language in the 5 or 10 minutes during which the Military Police were there (R.71,77).

Witness stated that he and accused had seven or eight drinks in the course of the evening, and admitted that he was intoxicated himself (R.74,75).

Accused testified briefly in his own behalf. His dinner consisted of a sandwich and a cup of coffee at "Tiny's", and he had some drinks at the Press Club. He met Shaff near the entrance of the St. Francis Hotel about 9 o'clock. Shaff insisted that accused accompany him. Accused had only nine cents in his pocket, but he consented. They were at the Bal Tabarin at 11 o'clock, but accused did not buy or pay for any drinks there. He did not remember leaving there (R.80,81).

Accused did not remember being at the Club Lido, seeing the Military Police prior to his appearance at the station, or striking Lieutenant Reger (R.81,82). His next recollection was that he was in a cell, handcuffed, and screaming. This recollection lasted about a second (R.81, 82). His next recollection was seeing the face of Captain Barrett, his commanding officer, as he opened the door of the lock-up (R.81).

Accused admitted that he was drunk (R.81).

Lieutenant Colonel John Schonher, 6th Coast Artillery, Fort Barry, California, testified that accused has been in his battalion approximately one year, during which he was assigned to Battery K. The witness considers accused's efficiency rating to be excellent. Accused is very intelligent, shows a great deal of initiative, understands his specialized training as a data computer very well, and a group of men under his command has had excellent target practice. He considers accused hard-headed and stubborn, but his character excellent (R.96,97).

It was stipulated that accused's W.D.,A.G.O. Form 66-1 shows that from 18 July 1942 to 5 September 1942, accused attended Coast Artillery School (sea coast) at Fort Monroe, Virginia, and made a successful completion of the course, that from 21 September 1942 to 19 October 1942, he attended Coast Artillery School (gun data computer section) and successfully completed that course; that from 28 October 1942 to 31 December 1942, he was Battery Officer, Battery K, 6th Coast Artillery, with a rating of "superior". From 1 January 1943 through 30 April 1943, his rating was "E", and from 1 May 1943 through 30 June 1943, his rating was "E" (R.95).

4. The evidence with respect to Specification 1 may be briefly recapitulated as follows: Accused had already drunk a substantial amount of liquor during the evening, when he entered the Club Lido, a night club in San Francisco. While in the club he was unsteady on his feet, his breath smelled of liquor, his voice was loud and raucous, and his vision was that of a drunken man. His condition generally was such that the manager of the club felt called upon to summon the Military Police. It was necessary in turn for the Military Police to compel accused to leave the premises and place him in the lock-up at their station. Accused admitted that he was drunk.

Some witnesses testified that accused used profane and insulting language to civilians present, attempted to strike a bartender with a beer bottle, and was generally offensive in public. However, inasmuch as the court found him guilty of drunkenness, only, and excepted the words in the Specification, "and disorderly", it may properly be assumed that the court chose not to believe the testimony concerning his cursing, threats, and use of the beer bottle. Without that evidence there remains only evidence that accused was staggering, raucous, and recalcitrant. As such, he may not properly be characterized as grossly drunk, nor his behavior grossly conspicuous during the time he was in the club (CM 228894, Peterson), and it is the opinion of the Board of Review that the evidence is sufficient to support only a finding of guilty of drunkenness under Article of War 96, and not under Article of War 95.

With reference to the Specification, Charge II, the evidence shows that while accused was locked in the Military Police jail, he kicked and hit the door, attempted to escape, shouted at the officers and enlisted men of the Military Police in an abusive and profane manner, and struck an officer who entered the cell. His violence necessitated his being handcuffed and, even thereafter, he continued his kicking and cursing. His violent and abusive conduct continued for an hour and a half and was a clear violation of Article of War 96, as charged.

5. War Department records show that accused is 22 years of age. He graduated from Virginia Polytechnic Institute, where he completed the Reserve Officers' Training Corps course. On 30 May 1942 he was appointed second lieutenant, Coast Artillery Officers' Reserve Corps, and on 15 June 1942 he entered upon extended active duty. He was promoted to first lieutenant, Army of the United States, on 2 June 1943.

6. Nine of the ten members of the court participating in the trial recommended clemency in view of accused's prior excellent record and character, of the finding that he was not disorderly in a public place (referring to the Specification, Charge I), and of the fact that his training and service as an officer are "of considerable importance to the Armed Forces". The recommendation for clemency was signed also by the trial

judge advocate, the defense counsel, and the assistant defense counsel, and is attached to the record of trial.

7. The court was legally constituted and had jurisdiction of the person and the subject matter. Except as noted, no errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support only so much of the findings of guilty of Charge I and its Specification as involves findings of guilty of the Specification in violation of Article of War 96, legally sufficient to support the findings of guilty of Charge II and its Specification, and legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of violation of Article of War 96.

Thomas H. Tappy, Judge Advocate.
John Townsend, Judge Advocate.
Fletcher R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 1 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 First Lieutenant Heywood J. Knighton (0-467724), Coast Artillery 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 Charge I and its Specification as involves findings of guilty of the Specification in violation of Article of War 96, legally sufficient to support the findings of guilty of Charge II and its Specification, and legally sufficient to support the sentence and to warrant confirmation thereof.

3. Nine of the ten members of the court participating in the trial recommended clemency in view of accused's prior excellent record and character and his future potential value to the Armed Forces. The recommendation for clemency was signed also by the trial judge advocate, the defense counsel, and the assistant defense counsel. In view of the recommendations for clemency and the circumstances of the case, I recommend that the sentence be confirmed but that the execution thereof be suspended during the pleasure of the President.

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 ltr. for sig. Sec. of War.
Incl.3-Form of Ex. action.

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but execution suspended. G.C.M.O. 78, 25 Feb 1944)

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

SPJGQ
CM 244825

7 DEC 1943

UNITED STATES v. Second Lieutenant GEORGE H. MILES (O-1114233), Corps of Engineers.	ARMY SERVICE FORCES FOURTH SERVICE COMMAND Re-trial by G.C.M., convened at Camp Sutton, North Carolina, 12 November 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 Charges and Specifications:

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

Specification: In that Second Lieutenant George H. Miles, Corps of Engineers, Headquarters and Service Company, 1304th Engineer General Service Regiment, did, without proper leave, absent himself from his organization and station, Camp Sutton, North Carolina, from about 6 September 1943 to about 24 September 1943.

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

Specification 1: (Finding disapproved by the reviewing authority).

Specification 2: Finding of not guilty.

Specification 3: In that Second Lieutenant George H. Miles, Corps of Engineers, Headquarters and Service Company, 1304th Engineer General Service Regiment, having received a lawful command from Captain William F. Cronin, Corps of Engineers, his superior officer, who was then in the execution of his office, to report to Colonel Carl H. Breitwieser, Corps of Engineers, Commanding

Officer of the 1304th Engineer General Service Regiment, Camp Sutton, North Carolina, within ten minutes, did, at Camp Sutton, North Carolina, on or about 10 September 1943, wrongfully fail to obey the same.

Specification 4: (Finding disapproved by the reviewing authority).

He pleaded not guilty to all of the Charges and Specifications. He was found not guilty of Specification 2 of Charge II; guilty of the Specification of Charge I, except the words "6 September 1943" and substituting therefore the words "10 September 1943"; and guilty of the remaining Specifications and of the Charges. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority disapproved the findings of guilty of Specifications 1 and 4 of Charge II, approved the sentence but remitted the forfeitures, recommended that the sentence thus modified be commuted to a reprimand and forfeiture of $50 per month for 6 months, and forwarded the record of trial for action under Article of War 48.

3. The competent evidence of the prosecution in support of the Specifications and Charges of which the accused was found guilty and which were not disapproved by the reviewing authority may be summarized as follows:

In September 1943 the accused was stationed at Camp Sutton, North Carolina, and assigned to duty as Assistant to the S-3 section of the 1304th Engineer General Service Regiment, Regimental Headquarters. Over the weekend of September 4th and 5th, the accused was absent from Camp Sutton, North Carolina, on a VOCO. He failed to appear on 6 September 1943. About 11 a.m., 7 September 1943, he telephoned from Monroe, North Carolina, to his commanding officer, Captain William M. Wessely, and reported that he was not present for duty because of his mental state of mind and concern over a train wreck that had occurred the preceding day in which a friend of his was involved. Captain Wessely instructed accused to return to camp immediately. Captain Wessely saw accused that evening on his bunk in his quarters at Camp Sutton. He also saw him on the following morning (8 September 1943) in the Control Section of Camp Sutton. Although he was the accused's commanding officer he did not see the accused thereafter until 24 September 1943 (R. 10-12).

Major William S. Barnes, Executive Officer of the regiment testified that the accused reported at his office on the morning of 8 September 1943 and shortly thereafter left; that from 10 September 1943 to 24 September 1943 the accused was not at Camp Sutton and could not be found there although a thorough search was made for that purpose (R. 14).

On 10 September 1943 Captain William F. Cronin drove to Monroe, North Carolina under orders of the regimental commander to find the accused and bring him back to Camp Sutton. He found the accused in a room of the Monroe Hotel, Monroe, North Carolina and brought him back to the regimental area and there instructed him to report to the regimental commander. The accused requested that he be given ten minutes in which to wash. Captain Cronin granted this request and ordered him to "report in ten minutes to Colonel Breitwieser" (R. 18-19).

It was stipulated that if Colonel Breitwieser were present in court he would testify that the accused did not report to him at any time during 10 September 1943 (R. 21).

When the accused returned to Camp Sutton on 24 September 1943 he told Second Lieutenant Murray Kaplan that he had been ill and when he recovered he was in New York and had then come back to Camp Sutton (R. 17).

4. The accused elected to testify under oath and related in defense of the Charges that he failed to return to Camp Sutton on Monday, 6 September 1943 at 7 a.m. when on leave of absence by VOCO and did not return until 1 p.m. that day; that he again went to Monroe, North Carolina without permission and telephoned the following morning, 7 September 1943, to his commanding officer, Captain Wessely, and returned to Camp Sutton that afternoon. He did not recall receiving any direct order from Captain Wessely over the telephone at that time to return to the camp. He saw Captain Wessely the following morning, 8 September 1943, and in compliance with Captain Wessely's order to go to the Regimental Headquarters, he immediately reported to Major Barnes at those headquarters. He left shortly thereafter and was again in Monroe, North Carolina, on 10 September 1943 when Captain Cronin came and took him back to Camp Sutton. Captain Cronin told him that Colonel Breitwieser wanted to see him. The accused then said "Well I'll have to get washed up first, I will be up in about 10 minutes." Captain Cronin said, "O.K. see you in 10 minutes." The accused did not, however, return but left the camp at that time (R. 22-23). He admitted that he was absent without leave from 10 September 1943 to 24 September 1943 (R. 25). He testified further that he did not get along with either Captain Wessely or Colonel Breitwieser and for that reason had requested to be transferred on two different occasions.

5. With reference to the Specification of Charge I and Charge I, wherein the accused is charged with having been absent without leave, it was shown by competent evidence of the prosecution, and admitted by the accused, that he did absent himself from his organization at Camp Sutton, North Carolina, from 10 September 1943 to 24 September 1943. Evidence is, therefore, legally sufficient to support the finding of guilty of this Specification and the Charge.

With reference to Specification 3 of Charge II the evidence is clear, from the testimony of Captain Cronin, the superior officer of the accused, that Captain Cronin did, on 10 September 1943, at Camp Sutton, North Carolina, in the execution of his office, command or order the accused to report within ten minutes to Colonel Breitwieser. The accused claimed that Captain Cronin's conversation consisted of a request that he report to the Colonel rather than an order. It was shown by the prosecution, and admitted by the accused, that he did not report to Colonel Breitwieser either as he was ordered or requested, but instead the accused left the camp without authority. The accused was conscious of the fact that Captain Cronin had driven all the way to Monroe, North Carolina, and brought him back to camp because of the fact that the accused was absent without authority. He must have known that it was his duty to report, under such circumstances, to his commanding officer and therefore it is a reasonable inference to be drawn from the conversation between the accused and Captain Cronin, that Captain Cronin's direction was phrased as an order to report and that it was so understood by the accused. The evidence in support of the finding of guilty of this Specification is, therefore, considered legally sufficient.

6. The records of the Adjutant General show that the accused is 38 years of age, married, father of one son 13 years of age. He graduated from a Preparatory School in 1922. He was employed as a salesman, an estimator and as a foreman for a contractor by various concerns until he was inducted 27 August 1942. He was commissioned at OCS, Camp Belvoir, second lieutenant, 26 May 1943, after ten months service as an enlisted man. He attended the 2d Cadre Officers course of the Engineer School 5 June to 26 June 1943 but did not graduate "due to insufficient attendance due to student's A.W.O.L. (5 days)." His rating was satisfactory for that part of the course he completed.

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 as modified by the reviewing authority and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 61 or Article of War 96.

William A. Rounds, Judge Advocate

Paul Stephen, Judge Advocate

Herbert B. Fredman, Judge Advocate

1st Ind.

War Department, J.A.G.O., 31 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 George H. Miles (O-1114233), 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 as modified by the reviewing authority and to warrant confirmation thereof. I recommend that the sentence as modified 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 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 as modified by reviewing authority confirmed. G.C.M.O. 79, 25 Feb 1944)

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

SPJGK
CM 244848

7 JAN 1944

UNITED STATES)	ARMY AIR FORCES
)	CENTRAL FLYING TRAINING COMMAND
v.)	
)	Trial by G.C.M., convened
Second Lieutenant JOHN B.)	at Brooks Field, Texas, 8
GEORGE (O-685324), Air Corps.)	November 1943. Dismissal.

OPINION of the BOARD OF REVIEW
TAPPY, 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 Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: Nolle Prosequi.

Specification 2: In that Second Lieutenant John B. George, 53rd Base Headquarters and Air Base Squadron, did, in the vicinity of and at or near Norman, Oklahoma, on or about 17 September 1943, disobey paragraph 16a(1)(d), Army Air Forces Regulations numbered 60-16, issued by the Commanding General, Army Air Forces, in the execution of his office, reading as follows:

"16. Minimum altitudes of flight.
"a. Except during take-off and landing, aircraft will not operate
"(1) below the following altitudes:
"* * *
"* * *
"* * *
"(d) 500 feet above the ground elsewhere than as specified above."

by flying a military airplane at approximately fifty (50) feet above the ground, when not necessary to the performance of his mission and not during take-off or landing of said aircraft.

Specification 3: In that Second Lieutenant John B. George, 53rd Base Headquarters and Air Base Squadron, having received a lawful order from Lieutenant Colonel Howell M. Estes, Jr., to remain at Love Field, Dallas, Texas, until receipt of further orders, or words to that effect, the said Lieutenant Colonel Estes being in the execution of his office, did, by flying from Love Field, Dallas, Texas, to Pampa Army Air Field, Pampa, Texas, on or about 20 September, 1943, without having received competent orders to that effect, fail to obey the same.

Specification 4: In that Second Lieutenant John B. George, 53rd Base Headquarters and Air Base Squadron, having received a lawful order from Lieutenant Colonel Howell M. Estes, Jr., to pilot an Army Air Forces AT-6 airplane from Pampa Army Air Field, Pampa, Texas, directly to Love Field, Dallas, Texas, or words to that effect, the said Lieutenant Colonel Howell M. Estes, Jr., being in the execution of his office, did, on or about 18 September 1943 fail to obey the same by flying to and landing at Norman, Oklahoma, prior to proceeding to Love Field, Dallas, Texas.

Specification 5: In that Second Lieutenant John B. George, 53rd Base Headquarters and Air Base Squadron, having received a lawful order from Lieutenant Colonel Howell M. Estes, Jr., to proceed from Pampa Army Air Field, Pampa, Texas, to Love Field, Dallas, Texas, alone in an Army Air Forces AT-6 airplane, or words to that effect, the said Lieutenant Colonel Howell M. Estes, Jr., being in the execution of his office, did on or about 18 September 1943, fail to obey the same by taking Second Lieutenant Robert S. Knapek as a passenger on said flight.

He pleaded guilty to and was found guilty of the Charge and all Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48, but recommended, in view of the age of accused, his prior training and value to the Government, that the sentence be commuted to a reprimand, restriction to the limits of his post for three months, and forfeiture of $100 of his pay per month for six months.

3. Colonel Howell M. Estes, Jr., as director of training, was in command of a group of officers and enlisted men stationed at Brooks Field, Texas, and on 16 September proceeded to evacuate a number of airplanes from that field to Pampa Army Air Field, Texas, to avoid a threatened

storm. The accused was the pilot of an AT-6 type airplane on this mission. First Lieutenant William M. Beaven, Air Corps, was also the pilot of an airplane on this mission, but enroute from Brooks Field to Pampa Field he got lost and was forced to land at Love Field, Dallas, Texas. His airplane was damaged in landing which prevented him from proceeding to Pampa Field. The following day, 17 September 1943, at 0857, the accused and Second Lieutenant Robert S. Knapek each took off for a local flight from Pampa Field in two AT-6 type airplanes, the accused's plane bearing field number 0-21, and the plane piloted by Lieutenant Knapek bearing the field number 0-40 (outbound flight plan Log Ex. 1). At about 10:15 on 17 September two airplanes were observed by Commander W. J. Wicks, Commanding Officer, U.S. Naval Air Station, Norman, Oklahoma, flying at a low altitude in the vicinity of highway No. 9 and approximately 20 miles west of Norman. Commander Wicks was driving along highway No. 9 at a very slow rate of speed, the highway being under construction, when he heard an airplane in the vicinity diving at great speed. He alighted from his car and observed two AT-6 type airplanes zoom over his head and fly along the highway at an altitude of about fifteen feet above the ground. The two planes then made another pass over the highway, and he observed the field numbers on each of them were 0-40 and 0-21. The pilots were apparently simulating a strafing attack on the highway. The first pass over the highway by these planes was by far the lowest. The others were a little above the tree tops or possibly fifty feet above the ground. At the time this performance took place the weather was clear and unlimited. The area was sparsely populated and the terrain was very rough and hilly with numerous patches of trees here and there. These same two airplanes returned to Pampa Field from Norman, Oklahoma, and landed at 1256 (inbound flight plan log Ex. 1).

4. Army Air Force Regulation No. 60-16 dated 9 September 1942, prohibits the operation of Army aircraft below the altitude of 500 feet except during take-off, landing, and certain other conditions, therein specified (Ex. B).

5. The following day, 18 September, Colonel Estes instructed the accused to fly to Love Field, Dallas, Texas, in an AT-6 type airplane in order to permit Lieutenant Beaven to return to Pampa in the plane which accused was to use in making the flight to Love Field. Accused requested permission of Colonel Estes to allow some of the pilots in the pool to go over on his wing, in order to get some time in, but this request was denied. He was ordered to go direct to Love Field and to go alone. He was further ordered to remain at Love Field in charge of the airplane flown there on the 16th by Lieutenant Beaven, which was undergoing repair, until the repairs were completed and then contact Colonel Estes at Pampa or if he had left Pampa by that time to wire Brooks Field for instructions. These orders were given the accused by Colonel Estes between 1350 and 1400 hours on 18 September 1943 (R.9-11). At 1436 hours, 18 September 1943,

accused cleared Pampa Field for Norman, Oklahoma, instead of Love Field, Dallas, as he had been ordered (R.20; Ex. C, Ex. C-2), and remained at that station approximately one hour before proceeding to Love Field, Dallas (R.20). He departed from Norman, Oklahoma, for Love Field at 1737 hours on 18 September (Ex. D; Ex. D-2) and arrived at Love Field at 1839 hours the same date (Ex. E, Ex. E-2). He did not go alone as ordered, but took Lieutenant Knapek as a passenger in the rear seat of his plane (R.20; Ex. C-2; Ex. D-2; Ex. E-2).

6. Upon arrival at Love Field with Lieutenant Knapek as a passenger, he tried to locate Lieutenant Beaven but was unsuccessful. He then left a note on Lieutenant Beaven's bed purporting to convey the orders of Colonel Estes, viz.: that Lieutenant Beaven should fly back to Camp Pampa as soon as possible in the airplane which accused had used in making the flight to Love Field. The next morning, 19 September, Lieutenant Beaven left Dallas for Pampa Field in the airplane which had been repaired.

7. Accused remained at Love Field until 20 September, but not having received any instructions from Colonel Estes and rather than send a wire requiring three hours for a reply, he decided to fly to Pampa Field, which he did. Upon arrival at Pampa Field, he discovered every one had returned to Brooks Field, whereupon he flew back to Love Field, Dallas (R.19-20).

8. While he was making this flight from Love Field to Pampa Field and return Major William W. Holmes, Air Corps, on orders from Colonel Estes, had left Brooks Field for Love Field to pick up the accused and return him to Brooks. When Major Holmes arrived at Love Field he discovered accused had cleared for Pampa. He then proceeded to Pampa and upon arrival there discovered that accused had cleared that field for Dallas, whereupon, he notified the operations officer at Love Field and requested him not to clear accused from Love Field until his arrival there. He then flew back to Love Field, picked up accused, and returned him to Brooks Field (R.17-18).

9. Accused, at his own request, testified as a witness under oath. He termed his testimony as an apology and not as an excuse for his conduct. He admitted the low flying was absolutely inexcusable and admitted further the several failures to obey the orders in question. The substance of the accused's testimony was that he did not realize he was doing wrong, because he considered that going by way of Norman to Dallas was only a slight deviation and did not greatly delay his arrival in Dallas; he considered that taking a passenger in the rear seat of his own airplane was about the same as going alone, as no other plane was taken; and he considered that his return from Dallas to Pampa was not improper as he had waited for orders for some time and failing to receive them thought it best to use his own judgment.

10. The evidence conclusively shows that accused violated Army Air Force Regulations Number 60-16, issued by the Commanding General, Army

Air Forces dated 9 September 1942, as alleged in Specification 2; that he failed to obey a lawful order of his superior officer to remain at Love Field, Dallas, Texas, as alleged in Specification 3; that he failed to obey a lawful order of his superior officer to fly an AT-6 type airplane to Love Field by flying this plane via Norman, Oklahoma, before proceeding to Love Field, as alleged in Specification 4, and that he failed to obey a lawful order of his superior officer to fly alone in an airplane from Pampa Air Field to Love Field by taking Lieutenant Knapek as a passenger in the rear seat of his plane, as alleged in Specification 5.

The findings of guilty of each of the Specifications and of the Charge are sustained not only by the accused's pleas of guilty, but by the uncontradicted evidence presented by the prosecution as well as the testimony of the accused himself. In the opinion of the Board of Review the evidence establishes accused's guilt beyond a reasonable doubt.

11. War Department records show that accused is 19 years of age. He pursued a course in Chemical Engineering at the University of Oklahoma, for a period of two months. He had one year of cadet training in the Royal Canadian Air Force between October 1941 and October 1942. He enlisted as aviation cadet 2 February 1943; was appointed second lieutenant, Army of the United States, 26 June 1943, and on the same date ordered to active duty at Army Air Forces Advanced Flying School, Eagle Pass, Texas.

12. The court was legally constituted and had jurisdiction of the person and 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 violation of the 96th Article of War.

Thomas N. Tabby, Judge Advocate.

Lucy G. Gor, Judge Advocate.

Wm Rosenfeld, Judge Advocate.

(On Leave), Judge Advocate.

1st Ind.

War Department, J.A.G.O., 5 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 Second Lieutenant John B. George (0-685324), 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. Consideration has been given to the original action of the reviewing authority, dated 26 November 1943, approving the sentence and recommending a commutation thereof due to the youth of accused, his prior training, and potential value to the Government; to letters addressed by the father of accused to the President, dated 8 December 1943, to the Secretary of War dated 14 December 1943, and to The Judge Advocate General dated 14 December 1943; to a letter by the reviewing authority addressed to the father of accused, dated 29 November 1943, advising that he had approved the sentence and recommended commutation thereof; and to a letter from the reviewing authority dated 26 January 1944 to The Judge Advocate General requesting that the portion of his action of 26 November 1943 which recommends commutation of the sentence be disregarded because accused had willfully violated restrictions imposed upon him subsequent to his trial by leaving his station at night and occupying a room at a hotel in San Antonio, Texas, from 24 to 27 November 1943, which breach of restrictions was unknown to the reviewing authority at the time of his original recommendation and at the time of his letter to the father of the accused. It is evident that the accused has no appreciation of the duties and responsibilities of a commissioned officer.

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

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

8 Incls.
Incl.1-Record of trial.
Incl.2-Draft of ltr.sig. Sec. War.
Incl.3-Form of Ex. action.
Incl.4-Ltr. fr.father of acc'd to Pres.
Incl.5-Ltr. fr.father of acc'd to S/W
Incl.6-Ltr. fr.father of acc'd to JAG
Incl.7-Ltr.fr.rev. au. to father of acc'd.
Incl.8-Ltr. fr. rev. au. to JAG.

(Sentence confirmed. G.C.M.O. 171, 15 Apr 1944)

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

SPJGN
CM 244849

7 DEC 1943

UNITED STATES	8TH ARMORED DIVISION
v.	Trial by G.C.M., convened at North Camp Polk, Louisiana, 9 November 1943. Dismissal.
First Lieutenant JOHN H. RIMMER, Jr. (0-1296963), Headquarters Company, 7th Armored Infantry Battalion.	

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 85th Article of War.

Specification: In that First Lieutenant John H. Rimmer, Jr., Headquarters Company, 7th Armored Infantry Battalion, North Camp Polk, Louisiana, was, at North Camp Polk, Louisiana, on or about 24 October 1943, found drunk while on duty as Officer of the Day.

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 forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence but remitted so much thereof as relates to forfeiture of pay and allowances and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that on 24 October 1943 the accused was the duly designated and acting Infantry Officer of the Day of the 8th Armored Division Infantry Interior Guard with his tour of duty commencing at 1130 o'clock on such date and terminating at 1630 o'clock on 25 October 1943. The 8th Armored Division is comprised of the 49th, 58th and 7th Armored Infantry Battalions of which the latter was accused's organization. The Division General Orders relative to Guard Orders in effect during the time involved were in evidence and specified his duties

and recited that "the Battalion Commander of the Battalion furnishing the Officer of the Day will assume responsibility for the conduct of the Guard". The accused was sober when he assumed his duty in proper uniform and armed. During the afternoon, however, the accused entered the Infantry Officers' Clubroom where he began drinking 3.2 beer and by evening he was evidencing ostensible signs of intoxication. During the evening the Division Reserve Commander, Lieutenant Colonel Leo F. Kengla, Jr., escorting an Army nurse, appeared in the clubroom and the accused without previous arrangement apparently attached himself to the party. Also, during the evening a junior officer in company with another nurse visited the clubroom and another officer exhibited to the two nurses a unique pearl-handled revolver. During the examination of such revolver, the accused, "unsteady" and "wavering" on his feet, unholstered his own loaded automatic and pointed it at various persons, notwithstanding cautions expressed to him by several other officers who observed his conduct and were of the opinion, as they so testified, that the accused was at such time intoxicated to the extent that he was unable to perform his duties as Officer of the Day (R. 6-8, 8-10, 10-12, 12-13, 13-14, 14-16, 16-17; Exs. A, B).

Conversation among the officers who observed accused's actions and condition, resulted in one of them reporting the incident to the accused's battalion commander who directed that the accused be taken to the barracks to await his arrival. While awaiting his arrival for some 15 or 20 minutes, the accused, whose automatic was then unloaded by another officer, fell asleep while smoking a cigarette. He was awakened with difficulty and appeared before his battalion commander who relieved him of his duties and ordered him to remain in his quarters. The battalion commander, as did the other officers, expressed the opinion that the accused was an outstandingly efficient officer (R. 6-8, 8-10, 10-12, 12-13, 13-14, 14-16, 16-17, 17-19).

4. The evidence for the defense shows that neither Lieutenant Colonel Kengla nor his nurse companion on the occasion witnessed any display of weapons by the accused nor did they form an opinion that he was intoxicated, although he was seen drinking beer and dancing with one of the nurses. Lieutenant Colonel Kengla rated the accused as "superior" for military efficiency, had recommended him for promotion and had conversed with him for a few minutes shortly after the battalion commander had relieved him as Officer of the Day. At such time the accused appeared to be "nervous and agitated" but evidenced no appearance of intoxication and was advised that the matter was between him and his battalion commander. An officer, who had heard some of the officers, witnesses for the prosecution, discussing the episode, testified that two of such officers had stated that they "hoped Lieutenant Rimmer would be tried so that it would bring Lieutenant Colonel Kengla into the trial" (R. 20-23, 23-24, 24-25).

The accused, after explanation of his rights as a witness,

elected to make an unsworn statement in writing which recites that, after mounting the guard and performing numerous routine duties of his position as Officer of the Day, he instructed the Sergeant of the Guard where he would be and proceeded to the clubroom about 1600 o'clock, that there he encountered Lieutenant Colonel Kengla and two nurses with whom he drank about 4 or 5 glasses of beer, that he, at the request of one of the nurses, unholstered his automatic to demonstrate the difference between it and another officer's "old Western make: Single action Colts Model" revolver which he handled cautiously and subsequently reholstered, that while dancing with one of the nurses he had placed his gun and gun belt on the bar, and that, after he had been relieved, he had requested Lieutenant Colonel Kengla to speak to the battalion commander for him but was advised that it was a matter between him and his own battalion commander (R. 25, Def. Ex. 1).

5. The Specification alleges that the accused, at North Camp Polk, Louisiana, on or about 24 October 1943, was found drunk while on duty as Officer of the Day. The elements of the offense alleged are being found drunk while in the course of military duty and "any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties is drunkenness within the meaning of the article" (85) (MCM, 1928, par. 145).

The evidence adduced by the testimony of numerous officers establishes beyond a reasonable doubt that on the occasion in question the accused was "unsteady and wavering" on his feet after drinking beer, that he carelessly handled his automatic, and that he was intoxicated to such an extent that he was unable to continue the performance of his duties as Officer of the Day. The evidence for the accused, elicited from self-admitted unobservant witnesses, as does also the accused's unsworn statement, merely seeks to minimize the episode while corroborating in numerous details the evidence presented by the prosecution. The accused's guilt of the offense as alleged is, therefore, conclusively established by competent evidence which amply supports the findings of guilty of the Charge and its Specification.

6. The accused is about 36 years old. The War Department records show that he has had about 8 years enlisted service in the Mississippi National Guard prior to induction into Federal service on 25 November 1940 from which he was discharged because he was over 28 years old on 14 November 1941 but was recalled to active duty on 25 January 1942 and continued his enlisted service until 16 October 1942 when he was commissioned a second lieutenant upon completion of Officer Candidate School, that he has had active duty as an officer since the latter date and that he was promoted to first lieutenant on 28 July 1943.

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

For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of the Charge and its Specification and the sentence, and to warrant confirmation thereof. Dismissal is mandatory upon conviction in time of war of a violation of Article of War 85.

Abner E. Lipscomb, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

SPJGN
CM 244849

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 First Lieutenant John H. Rimmer Jr. (0-1296963), Headquarters Company, 7th Armored Infantry Battalion.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence as approved by the reviewing authority and legally sufficient to warrant confirmation thereof. Because of his previous record, I recommend that the sentence of dismissal be confirmed but suspended during the pleasure of the President.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the foregoing recommendation, should 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 execution suspended. G.C.M.O. 27, 13 Jan 1944)

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

SPJGN
CM 244865

7 DEC 1943

UNITED STATES	)	26TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Camp Campbell, Kentucky, 18 November 1943. Dismissal, total forfeitures and confinement for five (5) years.
Second Lieutenant KYLE C. DAVIS (0-1303991), 328th Infantry.	)	

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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. He was tried upon the following Charges and Specifications:

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

Specification: In that 2nd Lt. Kyle C. Davis, Company "B", 328th Infantry, did, without proper leave, absent himself from his station and duties at Camp Gordon, Georgia from on or about August 1, 1943 to on or about October 17, 1943.

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

Specification 1: In that 2nd Lt. Kyle C. Davis, Company "B", 328th Infantry, did, at Augusta, Georgia, on or about July 23, 1943, with intent to deceive, wrongfully and unlawfully make and utter to Hotel Richmond a certain check, in words and figures as follows, to wit:

Augusta, Georgia July 23, 1943 No. 11

GEORGIA RAILROAD BANK & TRUST COMPANY

PAY TO THE
ORDER OF Hotel Richmond——————————$ 20xx/100

Twenty Dollars and No 100/xx——————————DOLLARS

Kyle C. Davis
2nd Lt., Inf.
0-1303991

and by means thereof did fraudulently obtain from Hotel Richmond Twenty, (20.00) Dollars, he the said 2nd Lt. Kyle C. Davis then well knowing he did not have and not intending he should have sufficient funds in the Georgia Railroad Bank and Trust Company for the payment of said check.

Specification 2: Same form as Specification 1, but alleging check drawn on same bank dated July 24, 1943, payable to the order of Hotel Richmond made and uttered to Hotel Richmond at Augusta, Georgia and fraudulently obtaining thereby $10.00.

Specification 3: Same form as Specification 1, but alleging check drawn on same bank dated August 1, 1943, payable to the order of Hotel Times Square made and uttered to Hotel Times Square at New York, New York and fraudulently obtaining thereby $10.00.

Specification 4: Same form as Specification 1, but alleging check drawn on same bank dated August 1, 1943, payable to the order of Hotel Times Square made and uttered to Hotel Times Square at New York, New York and fraudulently obtaining thereby $5.00.

Specification 5: Same form as Specification 1, but alleging check drawn on same bank dated August 2, 1943, payable to the order of Hotel Times Square made and uttered to Hotel Times Square at New York, New York and fraudulently obtaining thereby $15.00.

Specification 6: Same form as Specification 1, but alleging check drawn on same bank dated August 21, 1943, payable to the order of Mr. F. V. Doty made and uttered to Mr. F. V. Doty at Lake George, New York and fraudulently obtaining thereby $5.00.

Specification 7: Same form as Specification 1, but alleging check drawn on same bank dated August 21, 1943, payable to the order of Mr. F. V. Doty made and uttered to Mr. F. V. Doty at Lake George, New York and fraudulently obtaining thereby $5.00.

Specification 8: Same form as Specification 1, but alleging check drawn on same bank dated August 25, 1943, payable to the order of Mr. F. V. Doty made and uttered to Mr. F. V. Doty at Lake George, New York and fraudulently obtaining thereby $10.00.

Specification 9: Same form as Specification 1, but alleging check drawn on same bank dated August 25, 1943, payable to the order of Mr. F. V. Doty made and uttered to Mr. F. V. Doty at Lake George, New York and fraudulently obtaining thereby $10.00.

Specification 10: Same form as Specification 1, but alleging check drawn on same bank dated August 27, 1943, payable to the order of Cash made and uttered to Mrs. Olive Doty at Lake George, New York and fraudulently obtaining thereby $20.00.

Specification 11: Same form as Specification 1, but alleging check dated 6 October 1943, drawn on First National Bank of North Vernon, North Vernon, Indiana, to the order of Cash made and uttered to Bank of Manhattan Company and fraudulently obtaining thereby $85.00.

Specification 12: Same form as Specification 1, but alleging check dated 7 October 1943, drawn on bank described in Specification 11, to the order of Cash made and uttered to Prever Trading Company and fraudulently obtaining thereby $75.00.

Specification 13: Same form as Specification 1, but alleging check dated 9 October 1943, drawn on bank described in Specification 11, to the order of Cash made and uttered to Prever Trading Company and fraudulently obtaining thereby $75.00.

Specification 14: Same form as Specification 1, but alleging check dated 13 October 1943, drawn on bank described in Specification 11, to the order of Cash made and uttered to Prever Trading Company and fraudulently obtaining thereby $60.00.

Specification 15: In that 2nd Lt. Kyle C. Davis, Company "B", 328th Infantry, with intent to deceive did at New York, New York, from on or about October 6, 1943 to on or about October 17, 1943, unlawfully pose as and pretend to be a 1st Lt. in the Army of the United States, well knowing that said pretenses were false, to the prejudice of good order and military discipline.

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 at such place as the reviewing authority might direct for twelve years. The reviewing authority approved only so much of the sentence as provides for dismissal, total forfeitures and confinement at hard labor for five 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. The evidence for the prosecution supporting the accused's pleas of guilty shows that his organization's morning report, which was properly identified and admitted in evidence, reflected his absence without leave as alleged. It was stipulated that the accused, while in uniform, was apprehended on 17 October 1943 at New York City and that from 6 October 1943 until apprehension he had unlawfully posed as and pretended to be a first lieutenant (R. 12-14; Ex. 1-2).

The investigating officer testified that the accused, after full explanation of his right to speak or remain silent, on 25 October 1943 voluntarily made statements in which he cooperatively admitted his absence without leave, his unlawful pretension to the rank of first lieutenant and his making and uttering with fraudulent intent the checks described

in Specifications 1 through 14, inclusive, Charge II, well knowing he did not have sufficient funds on deposit in the respective banks upon which they were drawn, and without intending so to have, for which he received the cash therefor. The checks themselves were identified and admitted into evidence (R. 14-19; Exs. 3-16).

4. The evidence for the defense shows that the accused, prior to trial, had redeemed the checks described in Specifications 1, 2, 4, 6, 7, 8 and 9, Charge II, aggregating the sum of $65. The accused elected to remain silent(R. 19-20).

5. The Specification, Charge I, alleges that the accused, without proper leave, absented himself from his station and duties at Camp Gordon, Georgia, from on or about 1 August 1943 to on or about 17 October 1943. The elements of the offense and the proof required for conviction thereof, according to applicable authority, are as follows:

> "* * * (a) That the accused absented himself from his command, * * *, station, or camp for a certain period, as alleged; and (b) that such absence without authority from anyone competent to give him leave." (M.C.M., 1928, par. 132)

The evidence adduced by the prosecution, including the morning report, the accused's admissions and the fact of his apprehension in New York City, far distant from his station, supplements the accused's plea of guilty and fully warrants the findings of guilty of Charge I and its Specification.

6. Specifications 1 through 14, inclusive, Charge II, allege that the accused at specified times and places wrongfully and unlawfully made and uttered with intent to deceive fourteen checks upon two named banks and thereby fraudulently obtained from described parties cashing them the money therefor when he well knew that he did not have, and not intending that he should have, sufficient funds on deposit with such banks for the payment thereof. The issuance of checks by an officer against a known inadequate bank account without intending that sufficient funds be on deposit for payment thereof is certainly conduct of a nature to bring discredit upon the military service and particularly is this so when such checks are cashed by civilians (CM 202027 (1934) Dig. Ops. JAG 1912-1940, sec. 453 (22)).

The checks themselves and the accused's admissions to the investigating officer, comprising the evidence for the prosecution upon these Specifications, supplement the accused's plea of guilty thereto and amply warrant the findings of guilty of Specifications 1-14, inclusive, Charge II and of Charge II.

7. Specification 15, Charge II, alleges that the accused did at New York, New York, with intent to deceive

> "from on or about October 6, 1943 to on or about October 17, 1943, unlawfully pose as and pretend to be a 1st Lt. in the Army of the United States, well knowing that said pretenses were false, to the prejudice of good order and military discipline."

"Assuming a rank superior to his own" is a violation of Article of War 96 (Military Law and Precedents, 2nd Ed., Winthrop, page 727).

The accused not only pleaded guilty to the alleged offenses but the stipulated evidence, admitted by the court after full explanation to the accused of its effect, establishes beyond a reasonable doubt his guilt and supports the findings of guilty of Specification 15, Charge II, and of Charge II.

8. The accused is about 21 years old. The War Department records show that he has had enlisted service from 28 September 1940 until 14 December 1942 when he was commissioned a second lieutenant upon completion of Officers Candidate School and that he has had active duty as an officer since the latter date.

9. 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 61 or 96.

Abner E. Lipscomb, Judge Advocate.

Tabbett H. Golden, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

(62)

SPJGN
CM 244865

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 Second Lieutenant Kyle C. Davis (0-1303991), 328th Infantry.

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

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

Myron C. Cramer

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 as approved by reviewing authority confirmed but confinement reduced to two years. G.C.M.O. 54, 5 Feb 1944)

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

SPJGN
CM 244884

22 DEC 1943

UNITED STATES	CAMP ROBERTS
v.	Trial by G.C.M., convened at Camp Roberts, California, 10 November 1943. Dismissal and confinement for ten (10) years. Disciplinary Barracks.
Second Lieutenant JOSEPH A. TENNANT (0-1307779), Infantry.	

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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 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 Joseph A. Tennant, Company A, 79th Infantry Training Battalion, Camp Roberts, California, did, without proper leave, absent himself from his station at Camp Roberts, California, from about 30 October 1943 to about 2 November 1943.

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

Specification 1: In that Second Lieutenant Joseph A. Tennant, Company A, 79th Infantry Training Battalion, Camp Roberts, California, did, at Camp Roberts, California, from about 30 September 1943 to about 31 October 1943, feloniously take, steal, and carry away five hundred thirty one dollars and no cents ($531.00), lawful money of the United States, the property of First Lieutenant John F. Wilbur, Infantry, Commanding Company A, 79th Infantry Training Battalion.

Specification 2: In that Second Lieutenant Joseph A. Tennant, Company A, 79th Infantry Training Battalion, Camp Roberts, California, did, at Camp Roberts, California, on or about 30 September 1943, feloniously embezzle by fraudulently converting to his own use lawful money of the United States, of the value of eighty dollars and no cents ($80.00), the property of Private John W. Shiel, entrusted to him by the said Private John W. Shiel for safekeeping by Second Lieutenant Joseph A. Tennant.

Specification 3: In that Second Lieutenant Joseph A. Tennant, Company A, 79th Infantry Training Battalion, Camp Roberts, California, did, at Camp Roberts, California, on or about 5 October 1943, feloniously embezzle by fraudulently converting to his own use lawful money of the United States, of the value of seventy dollars and no cents ($70.00), the property of Private Orville A. Smith, entrusted to him by the said Private Orville A. Smith for safekeeping by Second Lieutenant Joseph A. Tennant.

Specification 4: In that Second Lieutenant Joseph A. Tennant, Company A, 79th Infantry Training Battalion, Camp Roberts, California, did, at Camp Roberts, California, on or about 30 September 1943, feloniously embezzle by fraudulently converting to his own use lawful money of the United States, of the value of thirty dollars and no cents ($30.00), the property of Private Don D. Talcott, entrusted to him by the said Private Don D. Talcott for safekeeping by Second Lieutenant Joseph A. Tennant.

Specification 5: In that Second Lieutenant Joseph A. Tennant, Company A, 79th Infantry Training Battalion, Camp Roberts, California, did, at Camp Roberts, California, on or about 30 September 1943, feloniously embezzle by fraudulently converting to his own use lawful money of the United States, of the value of One hundred dollars and no cents ($100.00), the property of Private Charles W. Sutton, entrusted to him by the said Private Charles W. Sutton for safekeeping by Second Lieutenant Joseph A. Tennant.

He pleaded not guilty to and was found guilty of all Charges and Specifications. Evidence of one previous conviction for absenting himself without leave for 14 days, was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for ten years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under Article of War 48.

3a. The evidence for the prosecution concerning Specification 1, Charge II, shows that on 17 October 1943, First Lieutenant John F. Wilbur, the commanding officer of Company A, 79th Infantry Training Battalion, the organization with which the accused was serving as executive officer, issued an order to the men of that organization to the effect that any men who wished to deposit valuables in the company safe over the two week bivouac period for which the company was about to depart, should "turn them over to the executive officer * * * to be placed in the safe" (R. 116-118). This order which was issued by Lieutenant Wilbur in the presence of the accused was broadcast to the men of the organization and as a result thereof a number of the men in the organization brought various sums of money to the company orderly room. Prior to this time no instructions had been issued relative to depositing money at the orderly room for safekeeping. These sums of money were received either by the first sergeant or the company clerk, counted, placed in a sealed envelope bearing the name of the depositors and placed in the company safe (R. 15-24, 106-108, 110, 116-118). The evidence showing the names of the men who so deposited their valuables, the date of their deposit, the separate and total amount deposited, and the date upon which, following their return from manuevers, they demanded the return of their money, may be summarized as follows:

NAME	AMOUNT	DATE OF DEPOSIT	DATE OF DEMAND	
Courneya, J.P.,Pvt.	$25.00	17 Oct.	30 Oct.	(R. 25-37)
Damerow, L.H.,Pvt.	20.00	16 Oct.	30 Oct.	(R. 38-42)
Deidrich, A.B.,Pvt.	140.00	17 Oct.	31 Oct.	(R. 42-45)
Barnard, R.F.,Pvt.	70.00	17 Oct.	31 Oct.	(R. 45-49)
Green, R.C.,Pvt.	45.00	17 Oct.	30 Oct.	(R. 50-53)
Hadley, B.H.,Pvt.	17.00	17 Oct.	30 Oct.	(R. 53-55)
Johnson, H.H.,Pvt.	34.00	17 Oct.	30 Oct.	(R. 55-57)
Johnson, V.L.,Pvt.	60.00	17 Oct.	31 Oct.	(R. 57-58)
Kohrmann, V.J.,S/Sgt.	80.00	17 Oct.	30 Oct.	(R. 59-61)
Marshall, D.M.,Pvt.	40.00	17 Oct.	1 Nov.	(R. 62-68)
Total	$531.00			

The evidence shows further that the safe in which the money in question was deposited was a company safe under the control of Lieutenant Wilbur. The commanding officer retained one key to the safe and gave the only other key to the accused who remained at the company area during the two week bivouac period of the company's absence. The accused did not have permission to remove any of the money which had been deposited by the enlisted men pursuant to the commanding officer's instructions. During the bivouac period the accused was observed to open the safe and to later close and lock it and place the key in his pocket. The company commander was not seen to open the safe during that period (R. 15, 94-96).

On 30 October 1943, upon the return of the company from their bivouac area, Lieutenant Wilbur opened the company safe in the presence of his company clerk and a group of soldiers who had called at the orderly

room for the purpose of withdrawing their money which they had left there for safekeeping. As a result of the examination of the safe which followed, the company commander found a number of empty envelopes and that the separate sums of money enumerated in the above tabulation were missing from the safe (R. 21-23, 88, 97).

b. The evidence for the prosecution concerning Specification 2, Charge II, shows that on 25 September 1943, Private John W. Shiel, Company A, 79th Infantry Training Battalion, delivered to the first sergeant of his company for safekeeping the sum of $80 in an envelope. Thereafter on 30 September 1943, the accused gave Private Shiel a receipt acknowledging the receipt of the money "for safekeeping". On 31 October 1943 he called at the company orderly room and, in the absence of the accused, requested the return of his money. His money was not found to be deposited in the safe and it had not been refunded to him at the time of the trial (Pros. Ex. P. and A.).

c. The evidence concerning Specification 3, Charge II, shows that on 5 October 1943, Private Orville A. Smith, Company A, 79th Infantry Training Battalion, delivered $70 to the company clerk of Company A, who in turn delivered it to the accused for safekeeping. The accused gave Private Smith a receipt acknowledging that the money in question was received "for safekeeping". At the time this money was delivered to the accused, Private Smith had received no instructions from his company commander concerning the deposit of money for safekeeping. On 31 October 1943, upon his return from the bivouac area with his company, he called at the orderly room, and, in the absence of the accused, requested the refund of his money. The money was not found in the safe and has not been subsequently delivered to Private Smith (Pros. Ex. Q and B).

d. The evidence for the prosecution concerning Specification 4, Charge II, shows that on 20 September 1943, Private Don D. Talcott, Company A, 79th Infantry Training Battalion, delivered $30 to the first sergeant of his company for safekeeping. Subsequently on 30 September 1943, Private Talcott received a receipt signed by the accused for the money previously handed to his first sergeant, acknowledging the money in question was received by the accused "for safekeeping". Thereafter on 31 October 1943, Private Talcott called at his company orderly room and, in the absence of the accused, requested the refund of his money. The money in question was not found in the safe and has not been subsequently delivered to Private Talcott (Pros. Ex. O and D).

e. The evidence for the prosecution concerning Specification 5, Charge II, shows that on 23 September 1943, Private Charles W. Sutton, Company A, 79th Infantry Training Battalion, delivered $100 to the accused "for safekeeping". Thereafter on 31 October 1943, upon his return to his company from maneuvers, he called at the company orderly room and, in the absence of accused, requested the refund of his money. The money was not in the safe and the accused has not subsequently refunded the money to Private Sutton (Pros. Ex. R and C).

f. The evidence for the prosecution concerning Specification 1, Charge I, shows that the accused on 30 October 1943, was present with his company until about 1100 o'clock at which time he left the organization and was not seen until 3 November 1943. The accused had not been given permission to be absent from his organization during this period. On 1 November 1943, the accused called his company commander by long distance telephone from Santa Barbara. During the telephone conversation the accused was told of the loss from the company safe of about $800. In reply the accused stated "I can account for about eight hundred dollars of the money. Would it do any good to come back to camp immediately?" In response to this question the accused was ordered by his company commander to return to his organization at once (Pros. Ex. E; R. 111-115).

In a sworn statement, the accused explained that he had become greatly indebted by reason of his moving his family from South Carolina to California and because he had lost all his personal property and belongings in a fire which had consumed his quarters. He stated,

> "I do not recall definitely the date that I took money from the safe, but it was definitely the latter part of Sept. or the 1st of Oct. 1943. My pay check is fairly large but by the time I had paid bank notes and current obligations there was practically nothing left. I took from this safe all of the money as I list hereon.
>
> | | | |
> |---|---|---|
> | Pvt. | Courneya | $25.00 |
> | | Damerow | 20.00 |
> | | Deidrich | 140.00 |
> | | Barnard | 70.00 |
> | | Green | 45.00 |
> | | Hadley | 17.00 |
> | | Johnson,H.H. | 34.00 |
> | | Johnson,V.L. | 60.00 |
> | S/Sgt. | Kohrmann | 80.00 |
> | Pvt. | Marshall | 40.00 |
> | | Shiel | 80.00 |
> | | Smith | 70.00 |
> | | Talcott | 30.00 |
> | | Sutton | 100.00 |
>
> A total of $811.00 deposited in envelopes was removed by the undersigned and spent on bills, current, and also expenses incident to various visits to Paso Robles of my wife. * * * In removal of these mens funds I kept an accurate account with full intentions of replacing this by October 30th" (Pros. Ex. U).

The accused explained further that he had intended to replace the money taken by him from the proceeds of a loan but that he had been successful in procuring a loan for only $150 which was insufficient. He added the assertion, "I fully intended to make complete restitution and I have attempted this in every way possible. It is believed by the undersigned this can be accomplished in a reasonable length of time"(Pros. Ex. U).

4a. The accused, after his rights relative to testifying or remaining silent had been explained to him, testified that he was 40 years of age and first entered the service as a private on 14 July 1922. He was subsequently promoted through the various noncommissioned grades and became a master sergeant. He subsequently attended the Infantry School at Fort Benning, Georgia and on 5 January 1943 was commissioned as a second lieutenant. The accused explained that he was married and had had six children, four of whom were now living. The eldest son was in the Navy. He explained that he had experienced difficulties in procuring suitable housing for his family and that finally, because his wife was a poor manager, he brought his family to California to live with him. He had borrowed $400 from the bank in order to move his family, although the moving cost him approximately $1000. He asserted that both he and his wife were poor managers (R. 135-140).

During the first part of September 1943, he stated that there were

> "monies in the safe that was left there from a prior executive officer, -- so I noted these monies in there, I called these men in and gave them my personal hand receipt. * * * There was a note pressing, and I had pay coming - - or I was going to make a loan from the local bank, so I took from that safe a portion of these monies, and it grew, and it grew, and it grew."

He stated that he had intended to reimburse the soldiers. The accused explained that the envelopes which were found in the safe upon which the names of men and amounts were written in blue pencil were prepared by him to take the place of the envelopes which he had removed. He further explained that he had intended to place the various sums of money in these envelopes but failed to do so. The accused explained that he had indorsed his pay check for $322 and another check for $150 which he had procured as a loan and had thus made "a reinstatement of approximately $500" leaving him "$300 in arrears". The accused admitted taking the entire amount of $811 from the safe of Company A. He asserted that some of the money of Privates Shiel and Smith had been taken in September and replaced by him and then taken again. The accused explained that his delay in return to camp after his conversation with his commanding officer was due to the fact that he had overslept after having been up late with his nine months old baby who had been quite ill (R. 140-159). Under cross-examination, the accused was unable to account for the spending of approximately $2000 over a period of two months, the sum of money which he had received, including two pay checks, a Government check of reimbursement for transportation of his family to California and the amount taken from the company safe. On examination by the court, the accused admitted that he knew that he was doing wrong when he took the money in question from the company safe and that he was not entitled to take it.

b. Mrs. Grace Tennant, wife of the accused, testified to facts corroborating the accused's testimony relative to his difficulties and the family move to the west coast. She testified further that the

accused had not made a regular monthly allotment to her but sent her money whenever she phoned and asked for it. She testified that one of their children had been ill and her illness had necessitated expensive medical care. She was, however, unable to estimate the amount of money the accused had sent her during the preceding two month period.

5. The Specification, Charge I, alleges that the accused absented himself without leave from his organization from 30 October 1943 to about 2 November 1943. The oral testimony as well as the authenticated copy of the accused's organization's morning report sustains, beyond a reasonable doubt, the findings of guilty under the above Specification.

6. Specification 1, Charge II, alleges that the accused did, "feloniously take, steal, and carry away five hundred thirty one dollars and no cents ($531.00), lawful money of the United States, the property of First Lieutenant John F. Wilbur, Infantry, Commanding Company A, 79th Infantry Training Battalion".

The evidence concerning this Specification shows that ten men of Company A, in response to an order issued by Lieutenant Wilbur, the commanding officer of Company A, delivered a total sum of $531 to the first sergeant of the company or the company clerk, to be placed in the company safe for safekeeping. Lieutenant Wilbur testified that the accused did not have permission to remove any of the money which had been received as outlined above from the company safe. Under the facts shown, Lieutenant Wilbur was the officer directly responsible to the men for the money deposited and he therefore acquired a special property interest in the money. The Manual states that,

> "Where general ownership is in one person and possession in another, a special owner, borrower, or hirer, it is optional to charge the ownership as in the real owner or in the person in possession (M.C.M., 1928, par. 149g).

In view of the above authority, it was appropriate, in the Specification in question, to allege that the total sum of the money, namely $531, was stolen from Lieutenant Wilbur. The Manual states further,

> "A person then, has the 'custody' of property, as distinguished from the 'possession', where, as in the case of a servant's custody of his employer's property, he merely has the care and charge of it for one who still retains the right to control it, and who, therefore, is in possession (i.e., constructive possession as distinguished from actual possession) of the property. 'Property' in a thing is the right to possession, coupled ordinarily with an ability to exercise that right. (Clark)" (par. 149g, M.C.M., 1928).

From the language above quoted it is apparent that the accused had mere custody of the money deposited in response to orders from Lieutenant Wilbur

and that Lieutenant Wilbur retained the right to control it including the right to limit the accused's authority over it to the mere act of placing it in the safe. It necessarily follows, therefore, that the accused's act in taking the money from the safe was not only an abuse of his authority but a trespass against the property in question. The further fact that the accused admitted that he took the money and used it for his own purposes justifies the inference that he took it with the fraudulent intent to deprive Lieutenant Wilbur permanently of his interest in the money. The evidence supports beyond a reasonable doubt the findings of guilty of Specification 1, Charge II, and Charge II.

7. Sepcifications 2, 3, 4 and 5, Charge II, allege that the accused feloniously embezzled by fraudulently converting to his own use from Privates Shiel, Smith, Talcott and Sutton the sums of $80, $70, $30 and $100 respectively.

The evidence shows very clearly both by the testimony presented by the prosecution as well as the admissions of the accused, that the accused, prior to the order from the company commander referred to in paragraph 6 above, received the sums of money designated from each of the men named and that he gave each man a receipt, acknowledging that the money was received by him for safekeeping. The evidence shows, therefore, that a fiduciary relationship was created between the four enlisted men named in the four Specifications and the accused. The evidence shows further that the accused admittedly took the four sums of money intrusted to him and used them for his own purposes. Such unauthorized use of the four sums of money terminated the accused's right to retain possession thereof and constituted a wrongful embezzlement in violation of Article of War 93. The evidence supports, therefore, beyond a reasonable doubt, the findings of guilty of Specifications 2, 3, 4 and 5.

8. The records of the Office of The Adjutant General show that the accused is approximately 40 years of age. He has had continued enlisted service from 14 July 1922 until he was discharged to accept a commission as second lieutenant on 5 January 1943. His efficiency ratings as a soldier are shown as above average, excellent, satisfactory, superior, and satisfactory. From 24 August 1925 he was a technical sergeant in the band of the 13th Infantry where he has served his entire enlisted service. On 5 May 1943 he was sentenced to be restricted to the limits of his camp for 6 months, to forfeit $50 per month for a like period and to be officially reprimanded for absenting himself without leave for approximately fourteen days, in violation of Article of War 61. The forfeitures were remitted and the sentence as thus modified approved.

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 a conviction of violation of Article of War 61 or 93.

Abner E. Lipscomb, Judge Advocate.

(On Leave), Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

SPJGN
CM 244884

1st Ind.

War Department, J.A.G.O., 8 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 Joseph A. Tennant (0-1307779), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but that the confinement and forfeitures be remitted and that the sentence as thus modified be ordered executed.

3. Consideration has been given to the attached letter from Honorable Edith Nourse Rogers, House of Representatives, Washington, D. C., dated 10 December 1943, addressed to the Secretary of War and to a letter dated 11 December 1943, from Mrs. Grace R. Tennant, the wife of the accused, addressed to the President.

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

Myron C. Cramer

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

5 Incls.
Incl 1 - Record of trial.
Incl 2 - Dft. of ltr. for sig. Sec. of War.
Incl 3 - Form of Executive action.
Incl 4 - Ltr. from Honorable Edith Nourse Rogers.
Incl 5 - Ltr. from Mrs. Grace Tennant.

(Sentence confirmed but confinement and forfeitures remitted. G.C.M.O. 90, 26 Feb 1944)

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

SPJGQ
CM 244946

DEC 1943

UNITED STATES	)	ARMY AIR FORCES EASTERN TECHNICAL TRAINING COMMAND
v.	)	Trial by G.C.M., convened at Seymour Johnson Field, North Carolina, 13 and 17, November 1943. Dismissal.
Second Lieutenant RAYMOND J. FORBES (0-689858), 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 I: Violation of the 83rd Article of War.

Specification 1: In that 2nd Lt. Raymond J. Forbes, 322nd Fighter Squadron, did at East Haddam, Conn., on or about 1730, 6th October 1943, suffer through neglect a P-47B Airplane, serial no. 41-5974, of the value of $105,000, military property belonging to the United States, to be damaged by low and hazardous flying in the amount of $131.20.

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

Specification 1: In that 2nd Lt. Raymond J. Forbes did at East Haddam, Conn., on or about October 6th 1943, recklessly and hazardously fly a P-47B, no 41-5974, Government owned airplane at an altitude of about 150 feet and as a result thereof, did hit high tension power lines, in direct violation of AAF Regulation 60-16, dated September 9, 1942, Circular 3-8, HQ., 1st Fighter Command, dated 30 June 1943, and 326th Fighter Group Operations Memorandum 60-9 dated 24th July, 1943.

Specification 2: Finding of not guilty.

Accused pleaded not guilty to all Charges and Specifications. He was found not guilty of Specification 2, Charge II and guilty of all other Specifications and the Charges. No evidence of previous conviction was introduced at the trial. He was sentenced to be dismissed the service. The reviewing authority disapproved so much of the findings of guilty of Specification 1, Charge II, as involves a finding of guilty of the words "Circular 3-8, HQ, 1st Fighter Command, dated 30 June 1943", approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Briefly summarized the evidence for the prosecution is as follows: Accused was, on 6 October 1943, a second lieutenant, Air Corps, and a member of 322nd Fighter Squadron of the 326th Fighter Group, stationed at Westover Field, Massachusetts (R. 12; Pros. Ex. 3).

On that date and prior thereto, the altitude at which planes were to be flown by personnel of the Air Corps within the operations area of the 326th Fighter Group was fixed by Operations Memorandum No. 60-9, Headquarters 326th Fighter Group, 24 July 1943.

Section III of said memorandum provides:

> "Authority: TWX, YIC, 0173H 11 October 1942 IFC Circular 3-8, 30 June 1943 NYADW Circular 55-15 7 July 1943-TWX YIC D671E.
>
> "No pilot of this command will at any time fly below 1000 feet except on landing and take-offs and ground gunnery missions. Severe disciplinary action will be taken against any pilot violating the order mentioned."

In Section VI thereof, it is provided:

> "Authority: AAF Regulation 60-16, 9 September TWX YIC M571E 27 May 1943. TWX YIC P406E 12 April 1943, TWX YIC M952E, 31 May 1943.
>
> "All aircraft in this region will maintain minimum 1000 foot altitude except on landing and take-off * * *".

A copy of this memorandum, signed by accused, and acknowledging that he had read and, without question, understood it was introduced in evidence (R. 23; Pros. Ex. 6).

A letter from the operations officer of the 326th Fighter Group dated 14 August 1943 was introduced in evidence (R. 13; Pros. Ex. 4). This letter stated that, to clear up any confusion as to what aircraft accidents should or should not be reported, it was directed that all accidents of any sort regarding any aircraft, aircraft equipment or personnel be reported, completely and accurately in every detail to Headquarters, 326th Fighter Group and to Group S-2 office; and that pilots will report to their sub-squadron commanders all accidents of any nature that come to their attention. This letter had been posted on the bulletin board in the pilots' room and all pilots were required to read and be conversant with matters published thereon at all times (R. 13).

On 6 October 1943 accused was sent upon an acrobatic mission, known as Mission No. 7. The clearance form (Def. Ex. B) and, testimony of Corporal Robert C. Malat, Assistant Crew Chief of the plane flown, shows that accused took off in plane P-47B, serial No. 41-5974, from Westover Field at 1635 o'clock on that day (R. 22; Pros. Ex. 5). The clearance form and form #23 (Pros. Ex. 5) indicate that the landing, after the flight, took place at 1800 while the flight report (Pros. Ex. 3) shows the landing was 1830.

Corporal Henry Feidenfran, Crew Chief of the plane flown by accused on 6 October 1943, testified that he gave the plane a preflight examination prior to the flight made by accused, and except for "the T.O." which "is a modification of hose lines, and clamps for fuel and oil systems", he had found the plane in good condition (R. 21).

By stipulation between accused, defense counsel and the trial judge advocate it was agreed that, if Michael H. Maher were present in court, he would testify under oath, that he resides at Portland, Connecticut; that on 6 October 1943 at about 5:45 p.m., he was sitting in a tower of the drawbridge of the bridge at East Haddam, Connecticut; that his attention was attracted by the noise of two airplanes flying low along the Connecticut River, headed north, and that the plane on the west side of the river hit high tension electric wires but continued north following the river (R. 11; Pros. Ex. 1).

It was likewise stipulated and agreed that airplane P-47B, serial number 41-5974 was the property of the United States on 6 October 1943, was of the value of $105,000 and was, on that date, damaged in the amount of $131.20 (R. 11; Pros. Ex. 2).

Upon landing at Westover Field after the flight in question, accused entered upon his flight report, Form 1-A, (Def. Ex. A), under the section "Remarks", the following information:

"#3 Cowling Damaged /s/ R. J. Forbes, 2nd Lt.
Landing Light Broken /s/ R. J. Forbes, 2nd Lt."

To this was added the following notation:

"Prop. Nicked (Cpl. R. C. Malat, Asst. C. C.)".

Flight Report, Form 1-A and Flight Report Form 1, accompany one another, Form 1-A being primarily an engineering report filed inthe Engineering office while Form 1 is the flight log which is sent up through Operations channels (R. 16).

On the Flight Clearance Report (Def. Ex. B) accused had made the notation:

"Nose Cowling Damaged. Landing Light Broke.
/s/ R. J. Forbes, 2nd Lt. A.C."

No other report was made by accused on 6 October 1943.

On the following day (7 October), Major Henry H. Norman, Squadron Commander of the 322nd Fighter Squadron (R. 12), having been told by the operations officer of the accident to Lieutenant Forbes' plane (R. 18), personally inspected the damage to the ship (R. 16, 18). Major Norman was not on duty at the time accused landed the plane on 6 October 1943 but on the following day accused did, within a reasonable time after coming on duty, personally report the accident to him after accused had spoken to the operations officer about the accident (R. 19, 20). The substance of this report was that he (accused) had flown through some wires across the Connecticut River near East Haddam and that the damage to his plane was such as was noted on "Form 1A" and "I Fighter Command form"; that he landed at Westover, looked at the plane, checked it and filled out the forms which he took up to the operations office and deposited in a box provided for the purpose and then "left the line to go home for his off duty hours" (R. 29, 30). Major Norman did not consider this report a compliance with the rules and regulations governing reports of accident inasmuch as such reports were not to be made to him directly but to the sub-squadron commander, in the first instance (R. 13, 19, 31).

Corporal Malat, assistant crew chief on the ship flown by accused (R. 21) testified that, although the plane used by accused on 6 October 1943 was in good condition at the take-off, he discovered after it landed that it had suffered two large holes in the primary cowling, the left hand oil-cooler was damaged and the propeller had two small nicks in it (R. 22).

Captain Fernando Fernandez, 322nd Fighter Squadron, the officer who officially investigated these charges testified that he visited the scene of the alleged accident and observed certain high tension wires crossing the Connecticut river which accused is alleged to have hit (R. 27). The wires were approximately 150 to 200 feet above the river and, at the most, 75 feet above ground level. He personally interviewed accused on 9 October 1943, informed him of his rights, advising that "he could make a sworn or unsworn statement, or he could remain silent; that anything he might say could be used against him in a court-martial; told him of his right to cross-examine the witnesses who came before the investigating officer and of his right to object to anything they said. According to Captain Fernandez, accused "was perfectly contented to let the matter rest as it was", saying "he had nothing to hide and felt that he was guilty and would let the matter go as it was" (R.27). Accused then made the following statement:

"I, Raymond J. Forbes, 2nd Lt., A.C., A.U.S., ASN 0-689858 was cleared for an acrobatic flight between the hours of 1630 and 1800 on the sixth day of October 1943. I took off in the P-47B, No. 5974, assigned to me at 1635. I left Traffic and climbed to 10,000 feet and commenced acrobatic maneuvers working South. This continued until about 1720 when I noticed another P-47 in the vicinity at about 8,000 feet. I fell into formation with him and remained there about five minutes, then I dropped into trail and followed him about five minutes more. This was in the vicinity of East Haddam, Connecticut, the time between 1720 and 1730. At 1730 I peeled away and dropped down on the Connecticut river intending to drag the river on my way back to Westover Field. The last I saw of the other ship, it was above and behind me on my left.

"I was flying low up the river when I noticed a bridge crossing the Connecticut River ahead of me between Tylerville and East Haddam. I raised up, passed the bridge and dropped down again close to the water. About 300 yards further up the river a high tension power line crosses parallel to the bridge. As it was getting dusk, I didn't see the wires until the last fraction of a second. I pulled up, but too late to clear the wires and I hit at least one of them. I immediately started a climb. At this time I noticed the other ship mentioned about 2000 feet above and ahead of me to my left.

"I continued the climb until 5000 feet and tested the landing gear, wing flaps, cowl flaps, and propeller. They seemed in working order, so I continued on my way to Westover Field,

entered traffic and landed at 1800. After parking the ship, I got out and looked at the damage. I saw the nose cowling was damaged and the landing light broken. These I wrote up in the form 1A, which I left in the plane. I returned to the pilots room and entered the same remarks on the First Fighter Command Clearance.

"The following day Lt. Chaskin asked what had happened and I told him and at the first opportunity reported to Major Norman."

This was signed and sworn to by accused in the presence of C.W.O. Clair R. Yaw, Assistant Adjutant (Pros. Ex. No. 7; R. 28).

4. Accused having been fully informed of his rights by the defense counsel and the president of the court, elected to testify under oath (R. 33). He stated in pertinent part that on 6 October 1943 he was on an acrobatic mission. After completing the mission, he "was feeling pretty good and it was getting pretty late". He "picked up the river", flying low, at an altitude of about 150 feet. At East Haddam, approaching the bridge, he "lifted up". It was then dusk and at "just the last fraction of a second" he noticed the wires of a power line which he hit. He was "scared" but "climbed up and tested the airplane to see that it was working all right". Everything seemed to be all right so he returned to Westover and landed (R. 35). When he found the plane damaged he filled out Form 1, Form 1A and Form 23, reciting therein the damage done and reported the accident verbally on the next day to the Squadron Commander, Major Norman. He admitted that he did breach flying regulations by flying his plane below the minimum altitude requirements and hitting the power lines in doing so (R. 36), and that he had read the rules and regulations governing reports of accidents when they were posted on the bulletin board. He also admitted that he had made no effort to find his flight leader when he landed at Westover Field after his flight, "didn't even look for him" but, as it was late, went on home (R. 38).

He admitted that during the investigation by Captain Fernandez he made a statement but insisted that he was not fully advised of his constitutional rights (R. 36-38), in that he was not told that anything he said could be used against him nor that he did not have to make a statement unless he wanted to (R. 37). He admits that the Articles of War have been read to him "several times" but nothing about courts-martial (R. 38). Captain Fernandez flatly contradicted this statement (R. 27).

5. At the threshold of the trial after the law member, Major Miller, had stated cause for his own challenge and the court had sustained it, and another member had been peremptorily challenged by the prosecution, defense counsel interposed a challenge for cause against every remaining member of the court for the reason that there had been read to each, prior to the date of trial, in a manner not disclosed, Circular No. 3-8, Headquarters First Fighter Command, Mitchel Field, New York. The defense contended that the effect of this circular was to influence the court in considering the punishment to be imposed should accused be found guilty, and by publishing this circular the appointing authority sought to illegally attempt to control the exercise by the court of the powers vested in it by law, in violation of Paragraph 5, Manual for Courts-Martial, 1928.

This procedure amounting to a challenge to the array, the president of the court very properly suggested that members of the court should be individually challenged. Defense counsel thereupon challenged Captain Roy J. Brown, a member, for the reasons first assigned. It was then stipulated and agreed that defense should be deemed to have challenged each member for the same cause, in turn, and that the ruling upon the challenge of Captain Brown would be accepted as the ruling as to all others. There was considerable argument but no evidence was introduced in support of the challenge. Before the court closed for the consideration of the challenge Captain Brown announced in open court:

> "The fact that this circular was read to me in the presence of the other members of the court has no bearing on the way that I would vote if this man is convicted, or if he is acquitted. So far as influencing my own personal opinion by that, it did not have any influence whatsoever".

The court was thereupon closed, the vote was taken, and upon opening, the president announced that the challenge was not sustained.

No other member of the court was asked to state whether he had formed an opinion in the case or whether the reading of the circular had in any way influenced his judgment regarding the guilt or innocence of the accused or the punishment to be imposed in case accused were found guilty. Accused did not challenge any member peremptorily and when asked thereafter whether he objected to being tried by any member of the court then present replied: "Subject to the challenge previously entered, the accused has no other objections".

The prosecution finally asked:

"In view of the proceedings, is there any member of the court who now feels that he should not be a member of the court?"

There being no response, the president stated "No member does" (R. 5).

It is fundamental that, while courts should be liberal in passing upon challenges, they need not sustain a challenge upon the mere assertion of the challenger. The burden of maintaining a challenge rests on the challenging party (MCM 1928, par. 58f).

Here there was no showing that Captain Brown, or any other member of the court, could not fairly and impartially try the accused. Accused had the duty of introducing evidence in support of the grounds upon which his challenge was based and, since he failed to do so, it must be assumed that no real or substantial ground for challenge existed. Certainly it was not shown that the appointing authority attempted to control the exercise, by the court, of the powers vested exclusively in it by law. Upon such a meager showing of suspected bias or prejudice it cannot be said, in the absence of personal and individual examination of each member on voir dire touching the matter, that the court committed error in failing to sustain the challenges and no substantial rights of accused were violated thereby.

Thereafter, upon arraignment, defense counsel interposed a motion to strike Specification 1 of Charge II on the ground that the words "recklessly and hazardously" as well as "and as a result thereof, did hit high tension power lines" were interlined in the Charge Sheet by an officer unauthorized to do so and that such interlineation constituted a substantial change of the Specification requiring reinvestigation.

It was shown that the interlineations were initialed by the assistant staff judge advocate in the performance of a duty imposed upon him (MCM 1928, par. 34). The additional words produced no substantial change in the Specification. The gravamen of the offense, as originally laid and as stated in the amended Specification, is the violation of the pertinent regulations, circular and memorandum specified. The record shows that the Charges, thus amended, were referred for trial 27 October 1943, a copy of the Charge Sheet was served upon accused 29 October 1943 and the trial was commenced on 13 November 1943. Reference for reinvestigation, under all the circumstances, was wholly unnecessary. To fly a plane in the locale designated at an altitude less than 1000 feet was, by regulations and orders, presumptively reckless, hazardous and wrongful and the addition of the words indicating the result of the low flying are merely descriptive and, to that extent, surplusage. But, even though the

amendment had constituted a substantial change of accusation to which accused was unable to properly plead and defend, defense counsel had ample opportunity to request a continuance to prepare a defense (MCM 1928, par. 73). This he failed to do.

6. In addition to the admissions made by accused, under oath that he "did breach flying regulations by flying this ship below the minimum altitude", the findings of guilty as to Specification 1 of Charge II, are abundantly supported by competent other evidence of record.

The Specification alleges direct violation of Army Air Force Regulations 60-16, dated September 9, 1942, Circular 3-8, H.Q., 1st Fighter Command, dated 30 June 1943 and 326th Fighter Group Operations Memorandum 60-9, dated 24 July 1943.

Of the three, only the Operations Memorandum was introduced in evidence. Although there is no authentication of the copy by seal, inked stamp or other identification mark, or by certificate of the custodian of the original, as required by paragraph 116a, Manual for Courts-Martial, 1928, no objection was offered by the defense. It is also observed that while the signature of accused appears on the copy, acknowledging that he had read and, without question, understood the purport of the memorandum, there is nothing to show when his signature was placed thereon. However, since this memorandum was dated 24 July 1943 and section IX thereof provides:

> "Each pilot will be furnished 3 copies of this memorandum. All three copies will be signed by the pilot. One copy to be retained in the pilots personal P.I.F., one copy to be retained in Sq Operations office and one copy to be filed in Group Operations",

it may be presumed that accused received such copies and was aware of the contents of the memorandum before he undertook his flight on 6 October 1943, especially since he made no objection to its introduction and made no effort to rebut the inference. There was, therefore, no error in admitting the memorandum in evidence.

Since the court was authorized to take judicial notice of Air Force Regulations (MCM 1928, par. 125), it was unnecessary to offer Army Air Force Regulations 60-16 in evidence. The court erroneously took judicial cognizance of "Circular 3-8, H.Q. 1st Fighter Command, 30 June 1943" as this emanated from an authority inferior to that appointing the court, and since a copy of this circular was not introduced in evidence, the reviewing authority properly disapproved so much of the findings as related thereto (Spec. 1 of Chg. II).

(82)

By his own testimony, accused admitted conduct which conclusively shows that he suffered the plane he was operating to be damaged "through neglect". He testified that, although it was dusk, and visibility consequently impaired, he violated the known regulations and flew at such a low altitude that he hit the wires of a power line shown to have been only 75 feet above ground level and about 150 to 200 feet above the level of the river and which he was unable to see "until the last fraction of a second". This, together with the stipulation fixing the ownership and value of the plane and the amount of damage done, is legally sufficient to support the findings of guilty of Charge I and the Specification thereunder.

7. Accused is 22 years, 9 months of age. Records of the War Department disclose that he was born in Saginaw, Michigan. He was graduated from high school and served during July and August of 1938 in the Citizens Military Training Corps. He entered the service in November 1939 and served at Kelly Field and Brady, Texas, until October 1942 at which time he became an Aviation Cadet. After completion of the prescribed course of training he was commissioned a second lieutenant, Army of the United States, on 30 August 1943, entered upon active duty on the same date at Foster Field, Texas, and was thereupon assigned as a single engine pilot to Mitchel Field, New York. He is married.

8. The court was legally constituted and had jurisdiction of the accused and the offenses charged. No errors injuriously affecting the substantial rights of the accused were committed at the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings as modified by the reviewing authority and the sentence, and to warrant confirmation of the sentence. A sentence of dismissal is authorized upon conviction of either Article of War 83 or Article of War 96.

William A. Bounds, Judge Advocate.

Carlos Plum, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 20 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 J. Forbes (0-689858), 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 commuted to a reprimand and forfeiture of $100 of his pay per month for three 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.
Incl.1-Record of trial.
Incl.2-Dft. of ltr. for sig. Sec. of War.
Incl.3-Form of Ex. action.

(Sentence confirmed but commuted to reprimand and forfeiture of $100 pay per month for three months. G.C.M.O. 29, 15 Jan 1944)

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

SPJGK
CM 244948

15 JAN 1944

UNITED STATES	)	THIRD AIR FORCE
	)	
v.	)	Trial by G.C.M., convened
	)	at Morris Field, Charlotte,
Second Lieutenant ARTHUR	)	North Carolina, 9 November
G. CLIFTON (0-730866),	)	1943. Dismissal.
Air Corps.	)	

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

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

Specification 1: In that Second Lieutenant Arthur G. Clifton, Fourth Tow Target Squadron, Camp Stewart Army Air Field, Camp Stewart, Georgia, did, at Camp Stewart Army Air Field, Camp Stewart, Georgia on or about 15 September 1943, desert the service of the United States and did remain absent in desertion until he was apprehended by military police at Savannah Hotel, Savannah, Georgia, on or about 16 September 1943.

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

Specification 1: In that Second Lieutenant Arthur G. Clifton, Fourth Tow Target Squadron, Camp Stewart Army Air Field, Camp Stewart, Georgia, did, at Savannah Hotel, Savannah, Georgia, on or about 16 September 1943, with intent to deceive, wrongfully and unlawfully, register, with a woman other than his wife, as Lieutenant and Mrs. A. G. Clifton and by means thereof, did fraudulently obtain from Savannah Hotel, Savannah, Georgia, hotel accommodations under conditions unbecoming an Officer and a gentleman.

Specification 2: In that Second Lieutenant Arthur G. Clifton, Fourth Tow Target Squadron, Camp Stewart Army Air Field, Camp Stewart, Georgia on or about the 13th day of September 1943 with intent to deceive Army Emergency Relief, Camp Stewart Section of Fourth Service Command Branch, did officially state in an application for assistance to the

said Army Emergency Relief, Camp Stewart Section of Fourth Service Command Branch, that he had not been paid for August, which statement was known by said Second Lieutenant Arthur G. Clifton to be untrue in that the said Second Lieutenant Arthur G. Clifton had been paid for the month of August 1943.

Specification 3: In that Second Lieutenant Arthur G. Clifton, Fourth Tow Target Squadron, Camp Stewart Army Air Field, Camp Stewart, Georgia, at Headquarters Fourth Tow Target Squadron, Camp Stewart Army Air Field, Camp Stewart, Georgia, on or about the 13th day of September 1943 with intent to deceive William A. McConnell, Major, Air Corps, Commanding, Fourth Tow Target Squadron, Camp Stewart Army Air Field, Camp Stewart, Georgia, that he the said Second Lieutenant Arthur G. Clifton had not been paid by the United States for the month of August 1943, which statement by the said Second Lieutenant Arthur G. Clifton was untrue and false.

He pleaded not guilty to Charge I, but guilty of a violation of Article of War 61, guilty to the Specification of Charge I, except the words "desert", and "in desertion", substituting therefor respectively the words "absent himself without leave from" and "without leave", of the excepted words, not guilty, and of the substituted words, guilty; not guilty to Charge II, but guilty of a violation of Article of War 96; guilty to Specification 1 of Charge II, except the words "under conditions unbecoming an Officer and a gentleman", of the excepted words, not guilty; guilty to Specification 2 of Charge II; and not guilty to Specification 3 of Charge II. He was found not guilty of Charge I, but guilty of a violation of Article of War 61, and guilty of the Specification of Charge I, except the words "desert" and "in desertion", substituting therefor respectively the words "absent himself without leave from" and "without leave", of the excepted words not guilty, of the substituted words guilty; and guilty of Charge II and all its Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence with respect to the separate Charges and Specifications is as follows:

a. Specification, Charge I.

Major William A. McConnell, Air Corps, Commanding Officer of the Fourth Tow Target Squadron, Camp Stewart Army Air Field, testified that he had known accused since about the 15th of September; that accused was absent without leave the day after he reported; and that "after he had been gone a couple of days" he (Major McConnell) reported his absence

to the military police. Witness next saw accused at 11 o'clock the same evening at which time witness placed accused under arrest, restricting him to the post (R.6,7). Without objection by defense, there was introduced into the record as Prosecution's Exhibit 1 an authenticated extract copy of the morning report of the Fourth Tow Target Squadron, Camp Stewart Army Air Field, Camp Stewart, Georgia (R.5). This extract showed accused from duty to absent without leave on 16 September 1943 (Pros. Ex. 1). It was stipulated between the prosecution and defense that accused absented himself without leave from his organization and station at Camp Stewart, Georgia, on 15 September 1943, and that he remained absent until 16 September 1943, when he was apprehended by military police at the Savannah Hotel, Savannah, Georgia (R.5).

b. Specification 1, Charge II.

Without objection, the prosecution introduced, as Prosecution's Exhibit 2, a photostatic copy of a Signature Card of the Savannah Hotel, Savannah, Georgia (R.6; Pros. Ex. 2). This exhibit shows the assignment to "Lt. and Mrs. A.G. Clifton, O-730866 -- Tampa, Florida", of Room No. 504 at that hotel. The date of assignment or occupancy is not shown on the card. The "O-730866" is accused's serial number as shown by the Charge Sheet. It was stipulated that "the signature shown on" this signature card was "the signature of accused" (R.6). It was also stipulated between prosecution and defense that accused, with intent to deceive, registered with a woman other than his wife, as Lieutenant and Mrs. A. G. Clifton, and that he did "thereby fraudulently obtain from /the/ Savannah Hotel, Savannah, Ga., hotel accommodations" (R.6)

c. Specifications 2 and 3, Charge II.

Major McConnell testified that accused reported to him the day accused arrived at their field. Accused came to see witness in the afternoon of that day and had with him an application for a loan from funds of the Army Emergency Relief (R.7,8). The Major stated that accused presented the application to him, stating that he had not been paid during the month of August and that he would appreciate it if witness would approve the loan. Witness approved the loan and accused "got his money that afternoon" (R.7,8). The prosecution introduced in evidence without objection a certified true copy of the application filed by accused and approved by Major McConnell (R.8). The application was dated 13 September 1943 and set forth that accused had monthly pay and allowances of $338.25, with deductions of $6.60. It further stated that accused was "last paid July 1943", that he received the sum of $252.90, and that he entered on duty (presumably meaning at that station) on 11 September 1943. The application requested a loan of $100, and

stated that the circumstances prompting the request were that upon discharge from a general hospital and in ensuing travel, accused's baggage was stolen from the train. The application went on to state that due to "expense from this and [the] fact that have not been paid for August results in my requesting loan" (Pros. Ex. 3). The application further showed that the loan was approved and granted, and that accused acknowledged receipt of $100, promising to repay it in full on 1 October 1943 (Pros. Ex.3). It was stipulated between prosecution and defense that

> "* * * accused, on or about 13 September 1943, with intent to deceive Army Emergency Relief, did officially state in an application for assistance that he had not been paid for August, 1943, which statement was untrue and was known by accused to be untrue, in that he had been paid for the month of August, 1943".. (R.6)

Lieutenant Colonel Oliver H. Waltrip, Medical Corps, Station Complement, Morris Field, North Carolina, testified that he was base surgeon at that field, and that he had considerable experience in psychiatry. He said that he had occasion to observe accused over a period of approximately a week, and that in his opinion accused was sane when observed and at the time of the commission of the offenses, and knew the difference between right and wrong (R.10).

First Lieutenant Joseph J. Lowenthal, Flight Surgeon, 4th Tow Target Squadron, Camp Stewart, Georgia, testified that he had some training in psychiatry, that he had observed accused clinically, and that as a result of this observation he believed that accused was a "constitutional inadequate". By this, he explained, he meant that accused knew the difference between right and wrong, and was sane, but that he was prone to make the same mistakes over and over again (R.10,11).

4. Evidence for defense.

Accused testified under oath. He admitted absence without leave, but denied intention to desert the service (R.12). He testified that he met "a certain woman" in Savannah, Georgia, was particularly attracted to her, and registered with her in a hotel as man and wife (R.12,13,14). He stated that he had been having financial and marital difficulties (R.13, 16), and that while he was with this woman he was drinking and having "a very good time" (R.13,16). They decided they would go to Havana (R.13), but he did not plan to stay away any more than "two or three days * * * or not even that long" (R.14,16). He denied that he had any intention to desert, and stated that he fully intended to return (R.12,16). He did not know whether he was drunk, but he was able to walk, talk, and use the telephone, although he "would not say I had complete control of my faculties" and "would not say my judgment was good then" (R.14,16).

With respect to the Specification charging that he registered at the Savannah Hotel, Savannah, Georgia, with a woman other than his wife, accused "freely admitted" that he "did go to a certain hotel in Savannah, Georgia, and wrongfully register with another woman as man and wife" (R.12). This was the woman referred to previously (R.13,14). He stated that his own wife was working at Tampa, Florida (R.15).

With respect to Specifications 2 and 3 of Charge II, charging, respectively, that accused officially stated in an application for assistance to Army Emergency Relief that he had not been paid for the month of August when, in fact, he had been paid, and that accused falsely stated to Major McConnell that he had not been paid for the month of August, accused admitted "freely" that he "did make a misstatement on an application for a loan from the Army Emergency Relief that he did not receive * * * pay for August" (R.13). Likewise, though he had pleaded not guilty to making a false statement to Major McConnell, he was asked the following question and made the following answer: (R.14)

> "Q. Why did you tell Major McConnell you had not been paid, did you think you would not get a loan if you did not tell him that?
>
> "A. Yes, sir, I could not get a loan unless I had not been paid or had some valid excuse and I fully intended to pay the loan, which I did. It was a false statement, but it was not my intention to deceive anyone or the Government. It was my intention to get the money until the end of the month."

Accused further testified that he went to the Army Emergency Relief office and asked if it would be possible to borrow one hundred dollars, and that he was told that it would if he had good enough reason, and that accused could have the money if it were necessary for his living (R.15). He admitted that his statement to Army Emergency Relief and to Major McConnell that he had not been paid for August was untrue (R.15). He testified that he "had financial troubles", that he received approximately $340 per month, but had "trouble getting along on that" (R.15). He had a wife and a step-child aged 15 months and made an allotment to the child. However, he had received most of that allotment himself for the previous few months (R.14,15,16).

5. It is the opinion of the Board of Review that the evidence of the prosecution, the plea of accused, and the testimony of accused warranted the findings of guilty of Charge I and the Specification thereof as modified by exceptions and substitutions, in violation of Article of War 61.

With respect to Specification 1 of Charge II, the plea of guilty,

the stipulations and the testimony of accused, together with the registration card supported the allegations of the Specification. The conduct alleged constitutes a violation of Article of War 95 when the false registration is for the purpose of securing a room for an immoral purpose. The charging of such immoral purpose may be fairly implied from the wording of the Specification. And while such purpose may be fairly inferred from the very fact of such false registration, in this case accused by his own testimony to all intents and purposes admitted that he intended to obtain a room for an immoral purpose.

Accused pleaded guilty to Specification 2 of Charge II and by stipulation he admitted that he falsely represented that he had not been paid in August, as alleged in that Specification. It follows from this stipulation that accused was paid in August. Such evidence was properly before the court for consideration on the question of accused's guilt or innocence of Specification 3, one element of which Specification was that accused had been paid in August. All the other elements of Specification 3 of Charge II were proved by the testimony of Major McConnell.

6. War Department records show that accused is 23 years of age and is married. He is a high school graduate and enlisted in the Regular Army (Air Corps) in May 1939. He was appointed an aviation cadet in March 1942, and honorably discharged 28 September 1942 to accept appointment as a second lieutenant, Air Corps Reserve, on 29 September 1942.

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 mandatory upon a conviction of violation of Article of War 95 and authorized upon a conviction of violation of Article of War 61.

Lucy E. Gow, Judge Advocate.
Ann Trowbridge, Judge Advocate.
Fletcher R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 3 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 Second Lieutenant Arthur G. Clifton (0-730866), 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. The accused was found guilty of absence without leave in violation of Article of War 61, and of three specifications in violation of Article of War 95, charging, respectively, registering at a hotel as man and wife with a woman not his wife, wrongfully obtaining a loan from the Army Emergency Relief by means of a false official statement, and making a false official statement to his commanding officer. He was sentenced to be dismissed the service. There are no extenuating circumstances. His conduct stamps him as morally unfit to remain an officer. I recommend that the sentence be confirmed and carried into execution.

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

Myron C. Cramer

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

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

(Sentence confirmed. G.C.M.O. 135, 24 Mar 1944)

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

SPJGH
CM 244990

27 DEC 1943

UNITED STATES	)	SECOND AIR FORCE
v.	)	Trial by G.C.M., convened at Army Air Base, Sioux City, Iowa, 9 November 1943. Dismissal.
Second Lieutenant ROBERT C. HERRON (0-395986), Air Corps.	)	

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 61st Article of War.

Specification: In that 2nd Lt. Robert C. Herron, 354th Base Headquarters and Air Base Squadron, Army Air Base, Sioux City, Iowa, did, without proper leave absent himself from his organization and station at Army Air Base, Sioux City, Iowa, from on or about 0900, 11 October 1943 to on or about 1730, 13 October 1943.

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

Specification: In that 2nd Lt. Robert C. Herron, 354th Base Headquarters and Air Base Squadron, Army Air Base, Sioux City, Iowa, having been restricted to the limits of Army Air Base, Sioux City, Iowa, did, on or about 28 October 1943 break said restriction by going to Sioux City, Iowa.

He pleaded not guilty to and was found guilty of all Charges and Specifications. Evidence of a prior conviction for absence without leave for one day and the issuance of three worthless checks was considered by the court. 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:

a. Specification, Charge I: An extract copy (Ex. A) of Special Orders No. 278, Headquarters 18th Replacement Wing, Salt Lake City, Utah, dated 5 October 1943, showed accused transferred to the 354th Base Headquarters and Air Base Squadron, Army Air Base, Sioux City, Iowa. The orders directed accused to proceed on or about 6 October 1943, without delay, to his new station, and upon arrival to report to the commanding officer for duty. It was stipulated that accused registered at a hotel in Omaha on 10 October, at the West Hotel in Sioux City on 11 October, where he remained on 11 and 12 October, and reported for duty at 5:45 p.m. on 13 October. After accused reported at the Army Air Base, he was questioned by Captain Edwin S. Cram, the base adjutant, as to the reason for his delay. Accused stated to Captain Cram that he received his orders in Salt Lake City on 7 October, but was ill and marked "quarters" until 9 October; that he left Salt Lake City at about 6:00 p.m., 9 October, and arrived at Omaha at about 11:00 p.m., 10 October, where he stayed overnight; that he left Omaha at about 6:00 p.m. 11 October and arrived in Sioux City at about 10:30 the same night; and that on his arrival in Sioux City he registered at the West Hotel. Accused stated further to Captain Cram that he had "come up" with an enlisted man, who he thought had called the base to request permission for accused to "stay downtown" and report the following day; that on 12 October he "felt rather sick" and remained at the hotel; that he intended to report at 8:00 a.m., 13 October, but "slept through"; that he "felt sick" on 13 October and remained at the hotel until 4:30 p.m.; that he reported at the base at 5:45 p.m. that day; and that it had not occurred to him to call the base that morning. Captain Cram testified that accused did not request or receive permission for a "delay en route" and had no permission to be absent from the base. It was shown that train schedules permit a person to leave Salt Lake City at 6:00 p.m., arrive at Omaha at 8:40 p.m. the next day, leave there at 10:45 p.m., and arrive at Sioux City at 1:45 a.m. the next morning. After his arrival at the Air Base accused was admitted to the base hospital, and while there stated to Lieutenant Florence I. Andersen, Army Nurse Corps, that there was "nothing wrong"; that he felt "perfectly" all right; that he was sent over to the "medical officers" because he had stated he was ill when he arrived in town; that he was not ill but had heard that the commanding officer of the base was strict; and that he was frightened, so gave "that as an alibi". Accused also stated that he had previously been ill at Salt Lake City (R. 8, 10-24, 34).

b. Specification, Charge II: "Colonel Eaton", the base commander, issued an order to accused restricting him to the base. By direct authority of Colonel Eaton this order was repeated to accused on 14 October by Captain Cram, who instructed accused to remain within the limits of the base

until such time as the commanding officer saw fit to lift the restriction, pending clarification of the "AWOL" status of accused and whether or not charges would be preferred against him. The restriction was for no definite period and had not been lifted on 28 October 1943. Captain Clifton W. Cole, base executive officer, testified that on 28 October 1943, he saw accused, accompanied by another officer and two ladies in the bar of the West Hotel, Sioux City. He had seen accused on several occasions at the base and was positive in his identification. On or about the Friday evening preceding the trial accused told First Lieutenant Ralph A. Marks that he was awaiting trial by general court-martial, charged with having "gone AWOL" before reporting in to the post, and for breaking restriction. He further stated to Lieutenant Marks that Captain Cole claimed to have seen him coming out of a bar with another couple and a young lady, and "I don't know whether he did or not, but it's a cinch I didn't see him" or "he may have seen me or he may not, but I did not see him" (R. 14-16, 20-21, 24-34).

4. For the defense: In an unsworn statement to the court accused stated that he received orders on 7 October transferring him to Sioux City. He had been sick, with a recurrence of malaria, his glands were swollen, he had a bad cold, and his temperature was over a hundred. On 8 October he was "put in quarters" by the examining physician. On the morning of 9 October he received clearance and was told to check in at the hospital on arrival at his new station. He left Salt Lake City on the six o'clock train that night and arrived in Omaha at 8:30 p.m., 10 October. As he was still sick he stayed overnight at the Hill Hotel in Omaha. He slept late the next morning and that afternoon re-routed his luggage to Sioux City. He took the six o'clock train from Omaha and arrived in Sioux City at about 10:00 p.m. He was still having trouble with his glands, and an enlisted man he met on the train told him to check in at a hotel and it would be all right for him to report at the base in the morning. He registered at the West Hotel and slept until noon the following day, 12 October. He started out for the base, but the weather had taken a "terrific change", and as he was still feeling ill he went back to bed and stayed there until about six o'clock in the evening. He "tried to eat", then went back to bed, and slept until noon of the next day. It took until about 5:30 or 5:45 p.m. to get his luggage at the Railway Express and to go to the base. When he talked to Captain Cram after his arrival at the base he knew he should have called the base, but it "never occurred" to him. Colonel Eaton notified him that he was under restriction. He did not want to go to the hospital and was sent there over his protest. Lieutenant Andersen was in his room a great deal and he told her he had been sick when he arrived, but was feeling better and saw no reason why he should go to the hospital. Accused denied making the statement that Colonel Eaton was a "strict officer", but claimed the doctor at the hospital made such a statement to him. He did not tell

Lieutenant Andersen he went to the hospital to escape punishment (R. 43-46).

After the court had received evidence of previous convictions and data as to age, pay, service and restraint of accused and the prosecution had made an argument with respect to proper punishment, accused made a further unsworn statement, directed to mitigation of punishment, as follows: He had been an officer for about a year and a half before getting into trouble at Boise, Idaho. He entered the Army on 5 July 1941, and served in Panama and the Canal Zone. Shortly after war was declared he was transferred from the Air Corps to the "Engineers". He had been recommended for promotion but at the time of his transfer the recommendation was rescinded. He was "duty officer with the Engineers" for about six months and worked as a traveling paymaster, his duties taking him from one station to another. During this time he was never questioned about the length of any stay at a station, or for taking too much time going from one station to another, or in returning to his base. He caught malaria while in the jungles and after having three recurrences in Panama was sent back to the states on the advice of the Medical Department. After returning he was again recommended for promotion, but there was a change in commanding officers and the promotion was denied. Accused stated that he had always "done any job" given him, and that if any organization would give him a chance he would work to the best of his ability (R. 53-55).

5. The evidence shows that accused received orders transferring him to the 354th Base Headquarters and Air Base Squadron, Army Air Base, Sioux City, Iowa and directing him to proceed there without delay. He left Salt Lake City on the evening of 9 October, arrived in Omaha, Nebraska, at about 8:30 the following evening, and spent the night there at a hotel. By taking a train leaving Omaha at 10:45 the same night he reached that place, accused would have arrived at Sioux City at 1:45 a.m., 11 October. He left Omaha at about 6:00 p.m., 11 October, and reached Sioux City at about 10:00 p.m., the same day. Instead of going to the base accused registered at a hotel and stayed there until the evening of 13 October, when he reported for duty. He did not have permission to be absent from the base, and had neither requested nor received permission for a delay en route. The commanding officer of the base restricted accused to the limits of the base. On 28 October accused broke the restriction by going to Sioux City, where he was seen in a hotel bar. The evidence shows beyond any reasonable doubt that accused was absent without leave from 11 October to 13 October 1943, and that he broke restriction on 28 October 1943 as alleged.

6. The accused is 24 years of age. The records of the Office of The Adjutant General show his service as follows: Appointed second lieutenant, Cavalry-Reserve, Army of the United States, 8 July 1940; accepted 25 July 1940; active duty 5 July 1941.

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. Lewis, Judge Advocate

F. J. Lotterhos, Judge Advocate

Judson S. Clements, Judge Advocate

1st Ind.

War Department, J.A.G.O., 31 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 Robert C. Herron (0-395986), 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 was absent without leave for two days (Spec., Chg. I), and, having been restricted to the limits of his post, broke the restriction by going to Sioux City, Iowa, where he was seen in a hotel bar (Spec., Chg. II). He has one prior conviction (29 July 1943) of absence without leave for one day and of drawing and issuing, with intent to defraud, three worthless checks, each in the amount of $20.00. 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,
Major General,
The Judge Advocate General.

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

(Sentence confirmed. G.C.M.O. 103, 10 Mar 1944)

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

SPJGN
CM 245014

3 FEB 1944

UNITED STATES	42ND INFANTRY DIVISION
v.	Trial by G.C.M., convened at Camp Gruber, Oklahoma, 28 and 29 October 1943. Dismissal, total forfeitures and confinement for three (3) years.
Second Lieutenant JOHN W. C. COOKERLY, JR. (0-1109866), Corps of Engineers.	

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: Finding of not guilty.

Specification 2: In that Second Lieutenant John W. Clement Cookerly, Jr., 142d Engineer Combat Battalion, did, in violation of Section 398, Title 18, United States Code, at or near Rolla, Missouri on or about 5 July 1943 knowingly aid or assist in obtaining transportation in inter-state commerce for Norma Jean Hamilton, a female person, for immoral purposes, to wit, unlawful sexual intercourse between the accused and the said Norma Jean Hamilton.

Specification 3: In that Second Lieutenant John W. Clement Cookerly, Jr., 142d Engineer Combat Battalion, did, in violation of Section 398, Title 18, United States Code, at or near Fort Leonard Wood, Missouri, on or about 5 July 1943, knowingly procure a ticket to be used by Norma Jean Hamilton, a female person, in inter-state commerce in going from the State of Missouri to the State of Oklahoma, for immoral purposes, to wit, unlawful sexual intercourse between the accused and the said Norma Jean Hamilton, whereby, the said Norma Jean Hamilton was transported in inter-state commerce between the State of Missouri and the State of Oklahoma.

Specification 4: Finding of not guilty.

Specification 5: Finding of not guilty.

Specification 6: Finding of not guilty.

Specification 7: Finding of not guilty.

Specification 8: Disapproved by the reviewing authority.

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

Specification 1: In that Second Lieutenant John W. Clement Cookerly, Jr., 142d Engineer Combat Battalion, did, at Muskogee, Oklahoma on about 20 July 1943 to about 31 July 1943 conduct himself in a manner unbecoming an officer and a gentleman by living and cohabiting as man and wife with Wanda Waneta Wilson, a woman not his wife.

Specification 2: In that Second Lieutenant John W. Clement Cookerly, Jr., 142d Engineer Combat Battalion, did, at Muskogee, Oklahoma from about 6 July 1943 to about 31 July 1943 conduct himself in a manner unbecoming an officer and a gentleman by living and cohabiting as man and wife with Norma Jean Hamilton, a woman not his wife.

Specification 3: In that Second Lieutenant John W. Clement Cookerly, Jr., 142d Engineer Combat Battalion, did, at Muskogee, Oklahoma on about 20 July 1943 represent that Wanda Waneta Wilson was his wife by signing the register at the Severs Hotel, Muskogee, Oklahoma in the following manner, to wit, "Lt. & Mrs. John C. Cookerly, Camp Gruber, Oklahoma", which said statement was false and was known by the said Lieutenant Cookerly to be false.

Specification 4: In that Second Lieutenant John W. Clement Cookerly, Jr., 142d Engineer Combat Battalion, did at Muskogee, Oklahoma on about 6 July 1943 represent that Norma Jean Hamilton was his wife by signing the register of the Muskogee Hotel, Muskogee, Oklahoma in the following manner, to wit, "Lt. & Mrs. John C. Cookerly, Camp Gruber, Oklahoma", which said statement was false and was known by the said Lieutenant Cookerly to be false.

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NAVY DEPARTMENT

ADDITIONAL CHARGE II: Disapproved by the reviewing authority.

Specification: Disapproved by the reviewing authority.

The accused pleaded not guilty to each of the Charges and Specifications and was found not guilty of Specifications 1, 4, 5, 6, and 7 of Charge I but guilty of all Charges and of all other 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 five years. The reviewing authority disapproved the findings of guilty of Specification 8 of the Charge, the Specification, Additional Charge II, and Additional Charge II; approved the sentence but reduced the period of confinement to three years; and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that the accused was married on 3 September 1941 to Betty Louise Witt at Accident, Maryland. Early in 1942 he was serving as a noncommissioned officer in the Army and was stationed at or near Bremerton, Washington. "About the first of February" he made the acquaintance of Wanda Waneta Wilson, who was a resident of that town. They "dated" one another frequently, and, after a short period, they announced their "engagement". He commenced having sexual intercourse with her in May and continued his intimate relations with her approximately once a week until 4 November 1942 when he was transferred to the Officers Candidate School at Fort Belvoir, Virginia. Prior to his departure they discussed the question of whether she should join him at his new station. According to Miss Wilson, "Sometimes he said he would like for me to be there. Other times he said he would not like for me to go" (R. 102; Ex. Q; R. 28-30, 46, 86, 92, 94).

Some nine days after his arrival at Fort Belvoir he wrote her that "I am looking forward to seeing you in Washington soon * * * [Let] me know when you are coming and if you can arrange your travel so that you will arrive that evening so that I can meet you". Having purchased a railroad ticket out of her own funds, Miss Wilson left for Washington, D. C., on the first of December and arrived there on the fifth. She saw the accused that evening and every week-end thereafter until he was graduated and assigned to Fort Leonard Wood, Missouri, around 1 February 1943. On several occasions prior to his commissioning they conferred about her "future travels". "One time he said he was in the Army for a long time and he would probably see a lot of country while he was in it. Another time he said he was going to be traveling around from place to place in the Army and I should go home and not live in Army towns and follow him around". Since he "believed he would not be [at Fort Leonard Wood] long", it was finally decided that she "was to stay in Washington until he found where he would be" (R. 31-34, 46, 87; Exs. E1 and E2).

Pending further word from him, she went to Boston, Massachusetts, to visit a friend of hers named Helene Madsen. On 21 February 1943 he wrote her from Fort Leonard Wood that "I am afraid that I am going to be stuck here for a few months". She immediately called him on the long distance telephone about "my coming down there. He seemed rather reluctant but finally he consented" and promised to send her some money for her railroad fare. Since he failed to do so promptly, however, she borrowed sufficient funds from her friend with which to purchase a ticket to Rolla, Missouri, which was near Fort Leonard Wood. On her arrival in Rolla on 15 March 1943, she contacted the accused on the telephone and saw him two or three days later. After staying at a hotel for a short while she moved to No. 12, Rolla Gardens, "a private residence". She and the accused resumed their relationship and had intercourse with one another two or three times in the ensuing month. During this period he assumed and paid her living expenses. He lived with her openly and introduced her as his wife to several of his fellow officers and their wives, among them Lieutenant and Mrs. Teel (R. 35; Exs. G1 and G2; R. 36-38, 40, 42, 47-48, 52-53, 87, 92).

As a result of their illicit union she was then in an advanced stage of pregnancy. The expected baby was of course a subject for discussion. Miss Wilson testified that they talked about how "soon his divorce would be final, when we would be married, what we would name the baby and so on". "It was understood that if it was a boy it would be named John William Clement Cookerly". She registered at the local hospital as Mrs. Cookerly, and on 29 May 1943 she gave birth to a boy prematurely (R. 38, 49-50).

While Miss Wilson was still in the hospital, the accused shifted his attentions to Miss Norma Jean Hamilton, a fourteen year old clerk employed at one of the post exchanges. She had met him in February, and in June she "started going with him". About 1 July 1943 they drove out in her father's automobile, parked on the highway, and had their first intercourse with one another. This and subsequent instances of sexual relations between them were admitted by her in a written statement and by the accused in an oral statement to Mr. W. L. Buchanan, a special agent of the Federal Bureau of Investigation; but at the trial she denied that there had been any improprieties (R. 55-56, 87, 92, 95; Ex. M1).

On 5 July 1943 the accused left Fort Leonard Wood to assume a new post at Camp Gruber, Oklahoma. Miss Hamilton accompanied him to the railroad station at Lebanon, Missouri. There, according to her testimony, he "asked me in the presence of the sergeant and a lieutenant and two girls not to come with him, but I told him I wanted to come, because I wanted to be near him. I asked him if I could borrow the money to come with him. He said, 'Yes', and I borrowed the money from him and came to Muskogee, [Oklahoma] with him, but I paid him back later." When asked whether she purchased the ticket, she replied "No, he did". Earlier the same day the accused had a telephone conversation with Miss Wilson in which he said that she "might come down here in a few days then go home" (R. 41, 56-57, 87, 92, 95; Ex. M1).

Upon their arrival at Muskogee 6 July 1943 the accused and Miss Hamilton went to the Muskogee Hotel where he signed a registration card as "Lt. & Mrs. John C. Cookerly". In her written statement she averred that they had intercourse that night, but on the witness stand she testified that he did not come up to her room nor spend the night with her. The following day she rented a room from a Mrs. Bertha Milliken and moved into it. She introduced herself to her landlady as Mrs. Cookerly and later introduced the accused as "Lt. Cookerly". Although Miss Hamilton stated at the trial that she had no sexual relations with the accused in the new room, and although her testimony was in part corroborated by that of Mrs. Milliken, there is substantial evidence to the contrary (R. 58-59; Ex. M1; R. 18-19, 24-25, 28, 62, 65, 70, 76, 84).

In the meantime the accused had failed to communicate with Miss Wilson. She finally called him on the telephone and "I told him when I would get in and he said he would meet me". Mrs. Teel had reserved a room for her at the Hotel Severs in the name of "Mrs. Cookerly" for the twentieth of July 1943. The accused was not there when she arrived, but he came in shortly thereafter and registered for "Lt. & Mrs. John C. Cookerly". They spent that night together. During the next few days he visited and had intercourse with her seven or eight times, displayed affection toward the child, and provided the funds with which she paid her bills. Their relationship was not destined to endure. One evening after informing Miss Hamilton that he would be unable to come to town, the accused was seen by her with Miss Wilson. The cat was out of the bag. Miss Hamilton confronted Miss Wilson and, upon comparing notes, they became convinced of their lover's perfidy. Both severed their connection with him. On 7 August 1943 Miss Wilson married Private Thomas Murray, a military policeman stationed at Camp Gruber (R. 20-22, 28, 41-44, 84; Ex. M1).

The accused was taken to the office of Mr. Buchanan for questioning on 6 August 1943. He readily admitted his sexual adventures with Miss Wilson and Miss Hamilton but did not sign a statement (R. 86-94).

4. The accused, after his rights as a witness were fully explained to him, elected to remain silent. The only evidence presented by the defense was the testimony of Captain George W. Bercik, the Classification Officer, Headquarters 42nd Division, Camp Gruber, Oklahoma. He stated that his headquarters maintained an official register of all officers reporting to the division, and that the accused signed in on 6 July 1943 at 1710. This was intended as corroboration of Miss Hamilton's testimony that the accused did not come up to her room at the Muskogee Hotel nor have intercourse with her on that date.

5. Specification 2 of Charge I alleges that the accused on or about 5 July 1943 did, in violation of Section 398, Title 18, United States Code, at or near Rolla, Missouri, "knowingly aid or assist in obtaining transportation in interstate commerce for Norma Jean Hamilton, a female person,

for immoral purposes, to wit, unlawful sexual intercourse between the accused and the said Norma Jean Hamilton". Specification 3 of Charge I alleges that the accused committed another violation of Section 398 at the same time and place in that he did "knowingly procure a ticket to be used by Norma Jean Hamilton, a female person, in interstate commerce in going from the State of Missouri to the State of Oklahoma, for immoral purposes, to wit, unlawful sexual intercourse between the accused and the said Norma Jean Hamilton, whereby, the said Norma Jean Hamilton was transported in interstate commerce between the State of Missouri and the State of Oklahoma." These offenses are laid under Article of War 96. Specification 1 of Additional Charge I alleges that the accused did at Muskogee, Oklahoma, on or about 20 July 1943 to about 31 July 1943 conduct himself in a manner unbecoming an officer and a gentleman by living and cohabiting as man and wife with Wanda Waneta Wilson, a woman not his wife. Specification 2 of Additional Charge II alleges the accused committed the same offense at the same place between 6 July 1943 to 31 July 1943 with Norma Jean Hamilton, a woman not his wife. Specification 3 of Additional Charge I alleges that the accused did at Muskogee, Oklahoma, on or about 20 July 1943 "represent that Wanda Waneta Wilson was his wife by signing the register at the Severs Hotel, Muskogee, Oklahoma in the following manner, to wit, 'Lt. & Mrs. John C. Cookerly, Camp Gruber, Oklahoma', which said statement was false and was known by [the accused] to be false". Specification 4 of Additional Charge I alleges an identical representation by the accused on 6 July 1943 at the Muskogee Hotel, Muskogee, Oklahoma with respect to Norma Jean Hamilton. All of the acts complained of under Additional Charge I are set forth as violations of Article of War 95.

Section 398, Title 18, United States Code, commonly referred to as section 2 of the White Slave Traffic Act or the Mann Act, reads as follows:

> "Any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, or in any Territory or in the District of Columbia; any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or who shall knowingly procure or obtain, or cause to be procured or obtained, or aid or assist in procuring or obtaining any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in any Territory or the District of Columbia, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other

immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or in any Territory or the District of Columbia, shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $5,000, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the court."

The record presents convincing proof of two violations of this statute by the accused. Both he and Miss Hamilton admitted before the trial that they had had intercourse with one another in Missouri; that, when he was ordered from Fort Leonard Wood, she went to the railroad station with him to see him off; that at the last moment it was decided that she should accompany him to Muskogee, Oklahoma; that he purchased a railroad ticket for her either with his or her money; that they traveled together to Muskogee, Oklahoma; and that on the first night after their arrival they had sexual relations at the Muskogee Hotel. Other evidence indicates that they subsequently had intercourse on a number of occasions at Mrs. Milliken's house, but whether this was the fact is immaterial. Actual intercourse is not a condition precedent to a conviction under the Mann Act. The transportation of any woman or girl for "immoral purposes" is sufficient regardless of whether that purpose is realized: Athanasaw v. United States (227 U.S. 326; United States v. Brank, 229 Fed. 847,) (D.C. N.Y. 1916). The intent of the accused is revealed by his intercourse with Miss Hamilton in Missouri, his intercourse with her their first night at the Muskogee Hotel, and by his conduct toward Miss Wilson.

While ordinarily evidence of other crimes or misconduct is inadmissible, it may be introduced to show motive or purpose under the Mann Act. This exception to the general rule is well stated in the following quotation from Neff v. United States, 105F (2d) 688 C.C.A., 8th, 1939):

"The testimony of Dolores Fagerlie and Gladys Arneson as to the defendant's immoral conduct with each of them was admitted by the trial court over the objection of the defendant as bearing upon the intent of the defendant in transporting the prosecuting witness into the State of Minnesota, and the Court was careful to limit the effect of the testimony to that purpose alone. Referring to this testimony in the instructions to the jury, the Court used the following language: 'Evidence has also been offered by the Government for the purpose of establishing the intent with which the defendant took this girl across the State line into the State of Minnesota, if he did so take her. I refer to the testimony of

one or two other young girl witnesses, who testified to other occurrences with the defendant. That, gentlemen, may be considered by you, and if, under all of the evidence, you find beyond a reasonable doubt that defendant did take and transport the witness Bettie Jane Hanson into the State of Minnesota, you may consider that evidence for the purpose of throwing light upon the purpose and intent with which he took this girl there. That is not evidence, however; those circumstances testified to by those other two girls would not be evidence tending to show that he did take Bettie Jane Hanson from the State of Iowa to the State of Minnesota, but only for the purpose of tending to establish the intent or purpose of taking her there, if you find he did so take her.'

"The rule against the use of evidence tending to show the commission of distinct and separate crimes other than the one constituting the charge on trial is universally accepted and adhered to, and the evidence of these two witnesses as to defendant's improper conduct with them was admitted by the Court upon the theory that under the facts and circumstances of the case the challenged evidence came within a well recognized exception to the rule above referred to * * *".

The accused's relations with Miss Wilson are not such as to inspire confidence in the purity of his motives toward Miss Hamilton. What he had done to one, it is reasonable to conclude he would do to the other. The Don Juan complex usually follows a stereotyped pattern. To quote again from Neff v. United States, 105 F. (2d) 688 C.C.A. 8th 1939:

"It cannot, of course, be logically contended that the acts testified to by Dolores Fagerlie and Gladys Arneson are in any way connected with or related to the offense charged, but the vital question in the case is the purpose and intent with which the interstate transportation was made and the challenged testimony, indicating, as it clearly does, defendant's unclean attitude towards young girls of high school age, might reasonably be regarded as admissible as tending to show a present and continuing immoral purpose as to females of this class, and a promiscuous disregard of their chastity and virtue which, if established, would have a direct bearing upon the purpose and intent with which the interstate transportation was made."

The transportation in interstate commerce outlawed by the act need not be for commercial gain. The "nexus indicative of the genus is sexual immorality, and * * * fornication and adultery are species of

that genus": Johnson v. United States, 215 Fed. 679 C.C.A. 7th, (1914); see also Caminetti v. United States, 242 U.S. 470 (1916).

The Specifications under Additional Charge I require but little comment. The acts described constitute conduct unbecoming an officer and a gentleman, and their commission has been demonstrated beyond the peradventure of a doubt. The accused has openly lived and cohabited as man and wife with Miss Wilson and Miss Hamilton and has falsely represented both of them to be his wife by the manner in which he signed the registers at the Severs Hotel and the Muskogee Hotel. The evidence of cohabitation with Miss Wilson is particularly convincing. He permitted his name to be given to their illegitimate son, introduced her as his wife to his fellow officers, and openly shared her apartment with her on his evenings away from his post. The following language from II Bulletin, JAG August 1943, section 453 (19a) is directly in point:

> "Accused was found guilty of introducing as his wife in social groups of military personnel a woman who was not his wife, in violation of A.W. 95. The evidence showed that he introduced this woman to the officers and ladies of the post and into the social life of the post. Held: The record is legally sufficient to support the findings and the sentence. Such conduct offends against good morals, violates public decency and propriety, and is unbecoming an officer and a gentleman (Winthrop, 1920 Reprint, p. 718). CM 234787 (1943)."

The case under consideration is even more flagrant for the accused has unlawfully cohabited with two women and has represented both of them to be his wife. He has displayed a complete disregard and contempt not only for the opinion of society but for his duties and obligations as an officer and gentleman. The evidence clearly supports the findings and the sentence as approved by the reviewing authority.

6. The accused is about 23 years of age. The records of the War Department show that he had enlisted service from 5 September 1941 to 3 February 1943, when he was commissioned a second lieutenant, and that since the last 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. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence. Dismissal is authorized upon a conviction of a violation of Article of War 96 and is mandatory upon conviction of a violation of Article of War 95.

Abner E. Lifscomb, Judge Advocate

(On Leave), Judge Advocate

Gabriel H. Golden, Judge Advocate

(108)

SPJGN
CM 245014

1st Ind.

War Department, J.A.G.O., 17 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 Second Lieutenant John W. C. Cookerly, Jr. (0-1109866), 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 as approved by the reviewing authority and legally sufficient to warrant confirmation thereof. I recommend that the sentence as approved by the reviewing authority be confirmed but that the forfeitures and confinement imposed be remitted and that the sentence as thus modified be 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 as approved by reviewing authority confirmed but forfeitures and confinement remitted. G.C.M.O. 230, 29 May 1944)

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

SPJGQ
CM 245026

15 DEC 1943

UNITED STATES	)	99TH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Third Army Maneuver Area, Louisiana, 30 October and 12 November 1943. Dismissal.
	)	
Second Lieutenant LEONARD V. SKALICKY (0-1296274), 395th Infantry.	)	

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

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

Specification 1: In that 2nd Lieutenant Leonard V. Skalicky, Anti-Tank Company, 395th Infantry, did, without proper leave, absent himself from his organization and station at Camp Van Dorn, Mississippi, maneuver area, from on or about 0530 CWT 7 September 1943 to on or about 2300 CWT 10 September 1943.

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

Specification 1: In that 2nd Lieutenant Leonard V. Skalicky, Anti-Tank Company, 395th Infantry, being indebted to 2nd Lieutenant Frank T. Lesnicki, Anti-Tank Company, 395th Infantry, in the sum of Fifteen dollars ($15.00), which amount became and due and payable on or about 1 June 1943, did dishonorably fail and neglect to pay said debt.

Specification 2: In that 2nd Lieutenant Leonard V. Skalicky, Anti-Tank Company, 395th Infantry, being indebted to 2nd Lieutenant Robert Baird, Service Company, 395th Infantry, in the sum of Eighteen

dollars and Fifty cents ($18.50), which amount became due and payable within a reasonable time after 2 July 1943, did dishonorably fail and neglect to pay such debt.

Specification 3: (Nolle prosequi).

Specification 4: In that 2nd Lieutenant Leonard V. Skalicky, Anti-Tank Company, 395th Infantry, being indebted to First Sergeant John A. Bigelow, Anti-Tank Company, 395th Infantry, in the sum of Twenty dollars ($20.00), which amount became due and payable on or about 5 August 1943, did dishonorably fail and neglect to pay said debt.

He pleaded guilty, with exceptions, to the Specification of Charge I and to Charge I. He pleaded not guilty to Charge II and its Specifications. He was found guilty of both Charges and of the Specifications thereunder upon which he was arraigned. There was introduced in evidence a prior conviction by general court-martial on 2 April 1943 of violating Article of War 96 under two Specifications: (1) Wrongfully drinking intoxicating liquor in public with enlisted men, and (2) wrongfully fraternizing in public with enlisted men, for which offenses he was sentenced to be reprimanded and restricted to limits of his regimental area for one month. 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 of the prosecution pertaining to the Charges and the various Specifications thereunder may be summarized as follows:

a. Charge I and Specification.

A properly authenticated extract copy of the morning report of Anti-Tank Company, 395th Infantry, of which organization the accused was a member, was introduced in evidence showing the accused as absent without proper leave from his organization from 7 September 1943 to 11 September 1943 (Pros. Ex. A; R. 7). Accused was given permission to be absent during 7 September but failed to return that evening (R. 8). The accused was seen on Main Street, Natchez, Mississippi, at 10:30 A.M. of 10 September 1943 by Captain A. K. Wasleigh (R. 10). The accused pleaded guilty to the Specification except the words and figures "0530, 7 September 1943", substituting therefor the words and figures "0630, 8 September 1943" (R. 5).

b. Specification 1 of Charge II.

Lieutenant Frank T. Lesnicki, accused's commanding officer, loaned $15 to the accused at the latter's request in May 1943 with the understanding that it would be repaid the first of June (R. 7).

Lieutenant Lesnicki preferred the charges against the accused 13 September 1943. The accused was notified and on 14 September 1943 repaid the loan in full (R. 7, 14).

c. Specification 2 of Charge II.

Lieutenant Robert T. Baird, Jr., on 2 July 1943 loaned the accused $18.50 at the latter's request. The accused promised to repay the loan the next day by check. He failed to repay the loan as promised and on August 1 and "on one or two other times" Lieutenant Baird requested payment (R. 13). Upon each request the accused promised that he would make payment as soon as he received his check (R. 14). The accused repaid the loan in full on 14 September 1943 after charges had been preferred against him (R. 14).

d. Specification 4 of Charge II.

On 3 August 1943 accused borrowed $20 from First Sergeant John A. Bigelow, Anti-Tank Company, 395th Infantry, promising to repay the loan on 5 August "when he got his check cashed" (R. 9). Accused did not repay the loan until 14 September 1943 after Sergeant Bigelow had been called over to the Regimental commander's office to testify against the accused during the investigation of the present charges (R. 9).

4. The accused elected to testify (R. 14). He related that he was 23 years of age and had been in the Army for three years. He was married and had two daughters. For ten months his family lived in Natchez, Mississippi. He was pressed for money and forced to borrow because of his wife's illness after the birth of the first child. He was commended by the Commanding General of the IV Corps for a superior rating for umpiring maneuvers at Camp Shelby, Mississippi, February 1943 (R. 15).

5. The evidence is legally sufficient to support the findings of guilty of the Charges and Specifications. With reference to Charge I and its Specification (AWOL, 7 September 1943 to 11 September 1943) the finding is supported by the morning report, the evidence of the accused's presence in Natchez, Mississippi on 10 September and the plea of guilty of having been absent without leave from 8 September 1943 to 11 September 1943.

With reference to Charge II and its Specifications, a mere failure on the part of a commissioned officer to pay a personal debt is not an offense under Article of War 95. There must be shown a "dishonorable neglect" to discharge the indebtedness. The phrase "dishonorable neglect" has no precise mathematical limits but, in

general, a failure to pay is properly so characterized where, under all the facts, the effect of the failure is to compromise the honor of the officer concerned and the honor or credit of the military profession - if the failure to pay "brings the service into disrepute by lowering the faith (of others) in the integrity and fidelity to their obligations, of the commissioned officers of the Army", the offense is complete. An "unconscionable delay", or "false promises", or "evasion" when combined with a failure to pay have been held to constitute "dishonorable neglect". Winthrop's Military Law, p. 715.

The evidence as to Specification 1 of Charge II discloses that the accused borrowed $15 from Lieutenant Lesnicki during May under the express promise that he would repay the loan on 1 June. More than three months later the loan remained unpaid. During such interval a suitable regard for his own honor and that of the military profession would have caused the accused to make partial payment or at least request an extension of time within which to fulfill this pledge of payment. If the accused had sought to protect his integrity by such, or similar, means his failure to pay, standing alone, would not have constituted an offense. Under the record no such honorable action was taken. The specific promise of payment on a particular day was breached and for over three months the obligation was ignored. When the accused on 13 September 1943 learned that charges had been preferred, repayment was made the following day. Under such circumstances the delay was unconscionable.

As to Specification 2, the evidence shows that the accused borrowed $18.50 from Lieutenant Baird on 2 July under the express promise that the sum would be repaid the following day. When the debt was not paid as agreed Lieutenant Baird on several subsequent occasions requested payment. Each time the accused promised to pay as soon as he received his check. When on 13 September 1943 the accused learned that charges had been preferred, payment was then made. The evidence, which showed that but one day separated the loan and promised date of payment, and several subsequent unfulfilled promises of payment by the accused, indicated not only unhonored promises of payment but a wrongful intent not to perform at the time the promises were made. These false promises constitute a violation of Article of War 95.

As to Specification 4 the accused borrowed money from an enlisted man in his own command. He promised to repay it in two days. He failed and neglected to repay it until he was practically compelled to do so by court-martial proceedings five weeks later. In the meantime he ignored the obligation entirely. To borrow money from an enlisted man is in itself an offense. Such an offense coupled with the promise of almost immediate repayment followed by complete disregard

of the obligation under the circumstances related constitute conduct unbecoming an officer and a gentleman and a violation of Article of War 95.

The isolated failure to repay this loan might not in itself be dishonorable, but to borrow the money with a promise to repay in two days, at a time when he was indebted to others and unable to repay his other obligations, is evidence of dishonesty on the part of the accused.

6. War Department records show the accused to be 23 years of age. He graduated from high school in 1936 and attended business college for two years thereafter. He enlisted 14 November 1940 and served as an enlisted man until he was commissioned second lieutenant, Infantry, 12 October 1942 upon graduation from the Officers Candidate School at Fort Benning, Georgia. At that time he was assigned to his present organization.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of a violation of Article of War 95 and is authorized upon conviction of a violation of Article of War 61.

William H. Brooks, Judge Advocate.

Earle Lebburn, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 31 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 Leonard V. Skalicky (0-1296274), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed 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-Dft. ltr. for sig. S/W.
Incl. 3-Form of action.

(Sentence confirmed. G.C.M.O. 120, 10 Mar 1944)

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

SPJGK
CM 245066

22 JAN 1944

UNITED STATES v. Second Lieutenant SARGENT M. BAIRD (0-1318403), Infantry.	ARMY GROUND FORCES REPLACEMENT DEPOT NO. 1 Trial by G.C.M., convened at Fort George G. Meade, Maryland, 4, 19 November 1943. Dismissal.

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. Accused was tried upon the following Charges and Specifications:

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

Specification: In that Second Lieutenant Sargent M. Baird, Company "A", 5th Replacement Battalion, 2d Replacement Regiment (Inf), Army Ground Forces Replacement Depot Number 1, Fort George G. Meade, Maryland, did, without proper leave, absent himself from his organization at Fort George G. Meade, Maryland, from about 0001 9 October 1943 to about 1400 15 October 1943.

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

Specification: In that Second Lieutenant Sargent M. Baird, Company "A", 5th Replacement Battalion, 2d Replacement Regiment (Inf), Army Ground Forces Replacement Depot Number 1, Fort George G. Meade, Maryland, did, at Fort George G. Meade, Maryland, on or about 18 October 1943 with intent to deceive Lieutenant Colonel Frank E. Washburn, an officer duly appointed to conduct an investigation of a certain charge preferred against the said 2nd Lieutenant Sargent M. Baird, state to the said Lieutenant Colonel Frank E. Washburn, in the course of the said investigation, that he had been ill in bed in New York City from 8 October 1943 to 12 October 1943, which statement was known by the said 2nd Lieutenant Sargent M. Baird to be untrue in that he had not been so bed-ridden.

He pleaded not guilty to and was found guilty of the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and withheld the order directing the execution thereof "pursuant to Article of War 50½". The record of trial has been treated as though forwarded for action under Article of War 48.

3. Testimony introduced by the prosecution shows that accused is a second lieutenant, Infantry, Company A, 5th Replacement Depot, Army Ground Forces Depot No. 1, stationed at Fort George G. Meade, Maryland. At all times mentioned in the Specifications of the Charges he was attached unassigned to and carried on the morning report of Company A of the 5th Replacement Battalion, 2nd Replacement Regiment (R.6,7). Accused was granted ordinary leave for six days, effective on or about 2 October 1943 (R.9,10; Ex. B). Captain John R. Lyle, Infantry, Regimental Adjutant of the 2nd Replacement Regiment at Fort George G. Meade, testified that as adjutant he maintained a register in which all officers going on leave signed "out" and "in", and that accused "signed out" in that register on 2 October (R.9,10; Ex. C). Captain Lyle testified further that he signed the morning report of A Company, 5th Battalion, for the date of 9 October 1943. He identified that morning report. It was received in evidence and showed the following entry with respect to accused for that date, "From ordinary leave to AWOL 0001" (R.10,11; Ex. D). Captain Lyle testified further that he received no copy of any order extending accused's leave of absence and that he did not see accused between 2 October and 15 October, at which last named date accused reported to him in Regimental Headquarters and stated that he had "just returned from being absent" (R.12).

Captain George A. Richner in command of Company A of the 5th Battalion, to which accused was attached unassigned, testified that after accused went on leave he did not see him again until 15 October, at which time accused "reported in" to him, and that he signed the morning report for his company on that date. Captain Richner identified the morning report and, being introduced in evidence, it showed the following entry with respect to accused for 15 October 1943: "From AWOL to Ar in Qrs 1400". Captain Richner also testified that he was not available to sign the morning report of his company for 9 October and that it was signed for him by Captain Lyle, the Regimental Adjutant. Captain Richner testified further that between the 8th and 15th of October, "in as much as Lieutenant Baird [accused] had been a member of my command since its organization, we thought, perhaps, he had returned from leave, and perhaps gone to bed, gone to sleep, so we searched the quarters and also searched the area in order to find him, but did not find him" (R.6-9; Ex. A).

Lieutenant Colonel Frank E. Washburn, Corps of Military Police,

Army Ground Forces Replacement Depot No. 1, testified that he handled the pre-trial investigation of accused as assistant inspector of the depot. He saw accused several times and spoke to him; and around 20 October he interviewed accused as investigating officer. The witness stated that before any testimony was taken he explained to accused his rights under Article of War 24, read him a copy of the Charges and informed him, among other things, that after all the testimony was taken it was accused's privilege "to either make - take the stand and be sworn and make a statement under oath, to make a statement without being sworn, or to remain silent * * *". Colonel Washburn testified that accused "elected" to dictate a statement. This was done in his presence. The statement was typed and was shown to accused and accused refused to sign it. Colonel Washburn was then shown "a piece of paper" which he identified as the statement of accused so dictated and prepared in his office. Colonel Washburn was then asked by the trial judge advocate to tell the court to the best of his recollection just what accused said in that statement and he was instructed that he might use any memorandum he had with him which he made at the time and knew of his own knowledge to be exactly what accused did say. The president of the court then instructed the trial judge advocate to "determine whether or not this witness is going to use a memorandum". Accordingly, Colonel Washburn was asked whether he could recall the exact words of the statement as dictated by accused without reference (to a memorandum). Colonel Washburn replied: "Not without reference to the memorandum, no, sir. I could remember the substance of it, but not the exact words." The prosecution then stated to the court that it was proposed that Colonel Washburn use the statement as typed by his stenographer to "refresh his memory and to then testify from his own knowledge".

At this point the defense objected to the use of any memorandum that was not personally prepared by the witness.

Colonel Washburn at this point was asked by the president of the court concerning the usual procedure in his office in the matter of "making a memorandum" in cases of this kind. The colonel replied: "To type the statement and allow the man who dictated it to read it". Colonel Washburn was then asked if the memorandum he proposed to use "to refresh his memory" was made pursuant to that procedure. Colonel Washburn stated: "It was, I remember it distinctly because I asked him if he would sign it and he said he preferred not to sign it".

The court then announced "the witness may be permitted to use a memorandum to refresh his memory of the statements made at the time".

The prosecution then questioned the witness as follows:

"Will you please state the exact text of the statement made in your presence by Lieutenant Baird?"

The witness then read verbatim the transcript of the statement as typed by his secretary as follows:

> "I am stating that as of October 8th that I suffered from intestinal grippe and a touch of the flu, and was bedridden for three days at my mother's home, 617 Walton Avenue, New York City. Dr. Emory Gibson Minckler attended me at that time, at which time I asked the doctor to wire, advising the commanding officer, 2nd Regiment, that I was under his care. I was taken ill on the morning of Friday, 8 October, 1943, and remained in bed until Tuesday, the 12th, at which time I returned back to Baltimore, still feeling in poor physical condition, didn't report until Friday, the 15th."

The witness was then asked by the prosecution: "Are those the exact words of Lieutenant Baird * * *?". His answer was, "Yes" (R.13-21).

Witness stated that a few days after accused made the statement he expressed a desire to retract it and was told that "it was too late, it had already gone into the record" (R.17).

On cross-examination, defense counsel questioned Colonel Washburn further with respect to the statement which Colonel Washburn testified accused had made. He asked Colonel Washburn: "And the period of time during which the accused stated he was confined in bed was only up to the 12th, wasn't it?". The witness answered: "That is true, but he stated he returned to Baltimore and remained because he didn't feel well enough, and he reported on the 15th".

By stipulation it was agreed that if Dr. Emory Gibson Minckler were present in court he would testify that he was a practicing physician, residing in New York City and knew the accused; that on 7 October 1943 accused called on him at his office; that he examined accused and found him suffering from sinusitis and nervous fatigue; that he prescribed some treatment but did not order accused to remain in bed and did not see him after that visit; and that accused did not request him to communicate with his commanding officer or any military authority (R.31; Ex. E).

Pritchard Carr, Assistant Manager, Congress Hotel in Baltimore, testified that he knew the accused and that a registration card of the Congress Hotel in Baltimore, which he produced in evidence, showed that accused registered at the hotel on 8 October 1943 and checked out on 15 October 1943. This witness testified, further, that he personally saw accused a day or two after the registration, "maybe", he "wouldn't be able to say just exactly". However, Mr. Carr testified, he actually saw accused around the hotel several times "coming in and going out" and accused occupied the "rooms" during those days (R.31-33;

Exs, F,G).

Private Lawrence T. White, a member of the company to which accused was attached, testified that he knew accused and saw him in Baltimore around 8 October, at which time and place he talked with accused. On cross-examination this witness testified that he did not remember the date on which he saw accused in Baltimore, that it could have been any day between the 7th and 15th of October. On redirect examination this witness testified that about a week elapsed between the time when he saw accused in Baltimore and the time that accused returned to his station. Private John R. Brent also of Company A, to which company accused was attached, testified that he saw accused in Baltimore and talked with him about the 8th of October, the day before that on which he knew accused's leave expired (R.21-28).

4. Accused elected to remain silent and no evidence was offered by the defense.

5. The proof offered by the prosecution conclusively established the fact that accused was absent without leave from his organization from about 9 October 1943 to about 15 October 1943, as alleged in the Specification of Charge I. The morning report was received improperly in evidence to establish the date of accused's initial absence without leave, since the regimental adjutant who signed it for that date was not its official custodian so as to create a presumption of personal knowledge and since the record fails to show that he had personal knowledge of this absence obtained by his own investigation. However the testimony of the company commander that he searched the company area for accused during the period of absence charged without finding accused, that he did not see accused during this period, together with accused's admission to Colonel Washburn that after his leave had expired he had not returned until 15 October, are sufficient to establish the corpus delicti and the guilt of accused.

With respect to Charge II and its Specification, the statement alleged to have been made to Colonel Washburn by accused was read by Colonel Washburn from the original stenographic transcript of that statement. Colonel Washburn, before reading the transcript or memorandum of what accused said, testified that he could remember the substance of accused's statement, but not the exact words without reference to the memorandum.

Under the circumstances of this case it was not error to permit the witness to read the memorandum and this procedure did not violate Section 119b of the Manual for Courts-Martial 1928 (Wigmore on Evidence, Third Edition, Vol. III, Secs. 758-765; Myers v. Weger, 42 A. 280; State v. Cardoza, 11 S.C. 195).

The testimony of Privates White and Brent that they saw accused and his wife at the entrance to a theater in Baltimore around 8 October showed that accused was not confined to his bed in New York City until 12 October. Furthermore, there was clear proof that accused was registered in a hotel in Baltimore between 8 and 15 October and that he was seen in that hotel within a few days after 8 October by the assistant manager. This evidence proved the falsity of accused's statement to Colonel Washburn.

The evidence clearly shows that the accused made a false official statement as alleged. The fact that the statement was not signed by the accused is immaterial. Nor is it a defense that after the statement was made and reduced to writing the accused attempted to withdraw or retract his statement (CM 231445, Teixeira).

6. Accused is 34 years of age and married. He is a high school graduate and attended Massachusetts State College for two years. In civilian life he had been employed as trust clerk by the Fulton Trust Company of New York for eight years and as a salesman for two years. He enlisted on 12 January 1942 and after attending Officer Candidate School was discharged on 27 April 1943 and on the following day was commissioned a second lieutenant, Infantry, Army of the United States, entering on extended active duty on the same date. He attended Plattsburg Citizens Military Training Corps in 1926 and during the three succeeding years. He was a member of the Reserve Officers Training Corps at college and a member of the 107th Infantry, National Guard, New York, for three years, 1936 to 1939. He has been in arrest in quarters since 15 October 1943.

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 mandatory upon conviction of a violation of Article of War 95 and is authorized upon conviction of a violation of Article of War 61.

_____, Judge Advocate.

(On Leave), Judge Advocate.

Fletcher R. Anderson, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 1- 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 Second Lieutenant Sargent M. Baird (0-1318403), 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. In view of the circumstances in this case and the previous good record of accused, it is recommended 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.

Myron C. Cramer

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

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

(Sentence confirmed but execution suspended. G.C.M.O. 89, 26 Feb 1944)

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

SPJGK
CM 245081

14 FEB 1944

UNITED STATES	)	SECOND AIR FORCE
v.	)	Trial by G. C.M., convened at Geiger Field, Washington, 3 November 1943. Dismissal.
Second Lieutenant JACK D. WHITTIKER (O-675383), 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 Charge and Specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that Second Lieutenant Jack D. Whittiker, Air Corps, 21st Tow Target Squadron, did, at Spokane, Washington, on or about 18 October 1943, with intent to commit a felony, viz, rape, commit an assault upon Mrs. Helen M. Powers, by willfully and feloniously laying his hands on her body.

He pleaded not guilty to and was found guilty of the Charge and its Specification. No evidence of previous convictions was introduced. He was sentenced to dismissal, total forfeitures, and confinement at hard labor for six years. The reviewing authority approved only so much of the sentence as provided for dismissal and forwarded the record of trial for action under Article of War 48.

3. Accused is a second lieutenant, Air Corps, 21st Tow Target Squadron, Felts Field, Washington. Witness-in-chief for the prosecution was Mrs. Helen M. Powers. Her testimony as to the events of the earlier part of the night, leading up to the offense charged, was corroborated by that of Mrs. John B. Carter, Miss Eleanor Mulke and Mrs. Lillian Cummings, all of Spokane, Washington, These women were all employed (R.8,37,40,41,44). Mrs. Powers, the prosecutrix, was about 20 years of age. She had been

married for two years to an American soldier stationed in England. During her husband's absence, she had "gone out" with friends, but never with a stranger before the night in question when "it turned out so badly" (R.13, 15).

On the evening of 18 October 1943, by prearrangement, Mrs. Powers met Miss Mulke at Irwin's Cafe in Spokane, Washington, at about 7:30 p.m. "for a glass of beer and go to a show" (R.9,30,31,41). In this cafe, they met and joined Mrs. Carter, who was in the company of a "Lieutenant". A little later, Mrs. Cummings dropped in at Irwin's to see if Mrs. Powers and Miss Mulke were there. She joined the party (R.9,41,44,45). The party discussed going dancing, but since there were four girls and only one man a search was started for more men. The party split up but met a little later at the Hotel Davenport, by which time three more officers, including accused, had been added to the party with a minimum of formality. Even the officers were apparently strangers to each other (R.9,37,38,40, 43,46). They decided that they wanted to go to a place known as "Madge's". They took a taxi, eight in one cab besides the driver. Mrs. Powers did not think she kissed accused at that time. At Madge's there was dancing and some drinking. One of the officers had quite a bit of liquor with him. No one became intoxicated. Accused talked about a dog which he had back in his hotel room and mentioned the necessity of his returning to the hotel to feed it (R.9,10,16,38,39,42,46,47). Finally, accused told Mrs. Powers he had to go after his dog. He asked her to go along and said they would come right back. So she "went with him and * * * told the other girls not to leave" until she returned. They took a cab to the Coeur d'Alene, accused's hotel. They kissed while waiting for a taxi and while en route, "just a friendly kiss" (R.10,16,26). In the hotel, they went to the mezzanine floor and took the elevator to accused's room from there (R.16). Mrs. Powers said that she remained in the lobby while accused got his key at the desk. He asked if she would like to go up to his room. She said, "No". Accused, she continued, told her that his room was his home and that she would be treated as though she were in his home, so she went with him. Mrs. Powers explained: "During the course of the evening he was very gentlemanly, there wasn't anything out of the way", and she thought she might insult him if she refused (R.10,16,26). (Mrs. Powers did not make it clear whether she was in the lobby or on the mezzanine floor when she decided to go to his room.) It was approximately 12:15 a.m. (R.24). In the room, they found the dog on the bed. Mrs. Powers sat on the edge of the bed and started to play with the dog. Accused pushed her over and tried to kiss her. She protested. He said he "wanted to neck". She said she "didn't want to". He was holding her down. She asked to take off her coat, the idea was "she was going to try to get out". Accused stood up between her and the door. He threw her back on the bed, locked the door and turned out the lights. He told her not to be frightened, that he would not hurt her, "that he wanted to get hot". She said she wanted her coat off and asked him to take it off for her. This he did, hanging

up the coat, while she sat up on the edge of the bed and started to get up and to the door. He pushed her back on the bed and tried to kiss her. He said: "You don't know what it's like to have been married and to feel this way * * * All I want to do is to get hot". Mrs. Powers stated that she was so frightened she started to scream and scratch him. She desisted scratching when he threatened her. She was afraid of him. She could not fight him even though she was "not small" (R.10,11,17,18). Mrs. Powers continued:

> "I was afraid that he would hit me or something so that I wouldn't know what was going on, so I struggled with him, although I didn't try to mark him or anything in that respect. I was afraid of being hit or made unconscious, and then I wouldn't know what was going on, and finally he bent my arms back in such a way I couldn't hardly move them, and he pulled up my skirt, and his trousers were open, and he became very passionate, and finally after he had had a discharge, he let me up, and after that I wasn't afraid of him, and I told him that I was going to call the police, that that wasn't anything for anyone to do, and I combed my hair; as I said, it was like all of a sudden he turned into an animal and went crazy or something, and then he was all right again. Captain Fuchs I thought might be at the police station, and I called him and told him I was coming over to talk to him, and I straightened my hair and put on my coat and went straight to the police station where I told Captain Fuchs my story, and he called the Military Police." (R.11).

With respect to her screams, and other details, Mrs. Powers stated that she screamed and that "a man in the hall evidently heard" her and said, "Where are you, I'll come and get you". Accused thereupon "put his fist in" her "mouth" (R.11,12). She stated that until after her coat was removed she did not scream. After that she started to scream and scratch. She explained that she could not leave the room while accused was hanging up her coat because she was frightened and inclined to get dizzy when sitting up suddenly, and further that when she got up he pushed her back. She stated that she was afraid of being hit "because the first time, when he put his hand on" her "mouth" he hit her "in the jaw in the process". She said that that blow was probably accidental, but was hard enough to indicate a lot of force if he did hit her (R.19). Later while lying crosswise on the bed, she brought up her knee to kick him and accused bent it out and over, her left leg, and then he knelt on it (R.20). She received bruises on her left leg from that. They were black and blue marks and showed up during the space of two or three days (R.12). At that time, she was on her back and he was face down on top, clothed except for his blouse. He placed his hand on her private parts. She tried to grab his hand. He did not have his hand over her

mouth. That was when she screamed. She said she knew accused had his trousers open since she "could feel --" (R.20,21). The prosecutrix testified definitely that while accused did not enter her "very far, he did slightly, and * * * there was a discharge" (R.14). She said that the penetration lasted "until he had his discharge". The emission was both inside and outside her body (R.22). On cross-examination she identified a signed statement made to an officer the next morning in which she said that the discharge went on the outside of her body (R.23). Mrs. Powers testified that during the attack she tried "as hard as possible" to get away from accused (R.13). The prosecutrix repeated that when she got ready to leave the room she was no longer afraid of accused. She combed her hair and put on her kerchief. While doing this she told accused what she thought of him. She testified that by this time accused was sitting in a chair and complaining because he had spent a good deal of money on her and she "hadn't been a bit cooperative". She threw a five dollar bill at him and told him to find someone who would be fond of his actions and that she was going to the authorities. She had phoned Captain Fuchs, and accused had not attempted to prevent it. Before phoning she had told accused her purpose. He told her that she could not do anything about it. She unlocked the door and went out. Accused "sat in the chair all the time", evidently, while she was preparing to leave. She left at about 1:45 a.m., having been in accused's room about one and one-half hours (R.12,23,24,27).

Mrs. Powers had no physical examination or treatment, except that there was a physical examination two days before the trial, at which time "Lieutenant" John R. Schroeder, Medical Corps, found four bruises, between one and three weeks old, on her left thigh, the largest of which was about one inch square. Lieutenant Schroeder testified that the bruises probably could not have been caused by kneeling on the thigh, but could have been caused by "rough handling" (R.29). Mrs. Powers testified that no one suggested (at the time) that she have a physical examination, and that she "didn't believe it was necessary" (R.25,29).

James J. Fuchs, Captain of Police, Spokane, Washington, testified that Mrs. Powers had been a casual acquaintance for about seven years as a schoolmate of his daughter (R.30,33). He stated that at about 1:30 a.m., 19 October (R.30,36), while on duty, he received a telephone call from Mrs. Powers. After that Mrs. Powers came in. She was very hysterical, crying, her face was flushed, and her hair was "tussled up" (R.30,31). Mrs. Powers made a "complaint" and Captain Fuchs called the Military Police (R.32). Captain Fuchs advised the prosecutrix to see a doctor for a medical examination (R.34). Sergeant Willis E. Bramer and Private Ferrill W. Gibson, of the 827th Guard Squadron, stationed at Geiger Field, Washington, and on duty as military police on the night of 18 October, testified that a telephone call was received by the Military Police about 2:45 a.m. (19 October) from Captain Fuchs, in consequence of which they went to accused's room in his hotel, where, after knocking loudly at the door and receiving no response, their admittance was

secured by the room clerk with a pass key (R.50,51,54,55). Accused was in the room, the bed was "fairly crumpled up", and there was a five dollar bill on the floor (R.50-52,54,55). Accused was in the bed and appeared as though he had been asleep (R.54). He was not intoxicated nor "unsteady on his feet". He was taken to the "MP Station" (R.59). Technical Sergeant John Herman, Jr., 971st Guard Squadron, was in charge of the Military Police in Spokane and interviewed accused. After being warned of his rights, accused gave to Sergeant Herman substantially the same version of the affair as that related by him when he took the witness stand in his own defense (R. 60-65,67-69). According to Sergeant Herman, the interview in part was as follows:

> "He", accused, "says at first the girl wasn't repulsive, she kind of liked it, and so they kept on. As the Lieutenant stated, they both got pretty hot, so things must have been going pretty good. He started taking liberties with her, he tried to lift up her dress, and she put his hand down, says no, so he quit, and then I asked him if he started playing with the girl's breasts, and he says he did, then she didn't seem to like that, he stated, so he quit again for a few moments, and they kept on necking again, and then he started lifting up her dress, and she made the statement that she didn't like that, and didn't want to do something like that, and I asked the Lieutenant then if he had gone taking free liberties with a girl beyond what a man should do. He says yes, he had touched her private parts. I asked the Lieutenant if he had at any time had his penis out. He says no, but he did say he had his pants unzipped, and that he had rubbed himself up next to the girl, and during this time the girl said that she was going to call out, and at first the Lieutenant let her go, and then he started again, and the girl said she was going to call out, and the Lieutenant said he stopped her, he didn't say how * * *." (R.62)

During this interview, accused was fairly calm (R.64). Herman went to accused's room at the hotel "right after talking" to accused (R.63). He examined the bed clothing and towels and found no "soil or spots caused from any fluid, which might be an emission" (R.63,66).

4. Accused testified in his own behalf. He said, in part:

> "On the evening in question, approximately 9:30 o'clock P.M., I was standing in Irwin's Cafe. I had about two beers in Irwin's Cafe and I started out the front door to go to another place, walking around, and on the way out I passed two women, and another man, a Lieutenant, an administrative medical officer, and some woman said 'There's another one' and I turned around, and one of the women asked me if I wanted to go out and have a good

time. They said they had plenty of whiskey and needed three men to make up a party, so I decided to go. The women said they had two more girls who would be waiting outside, so we stepped outside of Irwin's Cafe and there was no one there. They mentioned something about a blonde waiting outside. We walked straight up Sprague Avenue to the Outside Inn where I had previously been about an hour before, and I had been previously talking to a navigator Lieutenant and his buddy, sitting in a booth at the Outside Inn, so I told the party that we probably could get this other man and this other Lieutenant to go on the party and to make up the party of four; so as I said, we proceeded from Irwin's Cafe to the Outside Inn and I went over to this booth and I asked him if he would like to go, and he said he would like to go, and in the meantime, while I was talking to this third man in the Outside Inn, this medical administrative officer disappeared, and the girls said they had to have another man, so this navigator Lieutenant had a buddy there in the booth with him, and he consented to go on the party to make up the fourth man; so the two girls and myself and the first Lieutenant I propositioned to go on the party, we walked half-way across the street, and then when the girls decided this medical officer wasn't coming back, then I went back to get his buddy. The two girls and myself went to the Davenport Hotel, and we met in front of the Davenport Hotel, where we took a cab, the four couple of us, and proceeded straight to Madge's Night Club, out on East Sprague, and on the way to the club there was considerable necking going on in the cab. This girl, Mrs. Powers, we did neck on the way out to this Night Club, and this first girl, the one that had the brown fur coat on, Mrs. Carter, she was sitting in this Ellender's lap, and they did considerable necking on the way out too; she says they didn't. We all got out, we went inside, we acquired a booth, took the whiskey in, first with the whiskey on top of the table, and the floor man said we had to set the whiskey under the table, so we did that. We had a few drinks, I would say I had three or four drinks of whiskey, and we danced, and sat at the table, and we talked, certain conversation about where the girls worked, what we did, and where we are located, and everything, and we ordered chicken prepared for the four couples. The chicken was brought around, I ate my chicken, I didn't pay much attention to anyone else, and we had a few drinks during the course of the meal, and this one couple, they left, I don't know for what reason, so we set there I expect fifteen minutes after the couple left.

"I told this girl I had to go to my hotel, I had this dog there, told her we would get one of the bottles from the party and finish the party at my hotel, and she consented to go. I buzzed the elevator, cause there was no elevator waiting at that time, so I walked over to the desk clerk and asked for my key, because I took my dog up the early part of the evening and turned my key back in to the desk clerk, and when I went in the lobby at the Coeur d'Alene

Hotel I saw First Lieutenant Peterson there, and I said a few words to him, and this girl set down on a couch, and I asked her if she wanted to go up to the room in the elevator, and she said no, she would rather not be seen going up in the elevator, so I said we will go up the first flight of stairs and then catch the elevator, and we went up to the 6th floor to my room, 625. The girl sat on the bed, and I think the dog was on the bed at that time.

"We started necking again, she cooperated 100%, so we did considerable necking, and then we laid back down on the bed, and we necked there, and become rather passionate; she pressed her body close to mine. We was laying on the bed side by side and I pulled her dress up and touched the private parts of her body, which was very moist, and if she had any pants on I didn't feel them, so we laid there, and for a minute I had my hand on the private parts of her body, and she didn't resist, the first time she did, she jumped back a little bit, but after that she didn't, and I pushed her leg over with mine, her right leg over with my left knee, and we lay there for a few minutes, and then I pushed her on over and got in between her legs, and was standing on my knees, and she said she wanted to get up and remove her coat, and I let her up, and she got up and removed her coat, and I don't remember if I hung her coat up in the closet or anything; so we was both standing up at that time, and I took hold of her hand, and we sat down on the bed, and we started necking as before, and I put my hand on the private parts of her body, and I pushed her leg over again, and got both of my legs against her; I rubbed my body against hers; my pants were completely zipped, and she didn't resist. Then I got on my knees and started to unzip my pants, and then she let out a yell and said a lot about service men thinking they were privileged characters, taking a woman out, and she said she knew a member of the police force, I don't remember whether she said a captain, she said she was going to make trouble for me. She said she would make me sorry for bringing her up there in the first place, so she went to the phone and called this Captain Fuchs, and I didn't try to stop her, because I hadn't done anything to call the police for, so she called this police, and then went to the dresser and combed her hair, and put her coat on; and I give her a talking to. I told her why pick up a man like that and go to his room and have a necking party and rub it all over him, and then make a howl like that, and she said 'If its the money you're quibbling about, you spent on me, I will repay you' so she threw down some money, and I said, I was joking with her, and I said 'I spent fifty cents extra' so she said she didn't have any change, and threw down a five dollar bill and disappeared." (R.67-69)

Accused specifically denied that his penis was outside his pants. said that when he was in a prone position he reached down to unzip

his pants, that Mrs. Powers then screamed and jumped out from under him, and that he did nothing at that time to restrain her (R.71). He also testified that he did not know Mrs. Powers was married. He said he "found that out later from the MP's" (R.72). On cross-examination, accused was asked whether his actions would have been any different that night had he known Mrs. Powers was married. He replied:

> "A. Well, just let me see now, whether it would or not. Well, with the intentions when she went up to my room, and cooperated like she did, I didn't have any idea she was married, and I would say if she had been a married woman, I would say, no. After cooperating like she did I would say no. If she had of told me she was married I probably wouldn't have took her to the room. She didn't tell me anything about that." (R.73)

The court questioned accused about his introduction to "these women". He replied:

> "Well, it wasn't - you wouldn't call it a formal introduction at all. I started by the women and one of them said 'There's another one' and one of them asked me if I would like to go out. They said they had plenty of whiskey, would I like to go out and drink and dance and have a good time, and I says 'It sounds all right to me'. I don't recall whether - I was introduced to this blonde girl and this last witness in the lobby of the Davenport Hotel, I am sure, but I don't recall whether I was introduced in Irwin's Cafe or walking down to the Outside Inn." (R.75)

5. It is unnecessary to recapitulate the evidence. There is little conflict in the testimony as to what occurred prior to the time when the prosecutrix seated herself on the side of accused's bed in his room. From that point on the two stories conflict. Mrs. Powers said there was sexual intercourse between accused and her, which accused accomplished by the use of some force and threats, sufficient to overcome her claimed resistance. Accused stated that it was a "necking party" in which the prosecutrix "cooperated 100%". He told of amorous and passionate caresses that attained the ultimate in intimacy and of how he at last approximated a position for intercourse. He said that up to that point there was no resistance, except that at one time she removed his hands and that during certain stages of his advances she had said "No". However, he stated that when he unzipped his trousers for the purpose of accomplishing what he understood was a mutual desire, Mrs. Powers "let out a yell", screamed and got out from under him. He denied that his penis had been out of his trousers.

Certain undisputed facts throw fairly clear light on what actually happened and lead to definite and reasonable conclusions. Prosecutrix

and three other women were of a mind that evening to drink, dance, and adventure. Accused and at least two other of the four officers who composed the male contingent of the party were practically picked up for the occasion on the promise of an inexpensive, pleasureful evening. Mrs. Powers, regardless of her past conduct with strange men, was certainly not circumspect in this regard on the evening in question. Whether as the result of a pretext or not, she permitted herself to accompany accused to his hotel and up to his room at 12:15 o'clock in the morning. A right-thinking woman would not justify such conduct on the ground that she wanted to see accused's dog. The dog could have been brought downstairs. Nor is Mrs. Powers' explanation entirely satisfactory as to how she came to adopt the rather sophisticated technique of boarding the elevator on the mezzanine floor rather than in the hotel lobby. There had been kisses between the two while waiting for a taxi and while in the taxi en route to the hotel. There had been some drinking during the evening. Arrived upstairs in accused's room, Mrs. Powers sat down on his bed. It is impossible to believe her story that when he sat down beside her she protested and tried to get up. In view of the drinking, the past kissing, the risk involved in going to accused's room, the lateness of the hour, and all the circumstances, including the fact that she had been married two years to an overseas soldier, the conclusion is inescapable that when Mrs. Powers went to accused's room she at least desired to exchange with him certain of those caresses and physical engagements which are more or less preliminary to the sexual act itself. If anything more is required to compel the belief that in the room she gave some play to this desire, it is only necessary to recall her story that she was there with accused for an hour and a half. Had the prosecutrix been truthful and her version correct, the encounter would not have lasted over such an extended period.

On her own testimony, Mrs. Powers gave only initial indication, at the start, to accused of her disapproval of what was transpiring. She vocally protested, she claimed, when he started to "neck". Immediately after this, however, she asked him to remove and hang up her coat. This surely indicated to accused that she was consenting and cooperating. It is elementary in cases of this kind that the victim's refusal to consent must be communicated to the aggressor either vocally or by physical resistance. Her subsequent struggles, as described by her, do not carry conviction. In view of all that had occurred, accused may well have believed her resistance more coy than real. Mrs. Powers spoke of herself as not being a small person. There was a man nearby, according to her, who responded to her one scream. She had opportunity to scream again and did not. She did not scream until accused touched her person.

The actual complaint of the prosecutrix to Captain Fuchs is not convincing. She at first only threatened to complain. Accused rather dared her to make good. When she did complain she told a different story about

an emission than that recounted on the stand. On the stand she said that accused emitted partly out of her. To Captain Fuchs her story was that the emission was wholly out of her. A careful search of the linen and towels in the room failed to show any indication confirmative of this claim.

She not only failed to follow the advice of the Chief of Police and have a physical examination, but on the stand she denied that she had ever received such advice.

She herself said that after it was all over accused complained because she had not "been a bit cooperative". Accused used the language of frustration. She accepted this complaint by throwing the five dollar bill on the floor and telling him to find someone who would be fond of his actions, in short, someone who would satisfy him. This action of the prosecutrix strongly points to a realization on her part that he had not been satisfied.

In the light of the undisputed evidence and because of inescapable conclusions reasonably inferred therefrom, it is the opinion of the Board of Review that the prosecutrix departed from the truth in material aspects of her testimony. The story of accused not only finds credence in the straightforward manner of its telling and in his conduct and demeanor subsequent to the "incident" but it gains credibility because of the very lack of that quality in the testimony of his accuser.

Undoubtedly accused desired and probably expected to have intercourse with Mrs. Powers. And undoubtedly she was a willing party to at least certain aspects of the love-making. The encouragement which she gave him obviated the likelihood of any intent on his part to achieve his desire by the use of such force as might be necessary to overcome her resistance. In fact he desisted from further effort when she finally screamed and disengaged herself from him.

In a case of this kind, when the woman by her conduct indicates that she is in a receptive mood and lends encouragement to the advances of the male, his fondlings and caresses do not constitute an assault under Article of War 93 or 96, provided he desists, as here, when apprised of her refusal to wander further down the primrose path.

For the reasons stated, the Board of Review is of the opinion that the evidence is legally insufficient to support the finding that accused is guilty of assault with intent to rape, in violation of Article of War 93.

6. Attached to the record of trial are letters from three members of the court in which, for reasons severally stated, one member recommended

that accused be "returned to active duty", the second that "the sentence adjudged should either be suspended or mitigated to a forfeiture of pay not to exceed six months", and the third that accused be "retained in the service". Also attached to the record is a letter from Colonel W.G. Schauffler, Jr., Air Corps, Commanding Officer, Air Base Headquarters, Geiger Field, Washington, who forwarded the Charge and recommended trial by general court-martial in this case. In his letter Colonel Schauffler said: "I urgently recommend that the entire sentence be suspended, and that Lt. Whittiker be sent overseas immediately". A signed statement by accused is also attached to the record. In this statement accused pointed out that he was born and raised on a farm in Oklahoma. He graduated from high school in 1936, while in the 9th and 10th grades "making the highest upper 10% grade of various high schools in the state". After graduation, he started to work and in about 1939 he entered Oklahoma City University, working 12 hours a night daily, evidently to pay expenses. He enlisted in the Army Air Corps June 28, 1940. When discharged as an enlisted man to receive his commission, he was a sergeant and his efficiency and character ratings were "Excellent".

7. War Department records show that accused is 28 years of age. He was commissioned second lieutenant in the Air Corps, 20 March 1943. Prior service was: Enlisted man from 28 June 1940 to 7 July 1942; aviation cadet 8 July 1942 to 19 March 1943.

8. For the foregoing reasons the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence.

(On Leave), Judge Advocate.

John Wannenwitz, Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

SPJGK
CM 245081

1st Ind.

War Department, J.A.G.O., [illegible] - To the Commanding General, Second Air Force, Colorado Springs, Colorado.

1. In the case of Second Lieutenant Jack D. Whittiker (0-675383), Air Corps, I concur in the foregoing holding of the Board of Review holding the record of trial legally insufficient to support the findings of guilty and the sentence, and for the reasons stated I recommend that the findings of guilty and the sentence be disapproved. You are advised that the action of the Board of Review and the action of The Judge Advocate General have been taken in accordance with the provisions of Article of War 50½, and that under the further provisions of that Article and in accordance with the fourth note following the Article (M.C.M., 1928, p. 216), the record of trial is returned for your action upon the findings and sentence, and for such further action as 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. For convenience of reference please place the file number of the record in brackets at the end of the published order, as follows:

(CM 245081).

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.

(135)

1 JAN 1944

SPJGH
CM 245083

U N I T E D S T A T E S	)	40TH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Headquarters 40th Infantry Division, APO 40, 16 November 1943. Dismissal.
	)	
Second Lieutenant JOSEPH J. ALVARADO (0-1307352), Infantry.	)	

OPINION of the BOARD OF REVIEW
DRIVER, LOTTERHOS and CLEMENTS, 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 95th Article of War.

Specification 1: In that Second Lieutenant Joseph J. Alvarado, 108th Infantry, did, at Honolulu, T.H., on or about 1800 o'clock, 5 October 1943, take charge of a government vehicle and the driver thereof, Private H. B. Burgess, 35495562, Headquarters 1st Battalion, 108th Infantry, and thereafter did direct the said Private Burgess to drive him to the Alexander Young Hotel and did request the said Private H. B. Burgess to come to a room in the Alexander Young Hotel, where Second Lieutenant Joseph J. Alvarado served Private H. B. Burgess with intoxicating liquor while the said Private H. B. Burgess was on duty as a driver of a government vehicle, and was still obliged to drive the said government vehicle to its home station.

Specification 2: In that Second Lieutenant Joseph J. Alvarado, 108th Infantry, was, at Honolulu, T. H., on or about 5 October 1943, drunk in uniform in a public place, to wit, the Alexander Young Hotel, and the streets of Honolulu, T. H.

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

Specification 1: In that Second Lieutenant Joseph J. Alvarado, 108th Infantry, was, at Honolulu, T. H., on or about 5 October 1943, drunk in uniform in a public place, to wit, the Alexander Young Hotel, and the streets of Honolulu, T.H.

Specification 2: In that Second Lieutenant Joseph J. Alvarado, 108th Infantry, did, at Honolulu, T. H. on or about 1800 o'clock, 5 October 1943, serve intoxicating liquor to three enlisted men in a room at the Alexander Young Hotel.

He pleaded not guilty to all Charges and Specifications. He was found guilty of Specification 1, Charge I, except the words "did request the said Private H. B. Burgess to come to a room in the Alexander Young Hotel", substituting therefor the words "did allow the said Private H. B. Burgess to come to a room in the Alexander Young Hotel"; guilty of Specification 2, Charge I, except the words "the Alexander Young Hotel", substituting therefor the words "Honolulu Police Station"; not guilty of Charge I, but guilty of a violation of the 96th Article of War; guilty of Specification 1, Charge II, except the words "the Alexander Young Hotel", substituting therefor the words "Honolulu Police Station"; and guilty of Specification 2, Charge II and of Charge II. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution covering all Charges and Specifications may be summarized as follows: At about 6:00 p.m. on 5 October 1943, Private H. B. Burgess, the driver of a jeep designated to return officers, in town on pass, to their organizations, stopped for accused at the Army-Navy Y.M.C.A., Honolulu, T. H. Burgess observed that accused had been drinking. He was "staggering" but was not "loud" or "boisterous". Accused, accompanied at the time by two enlisted men, rode with Burgess to a hotel. On the invitation of accused Burgess went to a room in the hotel with accused and the enlisted men and while there was offered a drink of liquor by accused. When he informed accused that he was not supposed to drink on duty, accused told him he was welcome to it if he wanted it. Accused also "gave" the other enlisted men a drink. The drinks were mixed and sitting on a table. After all of them, including accused, had a drink Burgess and accused left the hotel. As Burgess could not find his way out of the city, he stopped the jeep and asked Sergeant Opal H. Gilliland, 810th Military Police Company, to direct him to the highway to "Kahuku". Gilliland, who was off duty at the time, saw that Burgess had been drinking, and offered to drive the jeep. When Gilliland, with the consent of Burgess, took the driver's place behind the wheel of the jeep, he noticed accused lying on the front seat with his head and shoulders between the seats, "completely passed out". Gilliland decided that Burgess was in no condition to handle the jeep and, instead of driving to the highway, proceeded to the police station. When they arrived at the station two enlisted men on duty "picked" accused out of the jeep, carried him inside and placed him on a bench. Accused had a "very strong breath", no muscular control, and could not stand up or talk. He vomited on himself and on the floor. First Lieutenant Jules Sachson, 810th Military Police Company, arrived at the police station about 7:00 p.m. and tried to arouse

accused, who was "obviously passed out". After several attempts he finally awakened accused and upon ascertaining his identity telephoned the organization of accused for transportation. About a half hour later, when he was informed that no vehicles were available, Lieutenant Sachson decided that Burgess was sober enough to drive and released them. Accused, dressed in uniform, was in the police station, a public place, for approximately two hours and could be observed by civilians entering and leaving the place. In the opinion of Lieutenant Sachson accused was "definitely drunk" (R. 3-16).

4. For the defense: Corporal Richard W. Fitzgerald and Private William L. McIntyre, enlisted men in the company of accused, testified that they met accused in town about 5:00 p.m., 5 October 1943. They were having trouble finding a place to stay for the night and accused offered them his room in the Alexander Young Hotel. They went to the hotel desk, accused checked out, and the room was registered in the names of the enlisted men. While in the room getting ready to leave, accused gave McIntyre and Fitzgerald a bottle of whiskey about one-third full, remarking that it was not enough for him to "bother about". The enlisted men accompanied accused to the Y.M.C.A., where he was to meet his transportation back to camp. After they waited on the corner for a while, Burgess arrived in a jeep and asked if they had anything to drink. Fitzgerald told him there was a bottle in the hotel room. Accused asked to be taken back to the hotel for his bag, and all of them went up to the room recently vacated by accused. After they arrived in the room, McIntyre mixed four drinks of liquor and placed them on the table. Neither McIntyre nor Fitzgerald saw accused take a drink, but all four glasses were emptied. McIntyre and Fitzgerald did not hear accused invite Burgess up to the room nor did they hear accused offer him a drink while there. Accused had been drinking but in their opinion he was not drunk. He walked and talked all right and his actions were normal. The accused and Burgess left the hotel for camp at approximately 6:30 p.m. (R. 18-28).

5. a. Specification 1, Charge I and Specification 2, Charge II: It is shown by the evidence that on 5 October 1943, at about 5:00 p.m., the accused checked out of the Alexander Young Hotel in Honolulu, and accompanied by two enlisted men (McIntyre and Fitzgerald) who had taken over his room proceeded to the Y.M.C.A., where he was to obtain transportation back to camp. About 6:00 p.m., when his driver, Private H. B. Burgess, arrived, accused requested him to drive them back to the hotel to get his bag. The accused and the three enlisted men went to the room recently vacated by accused and then occupied by McIntyre and Fitzgerald. After they arrived in the room McIntyre mixed four drinks of liquor and sat them on a table. Accused offered a drink to Burgess, who stated that he was not supposed to drink on duty. Accused told him he was welcome to it if he

wanted it. Both McIntyre and Fitzgerald testified that they did not hear accused offer a drink to Burgess. The three enlisted men each took a drink.

In the opinion of the Board of Review the evidence sustains the finding of guilty of Specification 1, Charge I beyond any reasonable doubt. Although the liquor came from a bottle which accused had previously given to McIntyre and Fitzgerald when he surrendered his room to them, and although the drinks were actually poured by McIntyre, yet Burgess testified definitely and without contradiction that accused offered him a drink and advised him that he was welcome to it although he was on duty. The testimony of McIntyre and Fitzgerald was merely that they did not hear accused extend the invitation to Burgess. When accused offered Burgess a drink which someone else had placed on the table, and Burgess took the drink pursuant to the invitation, accused in effect "served" the liquor to Burgess.

As to Specification 2, Charge II the Board is of the opinion that the finding of guilty is not sustained beyond a reasonable doubt. Although Burgess testified that accused "gave" a drink to the other two enlisted men, it appears that the incident occurred in a room then occupied by these men, and the liquor came from a bottle that had become their property. One of them (McIntyre) poured the drinks. They needed no invitation from accused under the circumstances, but merely took a drink in the presence of accused. As to that part of Specification 2, Charge II which alleges that accused served a drink to Burgess, a finding of guilty is not justified in view of the prior finding of guilty of that offense under Specification 1, Charge I.

b. Specification 2, Charge I and Specification 1, Charge II: The evidence is uncontradicted that on 5 October 1943 at about 6:30 or 7:00 p.m. accused was "passed out" in a jeep when a military policeman was asked by the driver for directions. The military policeman drove the jeep to the police station, and accused was bodily carried inside. He was so intoxicated that he could not stand up or talk. He remained in that condition for about two hours in the police station, where he could be seen by civilians entering and leaving. In the opinion of the Board the evidence supports the finding that accused was drunk in uniform on the streets of Honolulu and in a public place as alleged.

The court found accused guilty of Specification 2, Charge I, but only in violation of the 96th Article of War. As a result, accused was found guilty of the same offense under two identical Specifications (drunk in uniform in a public place), in violation of the 96th Article of War. In the opinion of the Board the finding of guilty of Specification 1, Charge II should be disapproved, in view of the prior finding of guilty of the same

offense under Specification 2, Charge I.

6. The prosecution called as a witness Captain Frank R. Burns, 108th Infantry Regiment, and he was allowed to testify as to the truth and veracity of Private Burgess, a member of his company and a witness for the prosecution (R. 16-17). The admission of this testimony was erroneous since Burgess had not been impeached on the ground that his reputation for truth and veracity was bad. However, in view of the fact that there was no evidence directly contradicting the testimony of Burgess, the Board of Review is of the opinion that this error did not injuriously affect the substantial rights of the accused.

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 5 March 1941; appointed temporary second lieutenant, Army of the United States from Officer Candidate School and active duty, 8 January 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 insufficient to support the findings of guilty of Specifications 1 and 2, Charge II and of Charge II, legally sufficient to support the findings of guilty of Specifications 1 and 2, Charge I and of Charge I, 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.

Samuel M. Drivers, Judge Advocate

F J Lotterhos, Judge Advocate

Judson S. Clements, Judge Advocate

1st Ind.

War Department, J.A.G.O. 2 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 Second Lieutenant Joseph J. Alvarado (O-1307352), 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 and 2, Charge II and of Charge II, legally sufficient to support the findings of guilty of Specifications 1 and 2, Charge I and of Charge I, and legally sufficient to support the sentence and to warrant confirmation of the sentence. The accused served a drink of intoxicating liquor to an enlisted man on duty as driver of a Government vehicle (Spec. 1, Chg. I) and was drunk in uniform in a public place (Spec. 2, Chg. I). The president of the court, for the members of the court, recommended that the execution of the sentence be suspended. 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.

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 of guilty of Specifications 1 and 2, Charge II, and of Charge II, disapproved. Sentence confirmed but execution suspended. G.C.M.O. 88, 26 Feb 1944)

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

SPJGQ
CM 245153

22 DEC 1943

UNITED STATES	)	DESERT TRAINING CENTER
	)	
v.	)	Trial by G.C.M., convened at Camp Young, California, 30 September, 22 and 23 October 1943. Dishonorable discharge and confinement for five (5) years. Disciplinary Barracks.
	)	
Private MAYNARD A. HOLM (17074779), 1st Airdrome Detachment, Air Corps.	)	

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

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

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

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

Specification: In that Maynard A. Holm, Pvt., 1st Airdrome Detachment, did at Indio, California on or about 11 August 1943 with intent to commit rape, commit an assault on Mrs. Oma R. Johnson of Indio, California by striking her with his fists, choking her with his hands, and otherwise beating and bruising her.

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

Specification 1: In that Maynard A. Holm, Pvt., 1st Airdrome Detachment, did on or about 12 August, 1943 at Indio, California make disloyal remarks against the Army of the United States by saying that he did not like the Army of the United States, that he wished he was in any army but the United States Army, that he was sorry he was an American, or words to that effect.

Specification 2: Withdrawn by order of the appointing authority (R. 13).

He pleaded not guilty to the Charges and Specifications. He was found guilty of the Specification of Charge I except the words "with intent to commit rape" and "with his fist, choking her with his hands, and otherwise beating and bruising her", substituting therefor the words "with intent to do bodily harm," of the excepted words not guilty, of the substituted words, guilty; guilty of Charge I, guilty of Specification 1 of Charge II, and of Charge II. There was evidence of two previous convictions by summary courts-martial for absence without leave and breach of restriction. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for five years. The reviewing authority approved only so much of the finding of guilty of the Specification of Charge I "as involves a finding of guilty of assault upon Mrs. Oma R. Johnson, at the time and place alleged, in violation of Article of War 96," approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The finding of guilty of assault under Article of War 96 is amply supported by the evidence. The record is, therefore, legally sufficient to support this finding and a sentence of confinement limited by the Table of Maximum Punishments to three months (MCM, 1928, par. 104c, page 100).

4. The competent evidence of the prosecution in support of Specification 1 of Charge II, which avers that the accused made disloyal remarks against the Army of the United States by saying that he did not like the Army of the United States and that he wished he was in any other Army but the United States Army and that he was sorry he was an American, may be summarized as follows:

Captain William Y. Buck, Company D, 744th Military Police Battalion, testified that on the morning of 12 August 1943, at 2 a.m., in the military police station at Indio, California, while questioning the accused concerning his alleged attack upon Mrs. Johnson, the accused made a statement which the witness described in the following manner (R. 149):

> "I can't give the exact words. The gist of it was that he believed he had been born in the wrong country, and was serving the wrong Army. Those are not the exact words, but contain the meaning."

The remarks made by the accused were so unusual that he was asked to repeat them. The substance of his repetition was the same. The witness was positive that the accused did not say that he was sorry he was an American (R. 154). The only other person present at the time was Chief of Police Ackley.

Chief of Police P. E. Ackley testified that he was present at the same time and place, and that the accused's alleged disloyal remarks were substantially as follows:

> "He said he did not like the Army, he wished he was not in the God-damned United States Army; he wished to Christ he was not an American, and he hoped he got a dishonorable discharge out of this." (R. 157)

Chief of Police Ackley was permitted to testify over objection that on 27 February 1943, in the police station in the City of Indio, the accused made a statement "The exact wording I could not say, but the gist of the statement was practically word for word the statement he made on the morning of August the 12th, 1943" (R. 159).

In describing the physical and mental condition of accused at the time he is alleged to have made the statement Captain Buck further said it was easy to be seen that the accused had been struck in the face and was in a certain stage of drunkenness (R. 150-152); that he was suffering from a mouth injury which affected his speech to a certain extent, although the witness was able to understand him (R. 154); and he seemed to think that he had been abused and had not been treated fairly; that he had had bad breaks in the Army and in this country and further felt that he would have had better breaks if he had been some place else (R. 154). The accused was in such bad physical condition that he was sent to the hospital (R. 155).

It was stipulated and agreed by the accused, defense counsel and the trial judge advocate, that if Captain James C. Peele were present in court, he would have testified that the accused was admitted to the Army Air Base Hospital on 12 August 1943 (after making the alleged remarks complained of) at which time he was suffering from

> "a cerebral concussion; contusions of the nose, face and right eye; loss of both right upper incisors, both nostrils clotted with blood; bridge of nose tended to palpatation; head aches; vertigo; right cheek contused; right side of upper lip edematous."

It was further stipulated that it is a medical fact that concussion may or may not cause irrationality, and that a blow sufficient to cause a concussion may cause a mental condition of such consequence as to

create a state of mentality that prevents the subject from remembering the immediate events that took place at the time, or subsequent to the receipt of the blow (R. 225).

It further appeared from the record that three enlisted men, believing the accused was attacking Mrs. Johnson, pulled him away from her. A fight ensued in which the accused was severely beaten by the three enlisted men (R. 101, 255).

5. The accused elected to testify in his own behalf and, with reference to the Specification in question, related that while he was engaged in an argument with Mrs. Johnson he was attacked by several enlisted men, one of whom kicked him in the face. They beat him to such an extent that his two upper right teeth were "kicked out, root and all"; his face was struck and beaten so that his nose and ears were full of blood; a large lump was on the back of his head; and his lip hung down as a result of the blow so that he was not able to talk (R. 200). At the time of trial it was impossible for him to breath through the right side of his nose. He was rendered unconscious as a result of the kick in the face until the following morning. When he became conscious he was in a hospital. There he remained for treatment, as a result of his injuries, from 12 August 1943 until 3 September 1943 (R. 199). He has no recollection whatsoever of being at the police station and therefore denied making the statements complained of to Captain Buck or to anyone else (R. 198, 202).

6. The court, upon the foregoing evidence, found the accused guilty of Specification 1 of Charge II which, as set forth, charges the accused with making disloyal remarks against the Army of the United States.

In the opinion of the Board of Review, the finding of guilty of Specification 1 of Charge II cannot be legally sustained for the reason that it was clear from the evidence that at the time the accused is alleged to have made the remarks complained of he was not mentally responsible for his speech. It was shown that he was beaten so severely about the head and face that he suffered a concussion of the brain. He was also drunk. His injuries were so severe that he was confined in a hospital for several weeks following the occurrence. To hold a man responsible for the deliberate and intentional utterance of statements made under circumstances which indicate that he was, at the time, not only angry and defiant because of the grievous injuries he believed he had wrongfully received at the hands of fellow soldiers, but was also so seriously wounded that he was then suffering a brain concussion, would be a harsh ruling and work a grave injustice. Furthermore, the testimony of Chief of Police, Ackley, of the "gist" of the accused's alleged statement made on 27 February 1943 was improper and prejudicial to the substantial rights of the accused.

The Manual for Courts-Martial (1928) par. 112, p. 112, provides:

> "A fundamental rule is that the prosecution may not evidence the doing of the act by showing the accused's * * * former misdeeds as a basis for an inference of guilt."

An exception to this rule is stated on the same page of the Manual as follows:

> "When criminal intent, motive, or guilty knowledge in respect of the act is an element in the offense charged, evidence of other acts of the accused, not too remote in point of time, manifesting that intent, motive, or knowledge, is not made inadmissible by reason of the fact that it may tend to establish the commission of another offense not charged."

The subject case does not fall within the exception. The Charge does not involve criminal intent, motive or guilty knowledge. It is not charged, nor is there any evidence that the accused made the statement with any particular motive. He was not endeavoring to influence anyone. Therefore, there was no motive involved. Nor was there any question of guilty knowledge concerning anything. Under the circumstances, therefore, the testimony of the Chief of Police concerning the accused's former statements was inadmissible.

In view of the foregoing it will not be necessary to pass upon the question whether this case falls within that class of cases of disloyal statements which have been held by The Judge Advocate General not to constitute a violation of Article of War 96 because the statement was made during an official investigation by a military superior and was an expression of the accused's true sentiments. CM 229062; CM 229063; CM 235134 (1943) Nor is it necessary to determine whether the statement charged to the accused constitutes a violation of Article of War 96. To constitute a violation of that Article of War it is not alone sufficient to show that the accused made the statement but it must also be shown that it in some reasonable manner was prejudicial to good order and military discipline or operated to the discredit of the service. Suffice it to say that the competent evidence is not sufficient to support a finding of guilty of Charge II and its Specification.

7. The record shows the accused to be 27 years of age. Accompanying papers show that he graduated from high school in Kansas City, Missouri, and attended the University of Missouri. He was employed for an undisclosed period of time by the Kansas City Gas Company as a sales representative from which position he enlisted in the Air Corps, 28 May 1942.

8. The court was legally constituted. For the reasons set forth above the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Charge II and its Specification (making a disloyal statement) but is sufficient to support the findings of guilty of the Specification of Charge I as modified by the reviewing authority and legally sufficient to support a sentence of not exceeding confinement at hard labor for a period of three months and forfeiture of two-thirds of his pay per month, for a like period.

William A. Downs, Judge Advocate

Earle Stephens, Judge Advocate

Herbert B. Fredman, Judge Advocate

1st Ind.

28 DEC 1943

War Department, J.A.G.O., - To the Commanding General, California-Arizona Maneuver Area, Camp Young, California.

1. In the case of Private Maynard A. Holm (17074779), 1st Airdrome Detachment, Air Corps, I concur in the foregoing holding by the Board of Review and for the reasons stated therein recommend that the findings of guilty of Charge II and its Specification be disapproved, and that only so much of the sentence be approved as involves confinement at hard labor for a period of three months and forfeiture of two-thirds of his pay per month for a like period. Upon compliance with the foregoing recommendations, under the provisions of Article of War 50½, 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 245153).

Myron C. Cramer

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

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

SPJGN
CM 245166

16 DEC 1943

UNITED STATES	)	EIGHTH SERVICE COMMAND ARMY SERVICE FORCES
v.	)	Trial by G.C.M., convened at Camp Livingston, Louisiana, 16 November 1943. Dishonorable discharge and confinement for two (2) years. Federal Reformatory, El Reno, Oklahoma.
Private JOSEPH P. DITULIO (20317857), Detachment Medical Department, 1879th Unit, Camp Livingston, Louisiana.	)	

HOLDING by 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.

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

CHARGE : Violation of the 96th Article of War.

Specification 1: In that Private Joseph P. Ditulio, Detachment Medical Department, 1879th Unit, Camp Livingston, Louisiana, did, at Camp Livingston, Louisiana, on or about 19 October 1943, wrongfully and unlawfully open one letter which was mailed and addressed to Private Albert Kist, ASN 6944617, Station Hospital Ward 31, Camp Livingston, Louisiana, prior to receipt of said letter by the addressee.

Specifications 2 through 9 the same as Specification 1 except as to address and name of addressee.

He pleaded not guilty to and was found guilty of the Charge and Specifications thereunder. Evidence of one previous conviction for wrongfully taking and carrying away one can of mince meat of the value of $1.42, in violation of Article of War 96 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 might direct for two years. The reviewing authority approved the sentence, designated the Federal Reformatory, El Reno, Oklahoma, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence supports the findings of guilty and the sentence except for the designated place of confinement, the legality of which presents the only question requiring discussion.

Confinement in a Federal Reformatory is not authorized unless confinement in a penitentiary is authorized under Article of War 42. Confinement in a penitentiary under Article of War 42 is not authorized unless the act or omission in question is recognized as an offense of a civil nature and so punishable by a penitentiary confinement, for more than one year by some statute of the United States of general application within the continental United States, excepting Section 289, Penal Code of the United States (18 U.S.C. 468), or by the law of the District of Columbia.

In order to constitute an offense in violation of the postal laws such as to render the accused liable for penitentiary confinement, the theft of mail must occur while the mail is in the custody of the Post Office Department. In this connection The Judge Advocate General has held that,

> "* * * a mail orderly cannot be regarded as an agent of the Post Office Department, but must be deemed to have received the letters on behalf of the addressees; that with delivery to him the control and authority of the Post Office Department over such letters comes to an end; and that any offense which he commits with respect to such letters could not be an offense against the laws designed by Congress for the protection of the mail" (Formiller, CM 167292; Stafford, CM 115684) (J.A.G. 311.132).

Since in the present case the accused was acting in the capacity of a mail orderly, he must be regarded as an agent of the addressees named in the several Specifications and not as an agent of the Post Office Department. The offense which he has committed, therefore, is a military offense and not one punishable by penitentiary confinement for a violation of the postal laws.

4. For the reasons stated, the Board of Review holds that the record of trial is legally sufficient to support the findings of guilty and only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for two years at a place other than a penitentiary, Federal penal or correctional institution.

Abner E. Lefcourt, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

1st Ind.

War Department, J.A.G.O., DEC 18 1943 To the Commanding General, Eighth Service Command, Army Service Forces, Dallas 2, Texas.

1. In the case of Private Joseph P. Ditulio (20317857), Detachment Medical Department, 1879th Unit, Camp Livingston, Louisiana, I concur in the foregoing holding of the Board of Review, and for the reasons therein stated, recommend that only so much of the sentence be approved as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for two years at a place other than a penitentiary, Federal penal or

correctional institution. Upon the designation of an appropriate place of confinement other than a penitentiary, Federal penal or correctional institution, you will have authority, under the provisions of Article of War 50½ and Executive Order No. 9363, dated 23 July 1943, to order the execution of the sentence. It is recommended that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

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 245166).

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

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

N. D.

(153)

SPJGH
CM 245278

1 JAN 1944

UNITED STATES	)	ROME AIR SERVICE COMMAND
	)	
v.	)	Trial by G.C.M., convened at
	)	33 Pine Street, New York, New
Second Lieutenant CHARLES	)	York, 24 November 1943. Dis-
W. YAGEL, JR. (0-808648),	)	missal, total forfeitures and
Air Corps.	)	confinement for one (1) years.

OPINION of the BOARD OF REVIEW
DRIVER, LOTTERHOS and CLEMENTS, 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 Charge and Specification:

CHARGE: Violation of the 96th Article of War.

Specification: In that 2nd Lieutenant Charles W. Yagel, Jr., Air Corps, 26th Transport Transition Training Detachment, Domestic Transportation Division, Air Transport Command, New York, New York, did at Chicago, Cook County, Illinois, on or about 2 September 1943 wrongfully and unlawfully marry Rose Kafka, he the said Second Lieutenant Charles W. Yagel, Jr., being at said time married to Mary Mitchell Yagel, from whom he had not been divorced, and the said Mary Mitchell Yagel being at said time still living.

He pleaded not guilty to and was found guilty of the Charge and Specification. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one year. 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: It was stipulated (Ex. II) that accused was married to Mary Veronica Mitchell Yagel on 30 May 1943, in Montgomery County, Alabama; that she was living and still the lawful wedded

wife of accused; and that the certified copy of the marriage license and marriage certificate attached to the stipulation "represents the license to marry and the marriage" of accused to Mary Veronica Mitchell Yagel. It was further stipulated (Ex. III) that the photostatic copies of an affidavit for marriage license, marriage license and certificate of marriage (showing the marriage of accused and Rose Kafka on 2 September 1943), all attached to the stipulation, were true copies of the originals on file in Cook County, Illinois. The affidavit for the marriage license shows accused as unmarried (R. F6-A).

Major George F. Ryan, who had been instructed to conduct a preliminary investigation, questioned accused on 5 November 1943, after advising him that he need not make a statement and that whatever he said might be used against him. At that time accused admitted that he married Mary Mitchell on 30 May 1943, that she was still living, and that there had never been a separation or divorce. Accused also admitted that he married Rose Kafka in Chicago while Mary Mitchell was still his "legally wedded wife". During the course of the preliminary examination accused identified an emergency addressee and personal property card (Ex. IV) signed by him and dated 14 September 1943, listing Mrs. Charles Yagel, Jr., 1500 Hayes Street, Nashville, Tennessee as his wife. He also identified a notification of discontinuance of allotment (Ex. V) dated 27 September 1943, his official request to discontinue a "Class E" allotment to Mary Mitchell Yagel, which stated that accused was not separated from his wife. Captain Edward Burling, Jr., and Major Ryan testified that they had an opportunity to observe accused during their investigation of the case and he appeared to them to be normal in all respects and in possession of his faculties (R. 1-7, 9, 14-15, 17-17A).

In a letter (Exs. VI and VI-A) to Rose Kafka Yagel dated 26 September 1943, accused professed his love and asked her not to "do anything" until he met her in Chicago. He stated that he was going to see the "C.O." the next morning to get a leave in order to get the "mess" straightened out as soon as possible, even if he had to tell the "whole story" to procure a leave. On 27 September 1943, accused requested an emergency leave from his commanding officer, Captain Joseph C. Pillion. When pressed for the purpose of the leave accused stated that he wanted to obtain a divorce. Captain Pillion refused to grant the leave. Captain Pillion stated that accused had been an extremely good officer from the point of view of discipline and had always willingly done everything requested of him (R. 8-A, 12-17-A).

On cross-examination of prosecution witnesses it was shown that accused was "calm and very level-headed" and willingly cooperated during the investigation of his case (R. 5-6, 8, 13).

4. For the defense: Accused testified that he graduated from high school in 1938, worked as a weaver in a silk mill and later as an aircraft mechanic, and enlisted in the Air Corps on 26 September 1940 because he felt that war was imminent and he wanted to be in it. He attended a technical school at Chanute Field, upon graduation became an instructor, and served in that capacity for about a year and a half. He served about six months at Bolling Field and then applied for and passed the entrance examination for aviation cadet. He was sent to Nashville, Tennessee, for classification and remained there from about 19 July to 8 August 1942. While at Nashville he met and became engaged to Mary Mitchell. From Nashville he went to a series of posts. While stationed at these various places he corresponded with Mary Mitchell and she visited him on two occasions at Montgomery, Alabama. They were married on 30 May 1943 after accused received his commission. After seven days together at Montgomery his wife returned to her work in Nashville and accused was sent to "Alpena" and finally to Chicago. Accused attempted to get his wife to come to Chicago but she was reluctant to leave her work. During the middle of August she visited him over a weekend and they discussed the matter of her moving to Chicago. They discovered that it was difficult to find living quarters, and his wife did not want to move until she resigned from her job. While in Chicago Mrs. Yagel told accused of going roller skating with a "couple of fellows" who were in Nashville on maneuvers, but later wrote him that she said this to make him jealous. Accused then told his wife that he had a girl in Chicago who met all the requirements he wanted in a girl. Accused was a Methodist but had studied to become a member of the Catholic faith, his wife's religion, so that, if they had children there would be no difficulties over religious problems (R. 20-26).

Accused had met Rose Kafka about 4 July, two weeks prior to the visit of his wife. After his wife left he took Rose Kafka out "every night" he was off duty and they soon fell in love. Rose wanted to get married, but he told her he was not thinking of marriage until after the war. He found it very difficult to tell her that he was already married. He had written his wife for a divorce but she did not understand the reason and kept "putting it off". On 30 August accused decided to tell Rose Kafka that he was married, but made the mistake of drinking too much to "work up courage", and when he was taking her home about 2:30 a.m. she "again proposed" and he accepted. Plans were made the following day for the wedding. Accused was on a drinking party with his brother pilots the next night and consumed about 21 drinks. The following day, 2 September, he was suffering from a "hangover" and could not think very clearly, but knew he was to meet Rose downtown for "something". He met her when she left work and they proceeded to the County Clerk's office

where "everything was rushed through" and they were married. Accused knew it was wrong to marry Rose Kafka but did not want to "break off" with her and "didn't have nerve enough" to tell her he was already married. Accused had no intention of marrying again but after his wife told him about going out with "fellows" in Tennessee, he decided to have a good time until he was sent overseas, thinking that she was doing the same (R. 25-32).

On cross-examination accused testified that he was in full possession of his faculties at the time of his marriage to Rose Kafka. He identified his signature on Exhibits IV, V, VI and VI-A, and stated that the name, Mrs. Charles W. Yagel, Jr., appearing on the emergency addressee card (Ex. IV) was that of Mary Mitchell Yagel, his wife (R. 33-39).

5. It is shown by the evidence and the admissions of accused in his testimony, that accused and Mary Mitchell were legally married on 30 May 1943, and that, while the marriage status still existed, he contracted a bigamous marriage with Rose Kafka on 2 September 1943, as alleged in the Specification of the Charge.

6. a. At the beginning of the trial a stipulation (Ex. I) stating the Illinois law of bigamy, was read to the court, and the record discloses that the case was tried on the theory that Illinois law applied. Bigamy has long been recognized as an offense under the 95th and 96th Articles of War, without reference to state laws (CM 128111, Barry). The erroneous consideration of Illinois law did not injuriously affect the substantial rights of accused since he was clearly shown to be guilty of bigamy in violation of the 96th Article of War.

b. The court attempted to correct the order detailing the court by changing the serial number of one member and adding "JR" to the name of another (R. F1-a). Such action was beyond the power of the court. However, it does not appear that the rights of accused were injuriously affected, since the court was legally constituted.

c. During cross-examination of accused he identified the signature of Rose Kafka on an affidavit (Ex. VII), which was admitted in evidence without objection, and read to the court (R. 35-36). The admission of such hearsay evidence was clearly erroneous, but the substantial rights of accused were not affected thereby because, except in unimportant particulars, the affidavit merely stated facts otherwise shown by the evidence without contradiction, and admitted by accused.

7. The accused is 22 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from

26 September 1940; aviation cadet from 18 July 1942; appointed temporary second lieutenant, Army of the United States, and active duty, 28 May 1943.

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 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. Drew, Judge Advocate

F. J. Lotterhos, 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 Charles W. Yagel, Jr. (O-808648), 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 whom he had married on 30 May 1943 was still living, unlawfully married another woman on 2 September 1943. I recommend that the sentence to dismissal, total forfeitures and confinement at hard labor for one year be confirmed and carried into execution.

3. The United States Disciplinary Barracks, Greenhaven, New York, should 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 carrying into effect the recommendation made above.

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 execution suspended. G.C.M.O. 154, 4 Apr 1944)

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

SPJGN
CM 245324

22 DEC 1943

U N I T E D S T A T E S	)	13TH AIRBORNE DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort Bragg, North Carolina,
Second Lieutenant EDMUND	)	26 November 1943. Dismissal.
E. GRUBB (0-1283945),	)	
Headquarters Company, 2nd	)	
Battalion, 513th Parachute	)	
Infantry.	)	

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 Charge and Specification:

CHARGE: Violation of the 95th Article of War.

Specification: In that Second Lieutenant EDMUND E. GRUBB, 513th Prcht Inf. was at Ft Bragg, N. C., on or about 10 November 1943, in the Bachelor Officer's Quarters of the 189th Glider Infantry, grossly drunk and disorderly while in uniform.

He pleaded not guilty to and was found guilty of the Specification and the Charge. Evidence of two previous convictions, for violations of Articles of War 95 and 96, was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that shortly before 3 o'clock on the morning of 10 November 1943, occupants of the Bachelor Officers Quarters of the 189th Glider Regiment at Fort Bragg, North Carolina, were awakened by a banging of steel cots stacked in the hall, where an investigation disclosed the accused, thoroughly intoxicated, urinating on the floor. He was conducted to the toilet, too incoherent to intelligibly utter his own name, which one newly

awakened officer, proffering assistance, managed to ascertain only from the identification card which the accused fumblingly poked in his direction. This same kindly disposed officer bathed the accused's head in cold water, after the latter had completed, at the urinal, the voiding process so inappropriately initiated in the hall. Leaving the bath room, the accused wiped his head on a quilt lifted from the bed of another officer, whose quarters he insisted were his own. Declaring he would fight the well-meaning lieutenant who had offered to conduct him to the building where he actually resided, a quarter of a mile away, the accused swung and missed, precipitating a struggle, which he punctuated by curses and insults directed at the friendly officers whose slumber he had so recently disturbed. Before they were able to subdue him, he had bitten one of them quite severely and had "snapped in the air several times in other attempts to bite". One of these officers testified, "I will say he was drunk because I could smell liquor on his breath very strongly, his eyes were bloodshot and more or less or rather half closed. He was not steady on his feet, and an additional factor that I consider is the distance at which he missed me when he did take the swing, it was pretty wide." On the issue of intoxication, the uncontradicted testimony of several other eye-witnesses corroborates that of the witness quoted (R. 8-12).

The officer of the day was summoned; in accordance with his orders, the officer of the guard, arriving later at the scene of the disturbance, escorted the accused to the guardhouse. The prosecution introduced, without objection, as "an official record taken in due course", the report of an examination by a medical officer of a specimen of blood taken from the accused at 4 a.m., 10 November 1943, certifying that the specimen examined contained "0.7 mgm. of alcohol per c.c.". Another medical officer, called as a witness by the court, testified that he could not tell from this report what percentage of alcohol the examined specimen contained - because a milligram is a weight, whereas a cubic centimeter is a measure, and the witness did not know the weight of a cubic centimeter of blood (R. 7, 9, 10, 12, 13, 19, 20; Ex. 1).

4. The evidence for the defense shows that accused's company commander was "entirely satisfied with the work that he accomplished," although "he wasn't actually functioning in any t.o. job in the organization", which already had its quota of officers when the accused was assigned. This company commander further testified , though he considered the accused an excellent officer, he would not take him in preference to those that he already had; but, having a vacancy, he would gladly accept him in his organization. On cross-examination, he testified, with reference to the accused, "I would say that he was in duty hours, responsible". His last rating was "very satisfactory" (R. 14-17).

First Lieutenant John Joseph Rascher of the 538th Parachute Infantry, had known the accused for a year and four months. The accused had been the witness' platoon leader when the latter was an enlisted man. He considered the accused "a very good officer, an efficient officer." "To my estimation," his testimony continues, "he always seemed to be right there on time, he was always willing to help out the men" (R. 17-18).

5. The accused, after being duly advised of his rights as a witness, elected to remain silent (R. 21).

6. The Specification alleges gross drunkenness and disorder in uniform. The uncontradicted evidence depicts an officer, who, in a drunken fog, stumbled, after midnight, into quarters not his own, and there not only committed a nuisance by urinating in the hall, but also reacted viciously to the kindly ministrations of the friendly officers, whose rest he had disturbed, precipitating, without provocation, a nocturnal brawl. This conduct shows such a lack of decency and decorum as to fall below the "limit of tolerance" specified in the Manual, and to seriously compromise the accused's character and standing as a gentleman, in violation of Article of War 95.

7. The medical testimony, as presented, was utterly lacking in probative force. It was, however, merely cumulative. Cogent, admissible evidence overwhelmingly establishes the accused's drunkenness.

8. The accused is 22 years of age. War Department records show enlisted service from 16 September 1940, and temporary appointment as second Lieutenant, AUS, with assignment to active duty, effective 19 May 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 of guilty and the sentence and to warrant confirmation thereof. A sentence of dismissal is mandatory upon conviction of a violation of Article of War 95.

Abner E. Lipscomb, Judge Advocate

(On Leave), Judge Advocate

Benjamin R. Sleeper, Judge Advocate

SPJGN
CM 245324

1st Ind.

War Department, J.A.G.O., 1 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 Edmund E. Grubb (0-1283945), Headquarters Company, 2nd Battalion, 513th Parachute Infantry.

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

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the foregoing recommendation, 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. ltr. for sig. Sec. of War.
Incl 3 - Form of Executive action.

(Sentence confirmed. G.C.M.O. 73, 15 Feb 1944)

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

SPJGQ
CM 245325

8 DEC 1943

UNITED STATES	NINTH ARMORED DIVISION
v.	Trial by G.C.M., convened at Camp Polk, Louisiana, 18 November 1943. Dismissal, total forfeitures and confinement for five (5) years.
Second Lieutenant KARL K. KENNON (0-1287722), Company C, 60th Armored Infantry Battalion.	

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 58th Article of War.

Specification: In that Second Lieutenant Karl K. Kennon, Company "C", 60th Armored Infantry Battalion (then Company "C", 52nd Armored Infantry Regiment), did, at Camp Ibis, California, on or about 2 August 1943, desert the service of the United States and did remain absent in desertion until he was apprehended at Junction City, Kansas, on or about 1 October 1943.

He pleaded not guilty to and was found guilty of the Charge and Specification. There was no evidence of any previous conviction. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for a period of ten years. The reviewing authority approved the sentence but remitted five years of the confinement imposed, and forwarded the record of trial for action under Article of War 48.

3. The competent evidence for the prosecution showed that the accused on 31 July 1943 was given verbal permission by his commanding officer to be absent from his post at Camp Ibis, California, over the week end which would expire on the morning of 2 August 1943. The accused failed to return to his post on that date and remained absent without leave until he was apprehended at Junction City, Kansas, 1 October 1943. A duly authenticated extract copy of the morning report of the accused's organization was admitted in evidence

without objection, showing the initial absence without leave (Pros. Ex. A). The accused's commanding officer identified his initials upon the extract copy and testified that the accused was absent during the time specified without leave. It was stipulated by the accused, his counsel, and the prosecution that "The accused was apprehended by military authorities on October 1st, 1943, at Junction City, Kansas" (R. 8-10).

4. The accused at his own request was sworn and testified that he was a second lieutenant and a member of Company C, 60th Armored Infantry Battalion, Camp Polk, Louisiana. On Saturday, 31 July 1943, upon his return to Camp Ibis, California from an absence on special duty, he was informed by his commanding officer that his wife who was living in Needles, California, 12 miles distant from Camp Ibis, was pregnant and ill. The accused was given verbal permission to be absent for the week end to visit his wife. He learned from his wife that she had consulted a doctor who advised her to leave that part of the country because of the heat which might endanger her life. She became ill again Sunday night (1 August 1943). The accused wired "home" for some money and upon receipt of the money on the following Tuesday morning he left Needles with his wife and took her to her home in Junction City, Kansas. At that time he intended to take her home and then to return to his station. He had no clothes with him other than the uniform that he wore. At the time he was under considerable mental strain and felt that his obligation to his wife was greater than that imposed by the Army. He telegraphed to his company commander advising him that he would return as soon as he received his check. On 14 August 1943, he purchased a railroad ticket from Junction City, Kansas, to Newton, Kansas, with the intention of returning to his station, but because there was still danger of his wife suffering a miscarriage, he did not return. When apprehended he was dressed in a pair of Army slacks and shoes. He immediately put on a clean uniform with all insignia and accompanied the officers making the arrest (R. 11-14). Before leaving Needles, California, with his wife, he made no effort to contact his commanding officer to get permission to leave (R. 16).

The defense called three character witnesses. All of them testified as to the very satisfactory rating of the accused as an officer and stated their willingness to have the accused in their organizations as a subordinate officer because of his capabilities and efficiency rating prior to commission of the offense for which he was tried (R. 16-25). It was also shown by the investigating officer that the investigating officer recommended that the charge be one of absence without leave under Article of War 61 rather than desertion under Article of War 58 (R. 18).

5. The evidence clearly establishes that the accused was absent from his station at Camp Ibis, California, without proper leave on 2 August 1943, and continued in that status until he was apprehended by the military authorities at Junction City, Kansas, on 1 October 1943.

Desertion is defined as absence without leave accompanied by the

intention not to return. Both of these elements are essentials to the offense. The proof of the accused's absence without leave is clear and admitted. It was also shown and admitted that the accused's absence was for the duration of two months and terminated by apprehension at a considerable distance from the accused's station at the time he absented himself.

The Manual for Courts-Martial, 1928, paragraph 130a, page 143, provides:

> "If the condition of absence without leave is much prolonged, and there is no satisfactory explanation of it, the court will be justified in inferring from that alone an intent to remain permanently absent."

The Manual further provides (p. 144):

> "Although accused may testify that he intended to return, such testimony is not compelling as the court may believe or reject the testimony of any witness in whole or in part."

It is, therefore, within the province of the court in such cases to determine the absence or presence of the intent to remain away permanently. This intent may be inferred from the duration of unauthorized absence of two months, the distance from his post to the place of apprehension, and the fact that the accused was apprehended by the military authorities. In the opinion of the Board of Review there was sufficient evidence to sustain the findings of the court that the accused intended to remain away permanently from his station.

6. The record shows the accused is about 23 years of age. He enlisted in the Regular Army at Waco, Texas, on 23 November 1939 and was assigned to the 23rd Infantry wherein he served until April 1942. He attended Officer Candidate School at Fort Benning, Georgia, and upon graduation was discharged and commissioned second lieutenant, Infantry, 15 July 1942 and assigned to the Ninth Armored Division.

7. The court was legally constituted and had jurisdiction over 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, total forfeitures and confinement at hard labor for five years are authorized upon conviction of violation of Article of War 58.

William A. Jones, Judge Advocate.

Earle Hepburn, Judge Advocate.

Herbert B. Gedeiner, Judge Advocate.

25-7324-100

1st Ind.

War Department, J.A.G.O., 1 - 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 Karl K. Kennon (O-1287722), Company C, 60th Armored Infantry Battalion.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and 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, and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

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

Myron C. Cramer

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

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

(Sentence as approved by reviewing authority confirmed but forfeitures and confinement remitted. G.C.M.O. 125, 11 Mar 1944)

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

SPJGN
CM 245354

22 Dec 1943

UNITED STATES v. Captain HARRY W. LANE (0-371612), Air Corps, 325th Base Headquarters and Air Base Squadron.	ARMY AIR FORCES EASTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Marianna Army Air Field, Marianna, Florida, 18 November 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 Charge and Specification:

CHARGE: Violation of the 95th Article of War.

Specification 1: In that Captain Harry W. Lane, 325th Base Headquarters and Air Base Squadron, Army Air Forces Pilot School (Advanced - Single Engine), Marianna Army Air Field, Marianna, Florida, being indebted to W. B. Pender in the sum of three hundred dollars ($300.00) for money loaned him on his promissory note, which amount became due and payable in full on or about 8 September 1943, did, at Greenwood, Florida, from 8 July 1943 to 8 October 1943, dishonorably fail and neglect to pay said debt.

Specification 2: In that Captain Harry W. Lane, 325th Base Headquarters and Air Base Squadron, Army Air Forces Pilot School (Advanced - Single Engine), Marianna Army Air Field, Marianna, Florida, did, at Greenwood, Florida, on or about 3 September 1943, with intent to deceive and injure, wrongfully and unlawfully make and utter to W. B. Pender a certain check in words and figures as follows to wit:

"Greenville, Miss., 9-3 1943 $300.00 Pay to the order of W. B. Pender Three hundred and no/100 Dollars to Greenville Bank & Trust Co. Greenville, Miss. /s/ H. W. Lane",

in payment of his promissory note dated 8 July 1943, in the sum of three hundred dollars ($300.00), he, the said Captain Harry W. Lane, then well knowing that he did not have and not intending that he should have sufficient funds in the Greenville Bank and Trust Company, Greenville, Mississippi for the payment of said check.

Specification 3: Finding of not guilty.

Specification 4: In that Captain Harry W. Lane, 325th Base Headquarters and Air Base Squadron, Army Air Forces Pilot School (Advanced - Single Engine), Marianna Army Air Field, Marianna, Florida, did, at Marianna Army Air Field on or about 10 September 1943, with intent to deceive his Commanding Officer, Colonel John W. Persons officially report to the said, Colonel John W. Persons that his total indebtedness amounted to seven hundred dollars ($700.00), which statement was known by the said Captain Harry W. Lane to be untrue, in that he, Captain Harry W. Lane was indebted in the sum of one thousand dollars ($1000.00) or more.

Specification 5: In that Captain Harry W. Lane, 325th Base Headquarters and Air Base Squadron, Army Air Forces Pilot School (Advanced - Single Engine), Marianna Army Air Field, Marianna, Florida, did, at Marianna, Florida, on or about 28 May 1943, with intent to defraud, wrongfully and unlawfully make and utter to The First Bank of Marianna, Marianna, Florida, a certain check in words and figures as follows, to wit:

"Greenville, Miss., May 28, 1943 $300.00 Pay to the order of First Bank of Marianna Three hundred and no/100 Dollars to Greenville Bank & Trust Co. Greenville, Miss. /s/ H. W. Lane",

and by means thereof, did fraudulently obtain from The First Bank of Marianna, Marianna, Florida, a credit to his account in the amount of three hundred dollars ($300.00), he, the said Captain Harry W. Lane, then well knowing that he did not have and not intending that he should have sufficient funds in the Greenville Bank and Trust Company, Greenville, Mississippi, for the payment of said check.

Specification 6: In that Captain Harry W. Lane, 325th Base Headquarters and Air Base Squadron, Army Air Forces Pilot School (Advanced - Single Engine), Marianna Army Air Field, Marianna, Florida, did, at Marianna, Florida, on or about 26 June 1943, with intent to defraud, wrongfully and unlawfully make and utter to the Herff-Jones Company of Indianapolis, Indiana, a

certain check in words and figures as follows, to wit:

> "Marianna, Fla. June 26 1943 No. 10 The First Bank of Marianna Pay to the order of The Herff-Jones Co. $497.66 Four Hundred ninety-seven and 66/100 Dollars /s/ H. W. Lane",

in payment of accounts owed the said The Herff-Jones Company for merchandise sold in the amount of $497.66, he, the said Captain Harry W. Lane, then well knowing that he did not have and not intending that he should have sufficient funds in The First Bank of Marianna, Marianna, Florida, for the payment of said check.

Specification 7: Finding of not guilty.

Specification 8: Finding of not guilty.

He pleaded not guilty to the Charge and all Specifications thereunder and was found not guilty of Specifications 3, 7 and 8 and guilty of the remaining Specifications and of the Charge. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that on 8 July 1943, the accused borrowed $300 from Mr. W. B. Pender for which he executed a note agreeing to repay the loan in two equal installments due 30 and 60 days from date respectively. The first installment was not paid on its due date and shortly thereafter the accused agreed to pay the entire indebtedness on 1 September 1943. Upon this latter date he issued his check to Mr. Pender for $300 upon the Greenville Bank and Trust Company, Greenville, Mississippi, which was returned, dishonored because of "insufficient funds". He had received the note for the worthless check and the indebtedness was still unpaid on the date of trial (R. 10-13, 14-15; Exs. 1-3).

On 30 July 1943, the accused obtained a loan of $400 from the Citizens State Bank, Marianna, Florida, which, on both 10 September 1943, and at the date of trial, was unpaid as was also his indebtedness of $78.27 owed by him to the Officer's Mess. Also on 4 August 1943, the accused obtained a loan of $300 from the Bank of Greenwood, Greenwood, Florida, which was similarly unpaid on the above mentioned dates. In addition to the account with the bank in Greenville, Mississippi, the accused, on 28 May 1943, opened an account with The First Bank of Marianna, Marianna, Florida, by depositing a $300 check drawn by him upon the Greenville bank. The deposited check was credited to accused's account but the bank would not honor withdrawals against it until it was actually collected. The $300 check was dishonored by the Greenville bank about 7 June 1943 for insufficient funds and the First Bank of Marianna had also in the meantime dishonored a $250 check drawn upon it by the accused and deposited in the Greenville bank for the same reason.

Theretofore, in December, 1942, the accused had purchased graduation announcements for a cadet graduating class from Herff-Jones Company, Indianapolis, Indiana, for $497.66, collecting the funds to pay the account from the cadets. On 26 June 1943, the accused issued a check for $497.66 to Herff-Jones Company which was dishonored for insufficient funds between its date and 8 July 1943. This check, however, was redeemed by the accused on 6 August 1943 (R. 13-14, 15-16, 16-18, 22-25, 26 and Exs. 5-8, 12, 13, 15).

In response to the express direction of his commanding officer requiring him to submit a list of his indebtedness, the accused on 10 September 1943, submitted a list showing his total indebtedness as $700 consisting of the debt of $300 owed to Mr. Pender and that of $400 owed to The Citizens State Bank and omitting the indebtedness of $300 and $78.27 owed respectively to the Bank of Greenwood and the Officer's Mess. The statements of his accounts in the Greenville bank and the Marianna bank for the period of time involved were appropriately in evidence and they, as did also the testimony of officials of the banks, showed that when the above described checks were presented the accounts did not contain funds sufficient to pay them (R. 8-9, Exs. 4, 11a-b, 14).

4. The evidence for the defense, elicited from the testimony of the accused who, after explanation of his rights as a witness, elected to testify, shows that he had during the preceding year lost about $2000 gambling with other officers, that he admitted the transactions shown by the evidence for the prosecution but that he always intended to deposit funds to pay the checks, although he knew his bank accounts upon which they were drawn were not ample to pay them and that he had unavailingly sought financial assistance from his wife and family. He had initialed the word "total" as descriptive of his indebtedness in the list submitted on 10 September 1943, as a result of what he considered an order to do so but also admitted that he had omitted $378.27 of indebtedness therefrom purposely as he intended to pay such amount before it would be brought to the commanding officer's attention. He also testified about another bank account with a Fort Sam Houston bank where he also had negotiated an unpaid loan (R. 27-36).

5. Specifications 1 and 2 of the Charge allege respectively that the accused from 8 July 1943, until 8 October 1943 dishonorably failed and neglected to pay a $300 indebtedness due one W. B. Pender and that on or about 3 September 1943 "with intent to deceive and injure, wrongfully and unlawfully" made and uttered to said debtor a $300 check upon the Greenville Bank and Trust Company, Greenville, Mississippi, in payment of said debt when he then well knew that he did not have and not intending that he should have sufficient funds in said bank to pay such check. Dishonorable failure and neglect to pay debts is a violation of Article of War 95 if such failure and neglect be dishonorable as the result of a deceitful and fraudulent plan or design to evade the payment thereof (M.C.M., 1928, par. 151, C.M. 220760 and 221833 (1942)

Bull. JAG 1942 Vol. 1, Sec. 453 (13) pp. 22-23, 106). It is likewise a violation of Article of War 95 to give a check on a bank where one knows or reasonably should have known there are no funds to meet it, and without intending that there should be (M.C.M., Id., CM 202601 (1935) Dig. Ops. JAG, 1912-1940, Sec. 453 (24) pp. 346-7).

The evidence overwhelmingly establishes the factual allegations of Specifications 1 and 2, excepting from the former the word July and substituting therefor the word September. The check itself, the bank statement, the testimony of the bank official and of the debtor fully show the commission of the offenses alleged, which are also in effect admitted by the accused in his own testimony. The deceitful and fraudulent design to evade payment of the debt is manifested by the accused's failure to pay as agreed, supplemented by his issuance of a worthless check therefor securing at least further time, his continued gambling and obvious manipulation of his various bank accounts. The evidence, therefore, shows beyond a reasonable doubt the commission of the offenses alleged in Specifications 1, excepting therefrom the word July and substituting therefor the word September, and 2, and is ample to support the findings of guilty thereof and of the Charge.

6. Specification 4 of the Charge alleges that on or about 10 September 1943, with intent to deceive, the accused officially reported to his commanding officer that his total indebtedness was $700, which statement was known by the accused to be untrue in that the accused at such time was indebted in an amount in excess of $1000. "Knowingly making a false official statement" is a violation of Article of War 95 (M.C.M., 1928, par. 151).

The commanding officer's testimony emphatically shows that he directed the accused to submit a list of his indebtedness. Such direction is not susceptible to the construction that a partial list would be sufficient. The accused deliberately omitted at least $378.27 of his indebtedness from the submitted list with the admitted intention of trying to liquidate it before it could be discovered by his commanding officer. His assertion that he subsequently initialed the inserted word "total", as descriptive of the listed indebtedness as the result of a direct order is obviously an attempted evasion, seriously discrediting his entire testimony and forcing the conclusion that his course of actions were motivated by deceitful and fraudulent intent. The evidence, therefore, conclusively establishes his guilt of the offense alleged in Specification 4 and fully warrants the findings of guilty of that Specification and of the Charge.

7. Specifications 5 and 6 of the Charge allege that the accused with intent to defraud, wrongfully and unlawfully on specified dates, issued to the persons named therein checks in specified amounts upon designated banks when he knew that he did not have and not intending

that he should have sufficient funds for the payment thereof. In the former of the two Specifications it is alleged that the accused "by means thereof, did fraudulently obtain from The First Bank of Marianna, Marianna, Florida, a credit to his account" in the amount of the described check. In the latter Specification it is alleged that the described check was given in payment of a pre-existing debt.

The evidence for the prosecution hereinabove commented upon establishes all of the material allegations of the two Specifications excepting from Specification 5 the words "by means thereof, did fraudulently obtain from The First Bank of Marianna, Marianna, Florida, a credit to his account in the amount of three hundred dollars ($300.00)", and from Specification 6 the words "with intent to defraud". These words must be excepted because the evidence is clear that The First Bank of Marianna did not in fact credit the accused's account with the deposited and subsequently dishonored check or advance funds against it, but merely handled it as a collection item. Furthermore, the check described in Specification 6 was given in payment of a pre-existing debt which consequently precludes the existence of a fraudulent intent in its issuance. The two Specifications, however, still allege violations of Article of War 95.

Specification 5 with the excepted words omitted, still alleges that the accused did "with intent to defraud, wrongfully and unlawfully make and utter" the check in question. Similarly, Specification 6 still alleges that the accused wrongfully and unlawfully made and uttered the check in question knowing that he did not have and not intending that he should have sufficient funds in the particular bank for the payment thereof. In a case involving a similar problem the Judge Advocate General held that:

> "Where accused is charged (A.W. 95) with drawing a worthless check and the court by exception excluded the allegation that the check was given for value it was held that the view that no offense is committed in passing a bad check unless value be received for it is too strict and would cause unfortunate consequences. A check given in payment of pre-existing debt or a gambling debt, a check given as a charitable contribution or as a gift, are all given without valuable consideration in the eye of the law, yet the giving of a bad check by an officer under the above circumstances would clearly be discreditable to the military service and in many cases conduct unbecoming an officer and a gentleman. The specification as modified states an offense. CM 202601 (1935)."

In view of the above authority and the circumstances under which the two checks were issued, we must conclude that the evidence,

supports, beyond a reasonable doubt, the findings of guilty of the two Specifications as well as the findings of guilty of the Charge.

8. The accused is about 35 years of age. The War Department records show that he was commissioned a second lieutenant of Cavalry in the Officers' Reserve Corps on 26 August 1938 and that he has had active duty as an officer since 10 October 1940 since when he has been promoted twice, to first lieutenant on 15 November 1941 and to captain on 9 February 1943.

9. 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 Specifications 1, 2, 4, 5 and 6 thereunder excepting, however, from Specification 1 the word July and substituting therefor the word September and from Specifications 5 and 6 the words "by means thereof, did fraudulently obtain from The First Bank of Marianna, Marianna, Florida, a credit to his account in the amount of three hundred dollars ($300.00)" and "with intent to defraud" respectively and the sentence, and to warrant confirmation thereof. Dismissal is mandatory upon conviction of a violation of Article of War 95.

Abna E. Lipscomb, Judge Advocate.

Benjamin R. Sleight, Judge Advocate.

(On Leave), Judge Advocate.

(174)

SPJGN
CM 245354

1st Ind.

War Department, J.A.G.O., 18 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 Captain Harry W. Lane (0-371612), Air Corps, 325th Base Headquarters and Air Base Squadron.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty of Specification 1 excepting therefrom the word July and substituting therefor the word September; legally sufficient to support the findings of guilty of Specifications 2 and 4; legally sufficient to support so much of the finding of guilty of Specification 5 as involves a finding that the accused did with intent to defraud, wrongfully and unlawfully make and utter the check therein described excepting therefrom the words "by means thereof, did fraudulently obtain from The First Bank of Marianna, Marianna, Florida, a credit to his account in the amount of three hundred dollars ($300.00)"; legally sufficient to support so much of the finding of guilty of Specification 6 as includes a finding that the accused did wrongfully make and utter the check described knowing that he did not have and not intending that he should have sufficient funds in the bank alleged for the payment thereof, excepting therefrom the words "with intent to defraud"; legally sufficient to support the sentence, and to warrant confirmation thereof. I recommend that the sentence of dismissal be confirmed and ordered executed.

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

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed. G.C.M.O. 109, 10 Mar 1944)

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

N.D.
(175)

1 JAN 1944

SPJGH
CM 245416

U N I T E D S T A T E S v. Second Lieutenant THOMAS RICHARD CATTON, III (0-750942), Air Corps.	)	ARMY AIR FORCES WESTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Roswell Army Air Field, Roswell, New Mexico, 25 October 1943. Dismissal and total forfeitures.

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 96th Article of War.

Specification: In that 2nd Lieutenant THOMAS R. CATTON, III, Air Corps, having received a lawful order from Major HOWARD K. WALTER, Air Corps, to report for duty as Detachment Officer in charge, the said Major HOWARD K. WALTER being in the execution of his office, did, at Roswell Army Air Field, Roswell, New Mexico, on or about September 25, 1943, fail to obey the same.

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

Specification 1: In that 2nd Lieutenant THOMAS R. CATTON, III, Air Corps, did, without proper leave, absent himself from his station at Roswell Army Air Field, Roswell, New Mexico, from about October 1, 1943 to about October 4, 1943.

Specification 2: In that 2nd Lieutenant THOMAS R. CATTON, III, Air Corps, did, at Roswell Army Air Field, Roswell, New Mexico, on or about September 14, 1943, fail to repair at the fixed time to the properly appointed place for Ground School Class.

Specifications 3-11: Same as Specification 2, except that they allege respectively the following dates: 15, 16, 17, 21, 23, 24, 25, 27, and 28 September 1943.

Specification 12: In that 2nd Lieutenant THOMAS R. CATTON, III, Air Corps, did, at Roswell Army Air Field, Roswell, New Mexico, on or about September 23, 1943, fail to repair at the fixed time to the properly appointed place for Link Trainer Class.

Specifications 13-14: Same as Specification 12, except that they allege respectively the following dates: 27 and 29 September 1943.

Specification 15: In that 2nd Lieutenant THOMAS R. CATTON, III, Air Corps, did, at Roswell Army Air Field, Roswell, New Mexico, on or about September 14, 1943, fail to repair at the fixed time to the properly appointed place for flying training.

Specifications 16-19: Same as Specification 15, except that they allege respectively the following dates: 22, 24, 28 and 30 September 1943.

Specification 20: In that 2nd Lieutenant THOMAS R. CATTON, III, Air Corps, did, at Roswell Army Air Field, Roswell, New Mexico, on or about September 14, 1943, fail to repair at the fixed time to the properly appointed place for Physical Training.

Specifications 21-33: Same as Specification 20, except that they allege respectively the following dates: 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, 27, 28 and 29 September 1943.

He pleaded not guilty to Charge I and the Specification thereunder and to Specifications 1 and 15, Charge II, and guilty to all other Specifications and to Charge II. He was found guilty of all Specifications and Charges and was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved "only so much of the findings of guilty of Charge II and specification 1 thereunder as involves a finding of guilty of absence without leave from 1 October 1943 to 2 October 1943, 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 shows that about 5 August 1943 accused was assigned to "314th Headquarters and Headquarters Squadron", Roswell Army Air Field, New Mexico, for "Four-Engine Transition Training" and was a student officer in Class "43-4-G". On 12 August accused was treated at the station hospital for "sinusitis" and placed on non-flying duty until 23 August. He returned to the hospital on 28 August and was placed on duty not involving flying until 6 September because of pain in his wrist. On account of diarrhea he was placed in "quarters status" from 10 September to 13 September. As a result accused was, by orders dated 13 September (Ex. 1), transferred to Class "43-4-H", which was the next class after that to which he originally belonged. Class 43-4-H began on 12 September. On 22 October accused was examined by Captain Clarence E. Dixon, Medical Corps, who found no disease of the central nervous system and no functional or organic mental disorder or change of personality (R. 13-15, 17-20).

a. Specifications 2-11, Charge II (failure to report to ground school class): The ground school class for Class 43-4-H began on 13 September. Regular schedules of classes that student officers were required to attend were distributed not later than Saturday prior to the week for which the schedules were effective. Records maintained in the office of the director of the ground school showed that accused was scheduled to be present in class, but was absent, on the following dates: 14, 15, 16, 17, 21, 23, 24, 25, 27 and 28 September 1943. There was only one ground school session scheduled per day, and it lasted for almost three hours. On 27 September, Captain Andrew R. Wetenkamp, squadron adjutant, questioned accused as to why he had missed ground school classes, and accused replied that he would make arrangements with the director of the ground school not to attend classes as he had "received them in G". He stated that he had not "already made arrangements" but would do so (R. 21-24, 36, 39-40).

b. Specifications 12-14, Charge II (failure to report to link trainer class): Regular schedules of classes in the link trainer department were posted on the bulletin boards. Records maintained in the office of the officer in charge of this department showed that accused was scheduled to be present in class, but was absent, on the following dates: 23, 27, and 29 September 1943. The absence on 27 September was from two sessions of the class (R. 24-26).

c. Specifications 15-19, Charge II (failure to report for flying training): Accused was in Section G of Class 43-4-H, and was placed in Group I, Squadron 4, for flying training. Regular flying schedules for student officers were posted on the bulletin boards. The students were supposed to fly every other day. Records of attendance (kept "in the ordinary course of business") showed that accused was scheduled to fly, but

was absent, on the following dates: 14, 22, 24, 28 and 30 September 1943. The record for 14 September was made by First Lieutenant Robert C. Walton, an instructor (who was not present as a witness). The method of checking attendance was that all students reported to "that room", each instructor called the names of the students who were to fly with him that day, and if a student was not present the instructor turned in a "no flight slip" and put "absent" in the report. It would be possible for a student to be present and the instructor not see him at the beginning of the period, but the commanding officer of the flying school, Captain Robert E. Belville, would go to the ready room, after they "go to fly", get their names and see "what they are supposed to be doing". When a student was present but no airplane was available for his use, he was marked "no ship" (R. 26-31).

d. Specifications 20-33, Charge II (failure to report for physical training): All students were required to get six hours per week (one hour per day) of physical training. Four or five classes were held each day from Monday through Saturday. If a student had free time prior to the class for which he was scheduled, he was permitted to attend an earlier class, and if he missed on Saturday he could make it up on Sunday. The records of attendance for the class of accused showed that he was scheduled to be present, but was absent, on the following dates: 14, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, 27, 28 and 29 September 1943. The records also showed that he was not present on Sunday, 19 or 26 September. On 27 September, when Captain Wetenkamp questioned accused about his absence, accused stated that he had "missed athletics quite a bit" and that he missed on 25 September because his wife was sick and he could not go on that day (R. 32-35, 40).

e. Specification, Charge I (failure to report for duty as detachment officer in charge): A student officer was on duty each night as detachment officer in charge, and the hours of duty were from 5:00 p.m. until 8:00 a.m. Officers having "the most delinquencies resulting from various acts of misconduct or violations of regulations" were selected for this duty, but it was not considered as punishment. Instructions were posted on the bulletin board, and also attached to the copy of the duty roster placed in the post office box of each officer designated as officer in charge. The officer for each night was required to report to the adjutant prior to 5:00 p.m., and at that time would receive any additional instructions. On 18 September the roster for the period 20-26 September (Ex. 2) was prepared under the supervision of Captain Wetenkamp. It detailed accused as officer in charge for Saturday, 25 September, directed him to report to the detachment adjutant prior to 5:00 p.m. on that date, and was promulgated "By order of Major Walter". Captain Wetenkamp signed the original and delivered copies to Sergeant Fred P. Keith, who posted one

on the bulletin board and delivered the others to the postal clerk. Sergeant Keith saw the postal clerk place the copies in the mail boxes. A few days before 25 September Second Lieutenant William T. Cochran, Jr., looked at the rosters on the bulletin board with accused, who pointed to his name and remarked "It is rather tough to be on duty that Saturday night". On 27 September accused admitted to Captain Wetenkamp that he knew he was officer in charge on 25 September (R. 38-46, 50-52).

Private First Class Jean F. Boisard was on duty as "sort of a Charge of Quarters" at student officer and cadet headquarters from 5:00 p.m. on 25 September until 8:00 a.m. the next day. A student officer in charge was supposed to be on duty with him, and when no one reported Boisard reported the fact to the adjutant. An officer who was to serve "over at the Student Officer Wing Headquarters" then came over and served as officer in charge. At some time between 6:00 and 7:30 p.m. on 25 September, Lieutenant Cochran saw accused at the Nixon Hotel and had a conversation with him. On 27 September when Captain Wetenkamp asked accused why he had not reported on 25 September, accused "mentioned" that his wife was sick and he could not leave her, and stated that he made no effort to contact the adjutant because his telephone was not in working order (R. 40, 48-49, 52-54).

f. Specification 1, Charge II (absence without leave): Extract copies of the morning report of Headquarters and Headquarters Squadron, 314th "TEFT" Group (Exs. 3 and 4) showed accused from duty to absent without leave 1 October 1943, and from absent without leave to duty 4 October. Captain Wetenkamp testified on cross-examination that students were allowed two overnight passes a week and one weekend pass on Saturday or Sunday night if they were not required to be on the post, that on other nights, unless scheduled for duty, students could remain out until 11:00 p.m., that they were free on Sundays, and that when on overnight pass they signed the departure book on leaving the post (R. 43-44, 54-55).

4. The evidence for the defense shows that the "proficiency card" of accused as an aviation cadet bore a notation of "average" for bearing and neatness and for "stalls" and of "above average" for attention to duty, academic average, academic grade, instrument flying, night flying, formation and general pilot ability. "Above average" was the highest rating used. Accused was recommended as a flying instructor at Marfa Army Air Field. The records did not cover his flying record after coming to Roswell Army Air Field. Written statements with reference to accused were admitted in evidence as follows: by commanding officer of primary training school, Fort Stockton, Texas (Def. Ex. A) that the service record indicates his character rating as "Excellent" and efficiency rating as a soldier as "Satisfactory", and that the final grade sheet indicates his general average in ground school as "91" and satisfactory completion of the course of elementary training;

by flight instructor throughout primary training (Def. Ex. B) that accused was punctual, attentive and expressed a keen desire to do his part, never needed a reprimand for conduct or neglect of duty, was one of the best students and was above average in flying technique and judgment; by the commandant of basic training school (Def. Ex. C) that accused performed his duties very efficiently; and by an instructor at Marfa Army Air Field (Def. Ex. D) that he was closely associated with accused as one of his students from about 1 June 1943 to about 1 August, that accused was a model student, that his military bearing and general conduct were excellent, and that he was an excellent flyer (R. 55-58).

Mrs. Patricia Catton, wife of accused, testified that they had been married about 16 months, accused had never been in trouble before, and when accused had to decide what type of training he desired, after basic, she urged and caused him to choose "Four-Engine" although he wanted "Pursuit". She stated further that during August and September she had been having fainting spells and coming to a medical officer at the post, on account of pregnancy. During that time she had urged accused to stay home. Captain Clarence E. Dixon, chief of the neuropsychiatry section at Roswell Army Air Field, who made an examination of accused, determined that he was of sound mind, that his reactions were normal, there were no emotional or other signs of instability, and that accused was psychologically and temperamentally qualified as a flying officer. He observed no element of resentment in accused nor evidence of "carrying a chip on his shoulder". The reaction of accused to the charges against him was that he felt that his actions were ill advised and that he was willing to pay the penalty (R. 63-66, 78).

As to Specification 1, Charge II, the evidence for the defense shows that about 4:00 or 4:30 p.m. on 2 October, Sergeant James R. Cole, accused, and their wives drove to the student officers detachment in Sergeant Cole's car. Accused went into the building to get his mail, but it was not available at that time. After fifteen minutes or more they left the post and returned to town. Mrs. Catton testified that on 25 September she was quite ill and desired the presence of accused, but did not call a doctor as she knew the cause of her illness and the doctor had previously advised her not to be alarmed (R. 59-60, 62, 65-66, 78).

Accused testified that he enlisted on 7 April 1941, was accepted as an aviation cadet in March 1942, but kept getting furloughs by mail without his request and did not get into aviation cadet work until 21 August 1942. He was commissioned 28 July 1943 and desired to get overseas in a fighter outfit as soon as possible. Repeated delays were disappointing to him. He has a brother, Major Jack J. Catton, who

is a group commander at Lockbourne Army Air Base. After accused arrived at Roswell Army Air Field on 5 August, he lost a great deal of flying time on account of physical ailments and was dropped back to the next class. The reason that he missed classes was that he did not want to "come to Four-Engine" but wanted to "go to pursuit", it looked as if he would not "get overseas" in six months or more, in pursuit it does not take as long, he heard that men who made requests for a change were "sent towing targets", so he decided that "maybe if I messed up a little bit they wouldn't want me and send me away to a fighter outfit". Accused realizes now that this was not a good idea (R. 67, 69-71).

As to Specification 1, Charge II, he stated that on the afternoon of 2 October he went to the post office at the post but the mail had not been distributed. He was told that he could not get his mail until he reported to Captain Wetenkamp. He went to the latter's office but was informed that he was out. As to Specification 15 he testified that he was "pretty sure" that he reported for flying on 14 September, because at that time he was making every effort to report for flying although he was not reporting for ground school. Every time he went down for flying in Class "H" he was told there were "no ships". The reason was that a preference was given to other students with less flying time (R. 67-68).

On cross-examination accused testified that in "basic" he signed a card expressing a preference for four-engine school and did not request a transfer. After being transferred to Class "H" he reported for flying three or four times and was told that there were "no ships". He never "missed flying" until 22 September except when he was grounded. He had about 20 hours of flying "in Four-Engine" before being placed in Class "H", and none after. None of his absences from classes or from flying in Class "H" resulted from sickness. On 25 September he went from the Nixon Hotel to his home and to a dance at the Officers' Club, and did not report as student officer in charge. He knew that he was scheduled for that night. He was not present on 1 October and did not sign the departure book from 1 October to 4 October (R. 72-76).

5. In rebuttal it was shown that the records of the flying class disclosed that on 14 September Lieutenant Walton was instructor for accused and "Lieutenant Andrews", that accused was absent and Andrews present, that another instructor had one student absent, and that Andrews and the other student present went up with the other instructor. As to the record of absence of accused on that day, the "blue slip" bore the signature of Lieutenant Walton. The records showed that on 1 and 2 October accused was scheduled for but absent from ground school class and athletics.

On 2 October Captain Wetenkamp was in his office until about 4:15 p.m., when he went across the street to the office of "Major Walter". The records did not show that accused was excused from any classes. It was the policy that students held over from another class were required to attend ground school classes unless they had satisfactorily completed the work. The records showed that accused had not satisfactorily completed the ground school work (R. 79-84).

6. Major Howard K. Walter, commanding 314th Headquarters and Headquarters Squadron, called as a witness by the court, testified that the orders assigning students for duty as officer in charge, were prepared under his direction by Captain Wetenkamp, his adjutant. They were orders of Major Walter through the adjutant (R. 84-85).

7. The evidence shows that accused came to Roswell Army Air Field as a student officer in the four-engine school about 5 August 1943, was placed in Class 43-4-G, lost a great deal of flying time on account of various ailments, and as a result was transferred on 13 September to the next class. On 14, 15, 16, 17, 21, 23, 24, 25, 27 and 28 September he was absent from ground school classes which he was scheduled to attend. On 23, 27 and 29 September he was absent from link trainer classes that he was supposed to attend. On 14, 22, 24, 28 and 30 September accused failed to report for flying training as required. On 14, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, 27, 28 and 29 September he failed to report for required physical training. On 25 September he failed to report for duty as detachment officer in charge, with a tour of duty from 5:00 p.m. to 8:00 a.m. the next day, although he had knowledge of the orders detailing him to that duty. These orders were issued in the name and by authority of Major Howard K. Walter, commanding officer. Accused was absent without leave from his station from 1 October to 2 October 1943.

Accused, who had previously made an excellent record, gave as the reason for his conduct that he was anxious to be transferred to "pursuit" and go overseas, and thought that if he "messed up a little bit" he would be "sent to a fighter outfit".

8. The reviewing authority approved "only so much of the findings of guilty of Charge II and specification 1 thereunder as involves a finding of guilty of absence without leave from 1 October 1943 to 2 October 1943, in violation of the 61st Article of War". Although this language is ambiguous, yet the Board of Review is of the opinion that the result was to disapprove only a part of the finding of guilty of Specification 1, Charge II, and not to disapprove all findings of guilty under Charge II except for absence without leave from 1 October to 2 October. Accused pleaded

guilty to Specifications 2-14 and 16-33, and the review by the staff judge advocate, which recommended the action taken, clearly discloses that the intention was merely to disapprove the finding of guilty of absence without leave for any period beyond 2 October.

9. The accused is 25 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 7 April 1941; aviation cadet from 21 August 1942; appointed temporary second lieutenant, Army of the United States, and active duty, 28 July 1943.

10. 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. Lewis, Judge Advocate

F. J. Lotterhos, Judge Advocate

Judson S. Clements, Judge Advocate

1st Ind.

War Department, J.A.G.O., 13 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 Thomas Richard Catton, III (0-750942), 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 failed to report to ground school classes on ten days (Specs. 2-11, Chg. II), to link trainer classes on three days (Specs. 12-14, Chg. II), for flying training on five days (Specs. 15-19, Chg. II), and for required physical training on fourteen days (Specs. 20-33, Chg. II), between 14 and 30 September 1943, inclusive; failed to obey a lawful order to report for duty as detachment officer in charge on 25 September (Spec., Chg. I); and was absent without leave from 1 October to 2 October 1943 (Spec. 1, Chg. II). I recommend that the sentence to dismissal and total forfeitures be confirmed, that the forfeitures adjudged be remitted, and that the sentence as thus modified be carried into execution.

3. Consideration has been given to a telegram dated 8 November 1943 and a letter dated 24 November 1943 in behalf of accused, both from Mr. Thomas R. Catton, father of accused, Los Angeles, California.

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.

3 Incls.
Incl.1-Record of trial.
Incl.2-Drft. ltr. for sig. S/W.
Incl.3-Form of action.
Incl.4-Telegram fr. Mr. Catton, 8 Nov. 1943.
Incl.5-Ltr. fr. Mr. Catton, 24 Nov. 1943.

(Sentence confirmed but forfeitures remitted. G.C.M.O. 98, 10 Mar 1944)

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

SPJGK
CM 245421

19 JAN 1944

UNITED STATES	)	FIRST AIR FORCE
	)	
v.	)	Trial by G.C.M., convened
	)	at Army Air Base, Richmond,
Captain WENDELL E. BOYER	)	Virginia, 26 and 27 November
(O-494636), Medical Corps.	)	1943. Dismissal.

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 95th Article of War.

Specification: In that Captain Wendell E. Boyer, Medical Corps, 1896th Engineer Aviation Battalion, was, at Richmond, Virginia, on or about, 24 October 1943, in a public place, to wit, The Nook Cafe, located between Grace and Franklin on Second Street, drunk and disorderly while in uniform.

He pleaded not guilty to the Charge and Specification. He was found guilty of the Specification; of the Charge, not guilty of a violation of the 95th Article of War but guilty of a violation of the 96th Article of War. Evidence of one previous conviction (2 Specifications of drunkenness in violation of Article of War 96) 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. The following is a summary of the evidence:

At about 6:00 or 6:30 o'clock on the evening of 24 October 1943, accused, while in uniform, entered the "Nook Restaurant", a public eating place at No. 111 North Second Street, in the City of Richmond, Virginia, with two sailors. At that time, between 50 and 55 people were present

in the restaurant and about two-thirds of them were civilians, including ladies. After consuming two bottles of wine, the accused and the two sailors started to leave without paying the check. When accused reached the bar the restaurant manager reminded him that he had not paid his bill. Accused stated, "The hell I haven't paid it". Upon being told that the waitress had previously reported to the manager that he had refused to pay his check, accused stated, "I don't intend to pay it. What are you going to do about it". The manager then attempted to collect the bill from one of the sailors. The sailor refused to pay, stating, "Why should I pay it? He [accused] asked us to come in and have a drink with him". Accused then called the manager a "Jew bastard", took off his coat and belt and said, "I'll lick the hell out of you" (R.9). At this time accused was "very intoxicated". He used "very bad language" and his conduct was observed by everyone present. The manager then called the military police (R.6-10,29). Second Lieutenant Waldo W. Colglazier, Corps of Military Police, 1345th Service Unit, responded to the call. Upon his arrival at the restaurant the accused had a sailor on either side of him. His breath smelled of liquor and he was talking in a "nonsensical" manner. His speech was incoherent and he could not walk straight. He was placed in arrest by Lieutenant Colglazier and ordered into a staff car. Accused refused to get into the car and had to be humored in order to get him in without the use of force. On the way to military police headquarters accused used obscene language, and force had to be used to get him from the staff car into the military police building. When he was brought before Major William W. Ackerly, Corps of Military Police, the commanding officer of the 1345th Service Unit, Military Police, Richmond, Virginia, accused staggered when he walked, his clothes were in a disheveled condition, and in the opinion of Major Ackerly accused was very drunk. He demanded a drink, said he was "drunk as hell", and wanted to get drunker (R.15-16; 19-21,24-25). The next morning Major Ackerly informed the accused of his conduct the night before. The accused, after having been warned by Major Ackerly that he did not have to make a statement and that any made by him might be used against him, admitted he was drunk, claimed he did not remember many of the things that he was accused of saying and doing and expressed astonishment at having done or said any of such things (R.17).

The accused declined to testify or to make an unsworn statement and no witnesses were introduced in behalf of the defense.

4. The undisputed evidence in this case discloses that the accused was drunk and disorderly while in uniform in a public place in the presence of civilians and enlisted men, as alleged in the Specification. Such conduct was, of course, a violation of Article of War 96.

5. The accused is 42 years of age. The records of the War Department show that he attended Colby College, 1918-1919. He attended Dartmouth College for four years (majoring in medicine), from which he was graduated with a degree of Bachelor of Science in 1923. He had two years of post-graduate work at the Medical School of the University of Pennsylvania, from which he was graduated as a Doctor of Medicine in 1925. He is married. On 7 September 1942 he was commissioned a captain, Medical Corps, Army of the United States (limited service only).

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 and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 96.

Judge Advocate.

Judge Advocate.

Judge Advocate.

1st Ind.

War Department, J.A.G.O., 2 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 Captain Wendell E. Boyer (O-494636), Medical Corps.

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

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

Myron C. Cramer

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

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

(Sentence confirmed. G.C.M.O. 132, 20 Mar 1944)

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

SPJGQ
CM 245507

(189)

8 DEC 1943

UNITED STATES	)	ARMY GROUND FORCES REPLACEMENT DEPOT NO. 2
v.	)	Trial by G.C.M., convened at Fort Ord, California, 30 November 1943. Dismissal and total forfeitures.
Second Lieutenant JAMES W. PAYNE (0-1546824), Medical Administrative 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 Charges and Specifications:

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

Specification 1: In that Second Lieutenant James W. Payne, Officer's School, Army Ground Forces Replacement Depot Number Two, Fort Ord, California, did, at the Spar Cafe, Olympia, Washington, on or about 18 October 1943, with intent to defraud, deceive and injure, wrongfully and unlawfully make and utter to "CASH", a certain check, in words and figures as follows, to wit:

~~SEATTLE~~, WASHINGTON Oct 18, 1943

National Bank of Washington ~~SEATTLE~~
(insert name of bank)

Ft. Lewis BRANCH
(if drawn on a branch insert name of branch)

COUNTER CHECK

PAY TO Cash Or Order $60.00

Sixty and no/100 DOLLARS

N S. F. /s/ James W. Payne
REFER TO MAKER 2nd Lt Med Adm C.

and by means thereof, did fraudulently obtain from ROY JOHNSON the sum of SIXTY ($60.00) DOLLARS, he, the said Second Lieutenant James W. Payne, then well knowing that he did not have and not intending that he should have sufficient funds in the NATIONAL BANK OF WASHINGTON for the payment of said check.

Specification 2: (Finding of not guilty).

Specification 3: (Finding of not guilty).

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

Specification: In that Second Lieutenant James W. Payne, 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 8 November 1943 to 11 November 1943.

He pleaded guilty to Charge II and its Specification and not guilty to Charge I and its Specifications. He was found guilty of Specification 1 of Charge I, Charge I, Charge II and its Specification and not guilty of Specifications 2 and 3 of Charge I. There was no evidence of any previous conviction. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The competent evidence for the prosecution in support of the Specifications and the Charges of which accused was found guilty may be summarized as follows:

With reference to Specification 1 of Charge I, it was shown that on 18 October 1943 at Olympia, Washington, the accused cashed his check in the sum of $60 drawn on the Fort Lewis Branch of the National Bank of Washington at a restaurant known as the Spar Cafe, and received $60 in cash from the restaurant through one of its employees. Ray C. Johnston, who was the manager of the Spar Cafe, testified by deposition that the check was returned by the bank upon which it was drawn because of insufficient funds (Deposition, Ex. 2). It appears from the testimony of the same witness that the accused had previously cashed checks at that restaurant which were honored when presented for payment. On 20 and 21 October 1943, the accused cashed two additional checks for $50 each at the same restaurant but arranged with Mr. Johnston and one of the employees

for these checks to be held as there probably were not sufficient funds in the bank to cover them. Mr. Johnston did not personally cash the check of 18 October 1943. The accused made no representation to him as to his having sufficient funds to cover that check at that time.

By the deposition of the cashier of the Fort Lewis Branch of the National Bank of Washington (Ex. 3), it was shown that on 18 October 1943 the balance to the credit of accused on deposit at that bank was $53.50.

In support of Charge II and its Specification, the evidence produced by the prosecution consisted of a duly authenticated copy of the morning report of the Officers' School, Army Ground Forces Replacement Depot No. 2, Fort Ord, California, the organization of which accused was a member, showing that the accused was absent without leave from 8 November 1943 to 11 November 1943 and the testimony of First Lieutenant Robert L. Henning, Adjutant of the above-described Officers' School, to the effect that the accused was a member of that organization and that the extract copy of the morning report offered into evidence was duly signed by the commanding officer (R. 9; Ex. 1).

4. The accused, having been advised of his rights regarding the giving of testimony elected to be sworn and testified in defense of the Charges as follows:

He enlisted in the Regular Army in January 1938 and was gradually promoted from private to private first class, specialist first class, "buck" sergeant, staff sergeant and technical sergeant. He attended Officer Candidate School and was discharged as an enlisted man and commissioned a second lieutenant on 12 May 1943 and assigned to the Officers' School at Fort Ord, California, where he had been attending classes two or three times a day but had very little to do (R. 11-12). He admitted that he had been absent without leave from 8 to 11 November 1943. Prior to arriving at Fort Ord he had family and financial difficulties and had stayed away from duty for three days because of his mental condition. He had a wife and two children who were dependent upon him and who, at the time of the occurrences complained of, were living at Olympia, Washington. He had a bank account at the Fort Lewis Branch of the National Bank of Washington and made a deposit therein of $75 on 15 October 1943. He admitted that he cashed the check for $60 at the Spar Cafe on 18 October 1943 and received $60 in cash. At the time he wrote the check he assumed that he had sufficient funds to cover it because of his recent deposit. He did not have an accurate recollection of the amount of his balance in the bank at that time (R. 14). When he cashed the two subsequent checks of 20 and 21 October 1943 for $50 each at the same cafe, he arranged with those cashing the checks to hold them until he could make a

deposit to cover them (R. 14). The purpose of cashing the checks was for living expenses (R. 19). He had made every effort to repay the cafe but had been unable to do so because of many other living expenses. He produced a letter from Ray C. Johnston, the manager of the cafe, dated 20 November 1943 (Def. Ex. A) in which the accused was assured that the three checks would be held by the proprietor of the cafe until the accused could make some arrangement to pay them off. He denied that he had intended to defraud or deceive anyone at the time he cashed the check on 18 October (R. 18).

5. In view of the plea of guilty and the clear evidence of record regarding the unauthorized absence of the accused, it was established that the accused was absent without proper leave from his organization at Fort Ord, California, from 8 November 1943 to 11 November 1943 as charged in Charge II and its Specification. No further discussion is necessary.

With reference, however, to Specification 1 of Charge I, the accused is charged with cashing his $60 check with intent "to defraud, deceive and injure" and with "well knowing that he did not have" sufficient funds in the bank upon which the check was drawn. The accused denied any fraudulent intent and denied that he knew he did not have sufficient funds in the bank at the time he cashed the check. Was there sufficient evidence from which fraud could properly be inferred or implied? The act of delivering a check, presently payable, in exchange for cash is in itself a representation that the check will be honored when presented for payment at the bank upon which it is drawn. If the check is dishonored because of the lack of funds on deposit belonging to the maker of the check, fraud may be implied from those facts alone. This implication or presumption however may be overcome by an explanation of the circumstances which, if believed, may explain the otherwise fraudulent act. In the subject case the weight of the evidence tends to overcome the presumption of fraud. It was shown that his bank balance at the time he cashed the check was $53.50 - only $6.50 short of the amount of the check. The accused claimed that he did not know the exact amount of his balance but thought it was sufficient. He had deposited $75 in his account three days previously. Two days later the accused realized that his account was not sufficient to cover a $50 check additional and obtained credit from the restaurant where he cashed that check by having it held until he could make it good. The restaurant proprietor apparently does not consider that he has been defrauded for he is not complaining about the cashing of the $60 check but is willing to consider it along with the later checks as promises to pay and hold all three until accused can arrange to pay them. When the accused learned that the check had been returned dishonored by the bank he immediately

arranged with the restaurant manager to have it treated in the same class as the subsequent checks. He did not evade the obligation. In the opinion of the Board of Review the reasonable doubt concerning the presence or absence of fraud should be resolved in favor of the accused. His error between the deposit on hand and the amount of the check was very slight. His conduct in arranging for credit, in endeavoring to raise the money with which to pay the restaurant, and his final arrangement for payment are circumstances favoring the absence of fraudulent intent. It therefore follows that this finding of the court cannot be sustained and the findings of guilty of Charge I and its Specification should be set aside.

6. The record shows the accused to be 24 years of age. He is married and has two children. He enlisted in the Regular Army 21 January 1938. He rose through various ranks to the grade of technical sergeant. He attended Officer Candidate School and was commissioned a second lieutenant on 12 May 1943.

7. The court was legally constituted. It had jurisdiction over the accused and the subject matter. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is not legally sufficient to support the findings of guilty of Charge I and its Specification but is legally sufficient to support the findings of guilty of Charge II and its Specification and the sentence and to warrant confirmation of the sentence. Dismissal and total forfeitures are authorized upon conviction of violation of Article of War 61.

William H. Lounsde, Judge Advocate

Paul Stephen, Judge Advocate

Herbert R. Federica, Judge Advocate

SPJGQ
CM 245507

1st Ind.

War Department, J.A.G.O., 31 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 W. Payne (O-1546824), Medical Administrative Corps.

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 Charge I and its Specification, but is legally sufficient to support the findings of guilty of Charge II and its Specification and the sentence, and to warrant confirmation of the sentence. 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.

Myron C. Cramer

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

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

(Sentence confirmed but execution suspended. G.C.M.O. 74, 19 Feb 1944)

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

SPJGN
CM 245510

12 JAN 1944

UNITED STATES	)	HEADQUARTERS ARMORED COMMAND
	)	
v.	)	Trial by G.C.M., convened at Fort Knox, Kentucky, 15 November 1943. Dismissal and total forfeitures.
	)	
Lieutenant Colonel JOHN J. CARUSONE (0-21295), Cavalry, Center Vehicle Department.	)	

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

1. The Board of Review has examined the record of trial 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 95th Article of War.

Specification: In that Lieutenant Colonel John J. Carusone, Cavalry, did, on or about 15 March 1943, at Baltimore, Maryland, being then lawfully married to Kate Carusone, nee Greer, feloniously marry one Madeline DeBona, the said Kate Carusone, his lawful wife, being then alive.

He pleaded not guilty to and was found guilty of the Specification and not guilty of the Charge, but guilty of a violation of Article of War 96. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence but recommended that the sentence be commuted to a reduction in accused's permanent rank fifty files and the forfeiture of $50.00 of pay per month for six months and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that on 4 August 1941 the accused married Kate Joan Greer in the State of Georgia and that on 14 March 1943 the accused married Madeline DeBona in the State of Maryland while his first wife was living (R. 8, Ex. 1-3).

4. The evidence for the defense, elicited by the testimony of the accused who, after explanation of his rights as a witness, elected to testify, shows that the accused and Kate Joan Greer were married at Macon, Georgia, about 4 August 1941, that in the following eight months they lived together only about five weeks during which time she unjustly deserted him on three occasions and that, upon the third desertion and at the suggestion of his then Commanding Officer, he engaged attorneys at Lake Charles, Louisiana, where he had established a "matrimonial domicile", to represent him in a divorce suit. His attorneys advised him about several types of divorce in Louisiana, one of which required the lapse of a year's time before he could remarry and it was his original impression that he would be awarded such a decree. However, subsequent communications with his attorneys led him to believe that the proceeding initiated by them would result in securing him a divorce which would permit him to remarry immediately because on 14 November 1942 he was awarded a preliminary decree by the 14th Judicial District Court, Parish of Beauregard, Louisiana "condemning the said defendant to return to the matrimonial domicile" and was advised that he would be awarded a final judgment upon the expiration of 45 days thereafter. On 15 January 1943 a final judgment was entered in his action pending in the Louisiana court whereby he was decreed a "separation from bed and board" from Kate Carusone which he concluded was a divorce as he had not been advised of any difference between such decree and one of divorce and made no effort to so inform himself because to him "a divorce was a divorce" and his attorneys had told him that it was his "final paper", "that was all there was" and that "he was glad to get me a final judgment". He received no further decrees from the Louisiana court and, claiming full reliance upon the decree of 15 January 1943, he immediately discontinued his marital allowance from his pay voucher and thereafter on 14 March 1943 he openly married Madeline DeBona at Baltimore, Maryland, reinstating his marital allowance. No question arose in his mind about the legality of either the dissolution of his former marriage or the consummation of his second marriage until he saw some correspondence of the War Department concerning it in June 1943 (R. 10-25; Exs. 6-7).

The accused's former commanding officer testified that he advised the accused to procure a divorce from his first wife and ascribed to him an excellent reputation and superior standing as an officer as did several other officers under and with whom he had served. Similarly laudatory were certificates from Major General Leroy H. Watson, Brigadier General Doyle O. Hickey and Colonel T. E. Boudinot (R. 25-30, 32; Ex. 9).

Evidence concerning the nature and effect of a decree of "separation from bed and board" by a Louisiana court was admitted. Also evidence was admitted to the effect that one who under an honest belief, based on reasonable grounds, that his first marriage had been dissolved by legal divorce, remarries is not guilty of bigamy in the State of Louisiana (R. 6-10; Exs. 4, 5).

5. In rebuttal the prosecution offered into evidence certified copies of the proceeding in the Louisiana court which show that on 20 May 1942 the accused filed a petition against his first wife for a separation from bed and board, that on 22 May 1942 one Stuart S. Kay was appointed "curator ad hoc" for accused's wife and was served with an order commanding her to return to the alleged matrimonial domicile in Louisiana within 30 days thereafter, that on 1 June 1942 the curator filed a formal answer on behalf of accused's wife, that on 11 January 1943 a preliminary default judgment was entered against the accused's wife, and that on 15 January 1943 a judgment decreeing a separation from bed and board between the parties was entered (R. 30-31, Ex. 8).

6. The Specification of the Charge alleges that the accused did "on or about 15 March 1943, at Baltimore, Maryland, being then lawfully married to Kate Carusone, nee Greer, feloniously marry one Madeline DeBona, the said Kate Carusone, his lawful wife, being then alive". The offense alleged is that of bigamy which "is committed by a party who, when already legally married to one person, marries another person" (Wharton's Criminal Law, 12th Ed. Vol. 2, Sec. 2030 at page 2343). It is observed by the same authority that "an honest but erroneous belief in a divorce is no defense, that the burden of proving a divorce, * * *, is on the defendant, and to sustain it, the record of the divorce must be produced", and that "when the act of bigamous marriage is made the subject of indictment, then at common law the place of such act has exclusive jurisdiction" (Id. secs. 2033, 2044 and 2063). The following excerpt is also applicable:

> "In bigamy the common law made an exception to the rule that a guilty mind is essential to crime. And the courts have taken the attitude that bigamy is a statutory crime wherein the courts will not consider intent unless the legislature has done so. Under this attitude the majority rule has developed that good faith of a defendant in contracting a second marriage, believing that a divorce was valid to dissolve a former marriage, or that separation had the effect of divorce, is no defense to a charge of bigamy.
>
> "Similarly are the many holdings that belief in good faith of termination of a former union by divorce, when in fact no such decree had been granted, is likewise no defense. Opposed to these views is that of several courts which recognize as defense a mistaken belief in the existence of a divorce; or at least mitigate punishment of bigamy because of this" (Id. Sec. 2077).

The latter rule is the rule in the State of Louisiana (See: State v. Sparacino, 164 La. 704, 114 So. 601 - accused's Exhibit 5). The State of Maryland, however, does not follow such rule and the gravamen of the offense alleged is not continued bigamous cohabitation in Louisiana or any other State but the alleged act of contracting a bigamous marriage in the State of Maryland.

The law of the State of Louisiana except insofar as it determines the nature and effect of a decree of "separation from bed and board" is, therefore, immaterial and the law of the State of Maryland relative to bigamy is controlling. In the State of Louisiana by statute a decree of "separation from bed and board" is not a divorce and "does not dissolve the bond of matrimony, since the separated husband and wife are not at liberty to marry again" and under the circumstances alleged in the accused's petition he sought and was entitled to only the decree awarded which after the passage of one year without reconciliation and the successful prosecution of another suit, for a divorce, would permit him to remarry (Louisiana Civil Code, Dart, 1932, Art. 136, 139, 159 - McNeely v. McNeely, 47 La. Ann. 1321, 17 So. 928). The State of Maryland by statute defines the crime of bigamy as follows:

> "Whoever being married and not having obtained an annulment or a divorce a vinculo matrimonii of said marriage, the first husband or wife (as the case may be) being alive, shall marry any person, shall undergo a confinement in the penitentiary for a period not less than eighteen months nor more than nine years; * * *" (Annotated Code of Maryland, Flack, 1939, Vol. 1, Sec. 19 Art. 27).

When measured by the foregoing authorities the evidence for the prosecution, which is admitted by the accused, conclusively shows the guilt of the accused of the offense alleged because his first marriage was shown and likewise his second while his first wife was still alive and while in the meantime he had secured not a divorce a vinculo matrimonii from her but merely an interlocutory decree of "separation from bed and board". The defense wholly failed to meet the burden upon it to prove as a defense a divorce from the first wife and, since the act of bigamous marriage is the gravamen of the offense charged, the consummation of the second marriage in the State of Maryland violated the law of that State where an honest but erroneous belief, based upon reasonable grounds, that the first marriage had been dissolved by divorce is no defense whatsoever. Intent not constituting an element of the alleged offense and the second marriage occurring in the State of Maryland the accused's beliefs concerning the validity ond effect of the decree of "separation

from bed and board" are unimportant, even if honestly held, because the act constituting the offense was performed in a jurisdiction where the minority rule is not recognized and also because, even in jurisdictions recognizing such minority rule, the honest belief in the dissolution of the first marriage by legal divorce must be based upon reasonable grounds in order to constitute a defense to the offense alleged. The evidence fails to show that the accused's professed belief that he had a valid divorce from his first wife, assuming its honesty, was or possibly could have been based upon reasonable grounds. He, according to his own testimony, was originally of the belief that the action in Louisiana, when successfully completed, would not permit him to remarry within one year. His attorneys had advised him of several types of divorce and he does not testify that they ever advised him that the decree of 15 January 1943 was a judgment of divorce. The decree itself does not purport to be a divorce but merely, as his attorneys advised, a final judgment of "separation from bed and board" in an action brought by the accused, over his sworn signature, for such purpose only and not for a divorce. These facts at least would place a reasonable person upon inquiry concerning the validity and effect of the decree and, if such inquiry had been even slightly pursued, the accused would have ascertained that it was not a divorce and that he was not allowed to remarry upon the strength thereof. It cannot be said, therefore, that the accused's belief that the decree, which he had secured, was a judgment of divorce entitling him to remarry at will was based upon reasonable grounds even assuming his honesty therein (CM 118397 (1918) and CM 123267 (1918) Dig. Ops. JAG, 1912-40 Sec. 454 (18)).

The evidence conclusively shows a violation of the law of the State of Maryland by the performance by the accused of an act in that State constituting the crime of bigamy in such jurisdiction. The accused's act, therefore, constituted conduct prejudicial to good order and military discipline and was of a nature to bring discredit upon the military service (MCM, 1928, par. 152c, CM 138903 (1920) and CM 197574 (1931) Dig. Ops. 1912-40, JAG. Sec. 454 (1)). The evidence, consequently, shows beyond a reasonable doubt the accused's guilt of the alleged offense and amply supports the findings of guilty of the Specification and of a violation of Article of War 96.

7. The accused is about 30 years of age. The Army Register shows the service of accused as follows:

> "1 lt. A.U.S. 9 Sept. 40; accepted 11 Oct. 40; capt. A.U.S. 10 Oct. 41; accepted 17 Oct. 41; maj. A.U.S. 9 July 42. — Cadet M.A. 2 July 34; 2 lt. of Cav. 14 June 38; 1 lt. 14 June 41."

War Department records show that he was promoted to lieutenant colonel on 6 March 1943. During his service as an officer ten efficiency reports upon him have been rendered. Three reports, covering a period of about one and one-half years, show general ratings of superior; four reports, covering a period of about a year, show general ratings of excellent; two reports, covering a period of about ten and one-half months, show general ratings of very satisfactory; and one report, covering a period of about three months, shows a general rating of satisfactory. The efficiency reports contain remarks attesting to his loyalty, capability, conscientiousness and fine character. He was given disciplinary punishment under Article of War 104 in April 1941 for striking a fellow officer, and was reprimanded in October 1942 for unbecoming conduct.

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, as found by the court, and its Specification and the sentence, and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 96.

Abner E. Lifscomb, Judge Advocate

(On Leave), Judge Advocate

Gabriel H. Golden, Judge Advocate

SPJGN
CM 245510

1st Ind.

War Department, J.A.G.O., 5 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 John J. Carusone (O-21295), Cavalry, Center Vehicle Department.

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. The reviewing authority after approving the record of trial added the following statement:

> "The record of trial presents the case of an officer who entered into a second marriage believing in good faith that a prior marriage had been dissolved by divorce, when in fact a decree of separation from bed and board had been entered in the civil proceedings for divorce. Accused, a graduate of the United States Military Academy, is an outstanding officer, as disclosed by the record of trial, and it is believed his services have a high value to the Government. It is recommended the sentence be commuted to a reduction in accused's permanent rank fifty files, and the forfeiture of $50.00 of pay per month for six months."

I concur in the recommendation of the reviewing authority to the extent that I think clemency should be extended to the accused. I am of the opinion, however, that the primary purpose of clemency in this case should be to afford the accused an opportunity to rectify his marital error. Furthermore, I am of the opinion that the imposition of a fine and reduction on the permanent promotion list is an inappropriate punishment. I recommend, therefore, that the sentence be confirmed but that the forfeitures be remitted, and that the sentence as thus modified be suspended during the pleasure of the President.

3. Consideration has been given to the attached letter from Honorable Clare Boothe Luce, House of Representatives, Washington, D.C.,

addressed to The Judge Advocate General under date of 30 November 1943, with fourteen inclosures.

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

Myron C. Cramer

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

4 Incls.
Incl 1 - Record of trial.
Incl 2 - Dft. of ltr. for sig. Sec. of War.
Incl 3 - Form of Executive action.
Incl 4 - Ltr. from Honorable Clare Boothe Luce.

(Sentence confirmed but forfeitures remitted. Execution suspended. G.C.M.O. 97, 10 Mar 1944)

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

SPJGK
CM 245561

4 JAN 1944

UNITED STATES v. First Lieutenant ANDREW J. HMEL (O-559931), Air Corps.	ARMY AIR FORCES SACRAMENTO AIR SERVICE COMMAND Trial by G.C.M., convened at McClellan Field, California, 15, 16, 17, 18 November 1943. Dismissal and total forfeitures.

OPINION of the BOARD OF REVIEW
TAPPY, 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 94th Article of War.

Specification 1: In that First Lieutenant Andrew J. Hmel, Headquarters and Headquarters Squadron, Sacramento Air Service Command, then of Detachment Headquarters and Headquarters Squadron, SASC, AAF Fresno Basic Training Center, Fresno, California, did, at AAF Fresno Basic Training Center, Fresno, California, on or about 31 August 1943 present for approval and payment a claim against the United States by presenting to Major Paul H. Woods, F.D., Finance Officer at the AAF Fresno Basic Training Center, Fresno, California, an officer of the United States, duly authorized to approve and pay such claims, in the amount of $168, for rental allowance from 1 June 1943 to 31 July 1943, and from 1 August to 24 August 1943, which claim was false and fraudulent in that the said First Lieutenant Andrew J. Hmel had been assigned adequate quarters at his permanent station, McClellan Field, California, from 1 June 1943 to 24 August 1943, and was then known by the said First Lieutenant Andrew J. Hmel to be false and fraudulent.

Specification 2: (Finding of not guilty).

Specification 3: (Finding of not guilty).

Specification 4: (Finding of not guilty by direction of the court at the conclusion of the prosecution's evidence).

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

Specification: (Finding of not guilty).

He pleaded not guilty to the Charges and Specifications. He was found guilty of Charge I and Specification 1 of Charge I, and not guilty of Specifications 2,3, and 4 of Charge I and of the Specification of the Charge and of Charge II. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Summary of material and relevant evidence.

Accused was charged with presenting for approval and payment a false and fraudulent claim against the Government when he knew such claim to be false. The amount of the claim was for $168, for rental allowances to which it is claimed he was not entitled. The facts are as follows:

Accused served as Assistant Acting Adjutant General at Headquarters, Sacramento Air Service Command, McClellan Field, California, from approximately 10 February 1943, until approximately 23 August 1943 (R.19,33,58, 76,79). Among his duties as such an officer were those of supervision of the Miscellaneous Branch of the Adjutant General's Office (R.58,81). The Orders Unit was a part of the Miscellaneous Branch of that office (R.81); accused was the assistant to Major (then Captain) Robert D. Harris, Air Corps, Acting Adjutant General at the field, and was charged with supervision of the Orders Unit (R.86) and with the assignment of all officers' quarters at the post (R.58,76,91,93).

Major Harris testified that prior to the early part of May 1943, a single officer was permitted to live off the Post at McClellan Field, and still draw his quarters allowances. This policy was changed some time in May and the new policy was reflected in Bulletin No. 30-2, Sacramento Air Depot Control Area Command, 21 May 1943 (R.38,80,91; Pros. Ex. 10).

This bulletin announced that the payments of quarters allowances to officers of the command without dependents had expired on 30 April. Allowances were to be paid to include 31 May 1943, to such officers if they were not assigned or occupying Government quarters as of this date and were maintaining and occupying quarters off the post at their own expense. Effective 1 June 1943, all officers without dependents were to be assigned Government

quarters, and though they would not be required to occupy such quarters, quarters allowances would not be paid in cases where officers maintained and occupied quarters off the post at their own expense (Pros. Ex. 10).

This bulletin was issued over the signature of Major (then Captain) Harris, Acting Adjutant General of the post, and accused's immediate superior.

Accused was assigned quarters at that station (R.78,90). The assignment was made, revoked, and remade, in the following manner. By paragraph 10, Special Orders Number 105, dated 21 May 1943, a previous verbal order of the commanding general assigning quarters to accused, effective 1 May, was confirmed and made of record (Pros. Ex. 5; R. 78,90). Then, on 25 May 1943, by paragraph 6, Special Orders Number 109, accused's name was deleted from the list of names in paragraph 10 of the order previously mentioned (Pros. Ex. 6; R. 90).

By paragraph 7, Special Orders Number 109, accused's name was added to a list of officers in paragraph 7 of Special Orders Number 105, 21 May, 1943, to whom bachelor officers' quarters at McClellan Field were being assigned effective 1 June, instead of 1 May, as in paragraph 10 of the same order (Pros. Ex. 4,6; R.90).

Major Harris explained that the reason for the revocation and reassignment was because some of the officers who had lived off post had made previous commitments with respect to such quarters. This extra month was given to avoid financial hardship. Accused was in charge of the orders unit of the Adjutant General's office, and revoked his own orders. He later told Major Harris that he had been living off the post during the month of May, and was therefore entitled to be on the list of officers whose assignments were effective 1 June 1943 (R.91).

First Lieutenant John J. Niemyski, Air Corps, 495th Air Base Squadron, McClellan Field, California, testified that he was the officer in charge of the Officers' Club and mess at McClellan Field, He was responsible for and was the custodian of all records kept on the bachelor officers' quarters at the field. Testifying from what the records reflected, he said that accused was quartered at the bachelor officers' quarters from 19 February 1943 to 15 July 1943. Witness could not testify of his own knowledge that accused actually did occupy the room (R.122,123,124). But he did testify that unless an officer went to the steward's office and made an application for a room he was not assigned to one (R.123).

On 21 August 1943, accused was ordered to temporary duty with Headquarters and Headquarters Squadron, Basic Training Center Number 8, Army Air Forces Technical Training Command, Fresno, California, on or about 23 August 1943. A three-day delay en route was authorized. The transfer

was ordered by paragraph 21, Special Orders Number 194, over the signature of Captain Harris (R.16,40,51,88; Pros. Exs. 3,7).

The record does not show the date of accused's arrival at Fresno, but he must have arrived there about 26 or 27 August, after his three days' delay en route. Prosecution's Exhibit "1" indicates that he left McClellan Field 24 August and arrived 27 August. Upon arrival, he was assigned as assistant to Major Paul M. Kegan, Post Adjutant (Deposition of Major Kegan, 1). After his arrival, accused reported to Sergeant William C. Henning, Finance Department, who was the enlisted man in charge of the Officers' Pay Section at Fresno (R.28).

Sergeant Henning testified that he informed accused that it was necessary for each officer to prepare his own Pay and Allowances Voucher. He informed accused that quarters were not furnished at the field, and that officers therefore had a portion of their monthly quarters allowance coming to them (R.28). Witness was presumably referring to that portion of August not yet expired. Witness asked accused if he had any quarters allowance due him (R.28).

Accused answered that he did. Witness asked accused if accused would like to have help in filling out this voucher. Accused answered, "No, I am able to do that myself". Witness handed accused the blank vouchers (R.28).

Shortly thereafter, on the same day, accused brought them back, completed and signed (R.28,30,33). Sergeant Henning went over the computations with accused and found them to be one cent in error with respect to the base and longevity pay (R.28,29,31). By reference to a Pay and Allowance Chart they determined the proper amount, and witness, with accused's knowledge, erased the last digits in the necessary places and made corrections (R.31). Prosecution's Exhibit 1 is a photostatic copy of the voucher signed and submitted by accused and corrected by witness (R.30).

By this voucher accused claimed $182.22 for base and longevity pay from 1 August 1943 to 31 August 1943, and $21.70 subsistence allowance for the same period; he claimed rental allowance of $120 from 1 June 1943 to 31 July 1943, and separately from this particular itemization, rental allowance of $52 from 1 August 1943 to 26 August 1943 (Pros. Ex. 10; R. 12,13).

The figure $120 placed in Item 7 of the voucher under "Credits" was in the voucher at the time witness went over the figures with accused, and witness testified that there was no question in his mind regarding it (R.29). Vouchers are never changed after payment by the post finance office, for immediately after payment they are sent to the General Accounting Office. This voucher was paid to accused in the amount of $375.92, which is the amount called for (R.34; Pros. Ex. 1). Witness stated that

he particularly remembered the circumstances surrounding the completion, presentation and payment of this voucher because it was the first one which had been brought to him filled out as to figures. Up to that time the office had always made out the vouchers of all officers at the field (R.34,35). Major Paul H. Woods, Finance Department, the Post Finance Officer at Fresno, testified that when control of the station passed from Technical Training Command to the Air Service Command the practice of preparing vouchers by the clerks for signature by the officers ceased except for officers assigned to Base Headquarters Squadron and the Medical Department (R.21,22). Accused reported as a new officer at the post, and it was the first Pay and Allowance Voucher on which he was ever paid there. Accused did not deliver a transcript of pay account nor a pay data card, neither being required. A check was issued to accused on the basis of the Pay and Allowance Voucher, dated 31 August 1943, in the amount of $375.92 (R.11,12,13,22,26,27; Pros. Ex. 1).

Accused submitted to Sergeant Henning and Major Woods, with the Pay and Allowances Voucher, a statement of service necessary to support the original Pay and Allowance Voucher submitted by an officer at a new station, and an extract of paragraph 21 of Special Order 194, Headquarters Sacramento Air Service Command, McClellan Field (R.10,11; Pros. Ex. 1).

Major Kegan, Post Adjutant at Fresno, whose assistant accused became upon arrival at that station, testified that he signed the certificate on the voucher stating that during the period for which rental allowance was claimed on the voucher, accused was not assigned adequate quarters at his permanent station (Pros. Ex. 1; Deposition of Major Kegan, 1).

Accused submitted this voucher approximately a week after accused got to Fresno. At the time accused submitted the voucher witness asked him whether or not there were quarters for bachelor officers at McClellan Field or whether accused lived in town (Deposition of Major Kegan, 2,3).

Accused replied that there were no quarters for single officers at McClellan Field, and that he had lived in the City of Sacramento (Deposition 2).

Witness asked accused why he had not claimed rental allowance from 1 June 1943 on previous vouchers. Accused replied that he did not need the money before and therefore had not claimed it, but that he needed the money now and was claiming the rental allowance due him which he had not previously collected (Deposition 2).

Major Kegan also testified that accused presented to him a Certificate of Non-Assignment of Quarters while assigned to McClellan Field, and that it was made a part of accused's Pay and Allowance Account for the month of August, clipped to the voucher, and forwarded (Deposition 2). This certificate was not introduced by prosecution in evidence. Item 17 of the

voucher, however, constitutes such a certification and is signed by the witness, while a similar certificate on the reverse side of the voucher is made part thereof by a typewritten insert between Items 14 and 15 on the face (Pros. Ex. 1).

Witness stated that he was familiar with accused's signature, and that it was on the voucher at the time the voucher was presented to witness for approval (Deposition 3).

First Lieutenant James H. Hightower, Finance Department, testified that he was the Assistant Finance Officer at McClellan Field on 21 August 1943. He further testified that under Army Regulation 35-3420, dated 10 March 1943, an officer with or without dependents who is stationed at a permanent station is not entitled to a rental allowance if he is furnished quarters at that permanent station, unless a competent superior authority declares those quarters inadequate. The commanding officer declared the bachelor officers' quarters at McClellan Field adequate as of May 1943, and this order was authenticated by the Adjutant (R.101,103).

Accused's temporary duty at Fresno was made a permanent assignment by paragraph 8, Special Order Number 207, dated 3 September 1943 (R.38; Pros. Ex. 8). This was issued from McClellan Field, which headquarters assumed command of Fresno about 1 September 1943 (R.88,92,96). Then, by paragraph 5, Special Order Number 220, dated 16 September 1943, he was transferred back to McClellan Field (R.38; Pros. Ex. 9). He took over his old duties at McClellan Field upon arrival there (R.94,95).

Evidence for accused:

After being properly informed concerning his rights, accused made an unsworn statement. Concerning the Specification charging him with presenting a false claim, he admitted that he did collect rental allowances for the period of 1 June 1943 to 24 August 1943. He further claimed that he was rightfully entitled to the money he drew; that he was married 18 May 1943 at Reno, Nevada, that he also had drawn his money for the month of May, and that he kept his marriage secret for purely personal reasons (R.150).

He stated also that the marriage was performed by a justice of the peace; that he assumed that all the legal papers in connection with that marriage were prepared by the justice of the peace and that all laws were complied with prior to and subsequent to the date of this marriage. He did not know the Justice personally and could only presume that he was fully qualified to perform the marriage (R.155).

The court thereupon directed the prosecution to have a search made

of the records in Reno, Nevada, concerning accused's statements that he was married (R.153).

Evidence in rebuttal:

The prosecution thereupon called First Lieutenant Loren A. Furtado, Finance Department, in rebuttal. Lieutenant Furtado testified that he was attached to the Finance Section, 495th Base Headquarters and Air Base Squadron, McClellan Field (R.155). He testified further that accused did not claim any rental allowance on his vouchers for the months of September and October 1943; that on each voucher, at Item Number 3, entitled "Dependents: (3) Lawful wife," the word "none" was entered (R.156,157; Pros. Exs. 16,17). He also testified that though it is customary for an officer to claim such allowances for rental and subsistence each month, he is not required to do so and may collect them in subsequent months (R.158).

The prosecution also introduced Stipulations "B" and "C" into the record (R.155). By Stipulation "B" it was agreed between prosecution, accused, and counsel for accused that if present in court one Harry Dunseath would testify under oath that he was the duly elected, qualified and acting Justice of the Peace in and for the Township of Reno, Washoe County, Nevada; that there are no other justices of the peace for that county; that a search of his records for the years 1942 and 1943 fails to reveal the performance by him of a marriage ceremony for Andrew J. Hmel; that he has no independent recollection of having performed a ceremony for Andrew J. Hmel, that he does not issue licenses for marriage and does not perform a marriage ceremony unless presented with a license.

By Stipulation "C", it was agreed between prosecution, accused and counsel for accused that if present in court a Mr. Taylor would testify under oath that he is the duly appointed Chief Deputy Recorder of Washoe County, Nevada, and that an examination of the records of his office fails to reveal the issuance or recording of a marriage license for an Andrew J. Hmel during the month of May 1943.

The defense offered no other evidence on this Specification.

4. Recapitulating briefly, the facts as found in the record of trial are as follows: Accused was a bachelor lieutenant in the Air Corps, stationed at McClellan Field, California, from 10 February 1943 to 24 August 1943. He was the Assistant Acting Adjutant General at this post, and as such was in charge of the Miscellaneous Branch, which in turn comprised the Orders Unit. He was also charged with the assignment of officers' quarters.

Until early May of 1943 a single officer was permitted to live off the post at McClellan Field, but still draw quarters allowances. A

bulletin announcing a change in this policy was published 21 May 1943 by the Orders Unit of accused's office. Bachelor quarters on the post were assigned to him and other single officers on that date, effective 1 May 1943. Four days later accused revoked this order and included his name in a list of officers assigned quarters effective 1 June 1943. Evidence is in the record that a specific assignment of quarters to accused was in effect from 19 February 1943 until 15 July 1943, and there is no evidence showing any revocation of the general assignment to him of bachelor quarters between 1 June 1943 and 24 August 1943.

On the latter date accused was transferred to Fresno, California, for temporary duty. Shortly after his arrival there, he filled out, signed and presented a Pay and Allowance Voucher for the month of August 1943. In it he claimed pay and subsistence for the month of August, as to both of which there is no controversy. He also claimed $60 per month for rental allowance for the months of June and July 1943, and $52 for the period of 1 August 1943 through 26 August 1943. During all this time the assignment of bachelor quarters at McClellan Field was in effect. When the certifying officer at Fresno questioned him concerning the availability of quarters at his previous station, accused replied that there were no such quarters and that he had lived in Sacramento.

Later accused returned to McClellan Field, and presented Pay and Allowance Vouchers there for the months of September and October 1943. He did not claim rental allowances on these vouchers. In an unsworn statement accused claimed that he had been married at Reno, Nevada, on 18 May 1943, before a justice of the peace. He said that he kept his marriage secret for personal reasons. A search of the records in Reno discloses that no marriage license was issued to accused in the month of May and the only justice of the peace for the county testified by deposition that he did not perform any ceremony for accused.

5. The record shows accused to have been guilty of making and presenting this false claim, beyond any reasonable doubt, His duties at McClellan Field were such that he must have known of all the orders and bulletins concerning the assignment of quarters to bachelor officers, for he was in charge of the unit in his office which published those orders. There is in the record uncontradicted evidence that accused was assigned specific quarters at McClellan Field from 19 February 1943 to 15 July 1943, and similar evidence of a general assignment to him and other bachelor officers of quarters which was still in effect at the time of his transfer to Fresno. There is evidence that these quarters were adequate.

There is also evidence that when asked at Fresno, where he presented this claim, he told an unqualified falsehood about the availability of quarters at McClellan and also about assignment of such quarters to him.

His claim in his unsworn statement that he was married is obviously a despairing effort to escape the consequences of his act by exempting himself from the application of the rule on bachelor officers and the assignment to him of quarters. The court's finding of guilty shows clearly that the court did not believe this part of his statement. In view of the evidence that accused made no claim for quarters allowance on the only two vouchers he filed subsequent to the one for which he was tried, and the fact that no actual evidence of his marriage was produced, the court was fully warranted in rejecting accused's claim.

The evidence clearly shows that accused filed a claim which he knew to be false, or which any man in the exercise of reasonable care must have known to be of a fictitious and dishonest character (MCM 1928, par. 150a, 150b; CM 241206, Russell; Winthrop, Military Law and Precedents, 2nd Ed., rev., p. 701).

6. There is a variance in the Specification upon which accused was found guilty, in that he is charged with presenting a false and fraudulent claim in the amount of $168, when the proof shows his claim actually to have been presented and paid in the amount of $172. If this error favored anyone, it favored accused. The dates and circumstances were proved with sufficient clarity to apprise accused and his counsel of the charge against him and there was no prejudice or material error.

7. War Department records show that accused is 25-7/12 years of age. He graduated from Gallitzin, Pennsylvania, High School, in 1936; enlisted in the United States Army on 5 August 1937 in the Air Corps and served, after reenlisting immediately upon the expiration of that enlistment, until 14 May 1942. His highest rank was technical sergeant. He was discharged to accept appointment as a warrant officer, junior grade, on 15 May 1942, serving in this grade until 23 June 1942, upon which date he graduated from the Officer Candidate School, Army Air Forces Technical Training Command, Miami Beach, Florida. He served as a second lieutenant until 14 June 1943 when he was promoted to first lieutenant. Upon the expiration of his first enlistment he was discharged with character, excellent. In recommending accused's appointment as a warrant officer, junior grade, Major Ellis A. Manship, Air Corps, his commanding officer, stated that accused was of excellent character and superior ability, and in recommending accused for promotion from second to first lieutenant, Brigadier General Edwin S. Perrin, his commanding officer, stated that he had discharged his duties in a superior manner.

8. 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 of guilty and the sentence and to warrant confirmation thereof. Dismissal is authorized under Article of War 94.

Thomas M. Tappy, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

(On Leave), Judge Advocate.

1st Ind.

War Department, J.A.G.O., 17 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 First Lieutenant Andrew J. Hmel (O-559931), 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.

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

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

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

(Sentence confirmed. G.C.M.O. 104, 10 Mar 1944)

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

SPJGQ
CM 245568

31 DEC 1943

UNITED STATES	)	86TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Camp Howze, Texas, 12 November 1943. To be shot to death with musketry.
Private KENNETH J. CLANCY (33410844), Company F, 343rd Infantry.	)	

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

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

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

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

Specification 1: In that Private Kenneth J. Clancy, Company "F", 343rd Infantry, then Private, attached Company "F", 343rd Infantry, did at Camp Howze, Texas, on or about September 15, 1943, desert the service of the United States and did remain absent in desertion until he was apprehended at Ardmore, Oklahoma, on or about September 20, 1943.

Specification 2: In that Private Kenneth J. Clancy, Company "F", 343rd Infantry, then Private, attached Company "F", 343rd Infantry, did at Camp Howze, Texas, on or about September 20, 1943, desert the service of the United States and did remain absent in desertion until he surrendered himself at Camp Howze, Texas, on or about October 5, 1943.

CHARGE II: Violation of the 65th Article of War.

Specification: In that Private Kenneth J. Clancy, Company "F", 343rd Infantry, then Private, attached Company "F", 343rd Infantry, having received a lawful order from Staff Sergeant William A. Krum, 1070th Guard Squadron, Headquarters Army Air Base, Ardmore, Oklahoma, a non commissioned officer who was then in the execution of his office, to report to the Commanding Officer of Company "F", 343rd Infantry, Camp Howze, Texas, did at Ardmore, Oklahoma, on or about September 20, 1943, willfully disobey the same.

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

Specification: In that Private Kenneth J. Clancy, Company "F", 343rd Infantry, then Private, attached Company "F", 343rd Infantry, did, on or about September 20, 1943, at Ardmore, Oklahoma, wrongfully and against the good conduct of military discipline knowingly have in his possession a forged pass.

He pleaded not guilty to and was found guilty of all Charges and Specifications. Evidence of one prior conviction for absence without leave from 19 March 1943 to 29 March 1943 (violation of Article of War 61) and for willfully losing clothing and equipment valued at $32.76 (violation of Article of War 84) was introduced at the trial. He was sentenced to be shot to death with musketry. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

Accused was a member of Company F, 343rd Infantry, since some time in February, 1943 (R. 11).

On 28 August 1943 a written directive (Ex. 4) was issued by Headquarters, 86th Infantry Division, to the commanding officers of the three infantry regiments of the division concerning the transfer of 500 enlisted men, from said regiment, to shipment. No. R.M.-911-A. This directive stated that the men so transferred would be available "10 September 1943 on call of Port Commander for transfer to a tropical climate" (R. 22, 23).

Accused was placed on the list of men transferred to this shipment under date of 9 September 1943 on the company morning report of 10 September 1943 (R. 8; Ex. 1). Movement orders were issued on 10 September 1943 by Headquarters, 86th Infantry Division, directing that the men comprising the shipment proceed on or about 22 September 1943 from Camp Howze, Texas to Camp Stoneman, Pittsburgh, California, so as to arrive there not later than 25 September 1943 for trans-shipment to tropical service (R. 23; Ex. 5). A transfer list showing accused transferred to shipment, No. R.M.-911-A, was issued under date of 9 September 1943 by

Headquarters, 86th Infantry Division (R. 24; Ex. 6). Upon learning of the pending shipment of transferred men First Lieutenant Henry I. Bernard, Jr., commanding officer of Company F, 343rd Infantry, read the order regarding overseas shipment at a non-commissioned officers' meeting and later read it to the company. Some time subsequent thereto and prior to 10 September 1943 he called together the men affected by the transfer order to inform them of their status, to give them words of advice and express his farewell (R. 25, 26). Accused was present in this group at the time (R. 29, 30). Lieutenant Bernard stated, without specifying when, that he personally informed accused that he was going overseas (R. 10, 11).

At the conclusion of the Company Commander's talk the first sergeant reported all present and then marched the group to the Regimental Recreational Hall, about 1/5 of a mile away, for instructions from First Lieutenant Earl Palmer, the regimental personnel officer. Accused was present with this group when they left the company area (R. 26, 27). Lieutenant Palmer testified that, upon assembling in the Regimental Recreational Hall, he read "Article of War 28", and "Section VIII, A.R. 380-5", explained to them that they were alerted for overseas shipment and stated "that any man going AWOL after he had been alerted for overseas movement although it was only for an hour would be tried for desertion". (R. 12, 13). Lieutenant Palmer fixed the date of this occasion as 7 September 1943. He assumed that all men on the transfer list were present because the non commissioned officer in charge of them reported all present (R. 12, 14). On 15 September 1943 accused was absent without leave from his organization (R. 7-9; Ex. 1) and remained in this status until he was apprehended by the police of Ardmore, Oklahoma, about 40 miles from Camp Howze, Texas on Sunday night, 19-20 September 1943 at 0130. He was turned over to Corporal Fred Faraone, 1070th Guard Squadron who was then in charge of the military police headquarters in Ardmore. On demand accused produced a pass, purportedly signed by Lieutenant Bernard, his company commander, which, on its face, authorized him to be absent from 1200, 18 September 1943 to 2300 19 September 1943 (R. 15-17; 21). Lieutenant Bernard testified that accused had no pass nor permission from him to be absent from his organization at the time indicated on the purported pass; that the signature thereon was misspelled, was not his signature and that he was the only person authorized to issue passes since sometime in the month of August 1943 (R. 9-11).

On the morning of 20 September 1943 Staff Sergeant William A. Krum, of the 1070th Guard Squadron, at 0915, told accused that he was "being released" and gave him a direct order to return to his commanding officer immediately, warning him of the seriousness of his offense should he fail to obey. At the time Sergeant Krum was Desk Sergeant at military police headquarters and authorized to sign the name of the Provost Marshal upon written orders directing enlisted men to return to their organizations. Such an order was given by him to accused at the time the verbal order was given (R. 18-20; Ex. 3).

About 15 minutes after accused had left military police headquarters under this order, Sergeant Krum saw him in a restaurant in

Ardmore, in the vicinity of the bus station. According to the bus schedule accused, in compliance with the order given to him, could have returned to Camp Howze within six hours after receiving it. The sergeant again explained the seriousness of the situation to accused - whereupon accused left the restaurant immediately (R. 20, 21). Accused did not return to Camp Howze, Texas until 5 October 1943 - 15 days later(Ex. 1). It was not shown in what manner the absence was terminated.

4. The rights of accused were explained to him and he elected to remain silent.

5. It is apparent upon reading the record that, in proving the desertions alleged, the prosecution proceeded upon the theory that accused absented himself from his organization, without leave, with intent to avoid hazardous duty, or to shirk important service. Since the Specifications of Charge I make no allegation of any intent the real legal issue in this case is whether the findings of guilty upon Charge I and its Specifications can be sustained.

The Specifications charge that accused, on two different occasions, "did * * * desert the service * * * and did remain absent in desertion * * * " until he "was apprehended" (Specification 1) and until "he surrendered" (Specification 2).

Both Specifications follow, with exactness, the model specification found on page 238 in the Manual for Courts-Martial, 1928, which is the form customarily used to allege a desertion.

An inspection of said model specification shows that it is recommended for use in charging a violation of Article of War 58. This is also true of model specification number 13 appearing on page 240 of the same manual. Article of War 58 provides: "Any person subject to military law who deserts or attempts to desert the service of the United States shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct * * * " (underscoring supplied).

Article of War 58, which is punitive in its nature, affords no specific definition of the offense of desertion. Article of War 28, however, in defining certain acts which shall constitute desertion, provides:

> "Any officer who, having tendered his resignation and prior to due notice of the acceptance of the same, quits his post or proper duties without leave and with intent to absent himself permanently therefrom shall be deemed a deserter.
>
> "Any soldier who, without having first received a regular discharge, again enlists in the Army or in the militia when in the service of the United States, or in the Navy or Marine Corps of the United States, or in any foreign army, shall be deemed to have

deserted the service of the United States; and where the enlistment is in one of the forces of the United States mentioned above, to have fraudulently enlisted therein.

"Any person subject to military law who quits his organization or place of duty with the intent to avoid hazardous duty or to shirk important service shall be deemed a deserter."

In paragraph 130, Manual for Courts-Martial, 1928, desertion is defined as "absence without leave accompanied by the intent not to return, or to avoid hazardous duty or to shirk important service."

Thus, it will be observed that the Article of War and the provision of the Manual define five types of desertion, and in each case, except that of a soldier again enlisting before discharge, a specific intent is an essential element of the offense as defined.

Although the Manual provides that "any intent expressly made an essential element of the offense by the Articles of War should be alleged" (par. 29, MCM, 1928), this is directive only and not mandatory. A charge of desertion based solely upon an absence without leave with intent not to return, requires no express allegation of the intent, because this type of the offense is nowhere specifically defined in any Article of War. With respect to the four other types of desertion, the intent, when an essential element of the offense, may be alleged, and, as a matter of precise pleading should be set forth in the specification, but if not, the omission is not a fatal error.

In neither of the recommended specifications above mentioned is there any allegation of a specific intent and consequently there is no way in which a person so accused could determine, from an examination of the phraseology of the specification alone, which type of desertion is charged against him; nor can the specification be aided by the concluding portion "and did remain absent in desertion until he was apprehended (or 'surrendered')" at the time designated; for, as was said in CM 224765, Butler this matter "is merely evidentiary in nature and descriptive of the period of time in which the accused remained absent * * * . This latter clause might also be considered as surplusage except for the cautious and desirable practice of always alleging in every desertion specification the dates between which an accused is charged with being absent in desertion. Thus, if the prosecution fails to establish the specific intent of desertion * * * the basis for a finding of the lesser included offense of absence without leave has been alleged."

In model specification No. 14, suggested as appropriate for charging "desertion in execution of a conspiracy", the allegation of specific intent "to avoid hazardous duty" or "to shirk important service", is parenthetically indicated. The same is true as to model specification No. 15, recommended for use in charging an "attempt to desert", wherein the allegation of a specific intent to "permanently absent himself without proper leave from his post and proper duties" or "to (quit) (absent

himself without proper leave from) his (organization) (place of duty) to (avoid hazardous duty * * *) (shirk important service * * *)" is indicated.

Accordingly, if deemed desirable, or necessary, a specific intent may be and often is alleged. But, as was also stated in CM 224765 Butler, supra, "it is accordingly clear that the word 'desert' is a broad, inclusive term and when used in a specification is susceptible of attributing to the accused any one of the three intents of mind described above. When, therefore the word 'desert' in a specification is modified * * * by the phrase '* * * in order to avoid hazardous duty' its meaning is narrowed and the justiceable issues of the specification are accordingly restricted. Furthermore, when a specification alleges desertion with an intent to avoid hazardous duty, the proof must show such an intent. If the proof shows no such intent, but rather an intent not to return to the service, there is a fatal variance between the allegata and the probata and a finding of guilty of desertion based on such proof cannot be approved." (underscoring supplied) (See also CM 231163, Sinclair.)

The situation presented by the instant case is the converse of that presented in the Butler case. Desertion may properly be charged without an allegation of a specific intent; but when alleged, the specific intent must be proved. If the accused, who ordinarily will have been present, with his counsel, during the investigation of the charge against him, and should therefore be fully aware of the nature of the offense with which he is charged, finds any cause to complain because of the vagueness or insufficiency of the specification, he is afforded a legal remedy by his right to plead in abatement in which case, if the court sustains his plea, it may permit the specification to be amended so as to obviate the objection. Under the circumstances, an application of the defense for a reasonable continuance would be granted unless it is obvious that a denial of the application will not affect the substantial rights of the accused (par. 66, MCM, 1928).

There was no such plea tendered in this case, nor any other objection made to vagueness, indefiniteness or insufficiency of the specifications. It is to be presumed that accused and his counsel were fully aware of the nature of the offenses with which accused stood charged. It cannot now be said that any substantial right of accused has been violated by failure to inform him with more particularity of the facts and circumstances surrounding the desertions alleged.

The record discloses that in the first instance accused did absent himself without leave from his organization at Camp Howze, Texas, and remained so absent until he was apprehended five days later at Ardmore, Oklahoma, by civil authorities who surrendered him to military control at that time.

Thereupon, the sergeant in charge of Military Police Headquarters in Ardmore gave accused direct orders, both written and verbal, to return immediately to his organization. Accused disobeyed the orders and the competent entries on the morning report of his organization at

Camp Howze, Texas, show that he was absent without leave from 16 September to 5 October 1943, on which latter date he was confined in the regimental guardhouse. There is no evidence of how the absence alleged in Specification 2 was terminated.

In this case accused's absence in the first unauthorized leave was but five days and at the time of his apprehension, accused was only 40 miles from his home station. He was apprehended not for being absent without leave, but for the minor infraction of violating the curfew restrictions. There is no evidence of his having worn civilian clothes during the period or that he did or said anything to indicate an intention not to return to the service. However, after being apprehended he was ordered to return immediately to his home station. This order he failed to obey and thereafter again went absent without leave for 15 additional days. The record is silent as to where he was or what he said or did during the interim.

He was, in fact, present at Camp Howze, Texas, on 5 October 1943 though in the guardhouse and since it is not shown by the record how his absence without leave on this occasion was terminated, it is to be presumed that he surrendered (Dig. Op. JAG, 1912-40, sec. 416 (7)). Such facts negative the intent not to return and strengthen the inference not only that he intended to, but did, return and voluntarily surrendered himself to military control. The record of trial is therefore legally insufficient to support the findings as to the Specifications of Charge I on the theory of absence without leave with intent not to return.

But, the evidence of record establishes that on 9 September 1943 following receipt of a memorandum of Headquarters, 86th Infantry Division making a call for 500 enlisted men for shipment to a "tropical climate", accused's name appeared upon a "transfer list" published by the same headquarters and by virtue of which the enlisted men so named were transferred from their respective organizations to a Shipment Number "pending receipt of movement orders". On 20 September 1943 a movement order was issued by the division headquarters directing the men thus transferred to proceed on or about 22 September 1943 from Camp Howze, Texas to Camp Stoneman, California and an A.P.O. number was designated for the unit.

It is apparent from these significant proceedings that the men so designated were destined for foreign service and that this fact was so understood by the officers responsible for the movements of the men. The movement order was read in non commissioned officers meeting and then to the entire company of which accused was a member. In addition thereto, the commanding officer of accused's company assembled the men who constituted the shipment and told them they were, in all probability, going overseas and bade them farewell. Thereafter, the personnel officer of the 343rd Infantry, personally advised the group that they were alerted for overseas shipment and read to them Article of War 28 and section VIII, A.R. 38-5, explaining to them the seriousness of absence without leave while they were in this status.

While there is no direct evidence that accused was actually present when the commanding officer read the movement order to the company or when the personnel officer instructed the group comprising the shipment order, he was present when Lieutenant Bernard assembled the men, told them of the probability of their going overseas and bade them farewell. He was also present when the group thereupon marched off to the Recreational Hall a short distance away for instructions from Lieutenant Palmer. In the absence of some credible explanation of his failure to be present at the instructional period which followed and in which it was accused's duty to participate, accused cannot complain of the presumption of fact that he was present. Consequently, in the light of all the evidence, the conclusion is inescapable that accused was fully aware of his status, knew the risks of the important service upon which he was about to embark and of the potential danger of trial for desertion if he absented himself pending his known departure for foreign duty.

Under these circumstances, when accused left his duty station and remained away without leave, it may properly be inferred, in the absence of a plausible explanation, that he did so with the intent to shirk important service. Had accused promptly returned to his organization at Camp Howze, Texas when he was apprehended in Ardmore, Oklahoma for a violation of curfew regulations, the finding of guilty as to Specification 1 of Charge I could hardly be sustained, for, Ardmore is only 40 miles from Camp Howze, and the movement order did not require the men to leave for Camp Stoneman, California, until on or about 22 September 1943. But when, after being ordered to return to his station after being returned to military control by his arrest, he deliberately disappeared for a further 15 day period of unauthorized absence, the inference of his intent to avoid foreign service during both periods of his unauthorized absence is justified. Inasmuch as the record does not show the manner of his return to military control, accused is favored with the presumption that he surrendered when he next appeared at Camp Howze, two weeks after his comrades had left for the staging area; but whether he was apprehended or surrendered would not affect his guilt under the Specification and the proof. The record is legally sufficient to support the findings as to Charge I and its Specifications.

Little need be said about the remaining Charges and their Specifications. In the Specification of Charge II it is alleged that accused willfully disobeyed an order of a non commissioned officer. There is no doubt that a direct order was given to accused by a non commissioned officer in the performance of his duty and that accused disobeyed. That such disobedience was willful under the circumstances is equally clear. It has been held by The Judge Advocate General that where a superior officer issued a formal written order to another officer to return "immediately" to his proper station and duty, which order was ignored, the officer failing to report to his station until seven days later, such conduct, wholly unexplained, showed an intentional and deliberate defiance of authority and sustained a finding of guilty of a violation of Article of War 64 (CM 218579, Lowrance).

Article of War 65 has the same general objects with respect to non commissioned officers as Article of War 64 has with respect to commissioned officers, namely, among other things, to insure obedience to their lawful orders. The terms "willfully disobeys", "lawful", and "in the execution of his office" are used in the same sense as in Article of War 64; and the term "order" is used in the same sense as "command" in Article of War 64 (par. 135a, MCM, 1928). The anology is complete and applying the reasoning in the Lowrance case to the instant case, it is concluded that the order to return at once to his organization was willfully disobeyed by accused.

The evidence clearly shows that accused knowingly had a forged pass in his possession at the time and place alleged in the Specification of Charge III.

6. Major General Harris M. Melasky, Commanding the 86th Infantry Division, the reviewing authority, stated in his action: "If I had the legal power to commute the sentence I would do so because I do not believe the facts of the case warrant imposition of the death penalty. I recommend, accordingly, that the sentence be commuted to dishonorable discharge, total forfeitures and confinement at hard labor for ten (10) years."

7. Accused was 19 years and 11 months of age at the time of the commission of the offenses charged. He was inducted at Erie, Pennsylvania on 1 February 1943, and has had no prior service.

8. The court was legally constituted and had jurisdiction of the accused and the offenses charged. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. A sentence of death is authorized, in time of war, for a violation of Article of War 58.

William A. Jones, Judge Advocate.

Earle Stephens, Judge Advocate.

Herbert B. Dedman, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 14 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 Kenneth J. Clancy (33410844), Company F, 343rd 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 also concur in the recommendation of the reviewing authority that the sentence be commuted to dishonorable discharge, total forfeitures and confinement at hard labor for ten years, and recommend that the sentence as thus modified be carried into execution. I recommend that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

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

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

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

(Sentence confirmed but commuted to dishonorable discharge, total forfeitures, and confinement for ten years. G.C.M.O. 92, 3 Mar 1944)

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

SPJGN
CM 245664

UNITED STATES	6 JAN 1944 SECOND AIR FORCE
v.	Trial by G.C.M., convened at Army Air Base, Kearney, Nebraska, 25 October 1943.
Second Lieutenant DAVID SCHUMAN (0-1846526), Air Corps.	

OPINION of the BOARD OF REVIEW
LIPSCOMB, SLEEPER and GOLDEN, 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 David Schuman, 2nd Lt., Air Corps, 520th Base Headquarters and Air Base Squadron, Army Air Base, McCook, Nebraska, did, at Army Air Base, McCook, Nebraska, on or about 10 September 1943, with intent to deceive Pfc. James P. McGrath, officially state to the said Pfc. McGrath that his office handled Certificates of Disability for Discharge, knowing the same to be untrue, and that he, as Courts and Boards Officer, would use the said office to assist him in obtaining the said Certificates of Disability for Discharge and by means of the aforesaid artifice did induce the said Pfc. McGrath to paint his personal automobile, thereby wrongfully obtaining the labor of said enlisted man of a value of approximately Forty Dollars ($40.00) to the prejudice of good military order and discipline.

Specification 2: In that David Schuman, 2nd Lt., Air Corps, 520th Base Headquarters and Air Base Squadron, Army Air Base, McCook, Nebraska, did, at Army Air Base, McCook, Nebraska, on or about 10 September 1943 with

intent to deceive Pfc. Joseph D. Christina, officially state to the said Pfc. Christina his office, handled Certificates of Disability for Discharge, knowing the same to be untrue, and that he, as Courts and Boards Officer, would use his said office to assist him in obtaining the said Certificate of Disability for Discharge and by means of said artifice did induce the said Pfc. Christina to perform labors on his personal automobile, thereby wrongfully obtaining the labor of said enlisted man of a value of approximately Seventy-five Dollars ($75.00) to the prejudice of good military order and discipline.

CHARGE II: (Finding of not guilty).

Specification: (Finding of not guilty).

He pleaded not guilty to all Charges and Specifications. He was found not guilty of Charge II and its Specification, guilty of Charge I and its Specifications, and 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 record shows that the court convened for the purpose of trying the accused at 1:30 p.m., on Monday, 25 October 1943. At the outset of the trial, the defense counsel made the following motion:

"At this time I would like to present to the Court a motion in request of a postponement, a matter of hours, a request for a two hour postponement. This, it is realized is somewhat unfair to the members of the Court but we repeatedly tried to avoid it and to this end asked for postponement by repeated request. The Defense did not get any of the evidence as a result of the investigation until noon yesterday. The formal investigation was not carried out until Saturday night and we could not get a copy of any of the evidence from the Investigating Officer until yesterday. Previous to that I asked the Trial Judge Advocate's consent and the Trial Judge Advocate said that it was not in his power to grant that. I presented the question to Major Sargent by telephone. The contacted the Second Air Force and called me back and said that he could not grant this postponement but recommended that I present this matter to you and that was the only recourse left to us. While we would like more time, since we are down here with all the witnesses we feel that two hours will be a minimum. We, therefore, make such request of the President of the court" (R. 3 - A-1).

Upon the trial judge advocate's comment that the foregoing statement presented no legal grounds for a continuance, defense counsel replied:

> "It seems valid grounds when a man is being tried under the 95th Article of War a request for postponement is adequate and legal grounds in order to prepare a defense coupled with the facts that we did not get the official evidence eminating from the officer investigating until on or about noon yesterday. In a case this serious and involving such serious charges two hours is not in excess. I also want to point out that yesterday was Sunday and some of the officers were not present or available to us. Some were away and some were out hunting" (R. 3-A-1).

The following colloquy ensued:

"PRES: What do you expect to gain by two hours time, Captain?
DC: Sir, nothing more in the gleaning of new evidence; really a more careful outlining of our case.
PRES: A full investigation was made of the case and I believe it is consistent with other investigation cases and that the evidence was presented in the presence of the accused.
DC: That is true, the Defendent was present.
PRES: I believe then that he was able to go into all the statements that were given to the Investigating Officer.
DC: Verbally, Sir. And verbally isn't always - - -
TJA: If the Court please, at the formal investigation not only was the accused present but the accused's counsel was present.
PRES: I feel that the objection is over-ruled. I think that under the circumstances that unless there are more extenuating circumstances involved - do any members of the court feel otherwise on that?
DC: No other circumstances, Sir, other than shortness of time in preparation."

The court, after a brief closed session, overruled the motion and proceeded with the trial of the case (R. 3-A-1, 2, 3).

The record discloses that the Charges were sworn to by the accuser on Saturday, 23 October 1943. On the same date, they were referred by Headquarters, Army Air Base, McCook, Nebraska to Second Lieutenant Philip A. Tracy, for investigation and report. Lieutenant Tracy's

indorsement, embodying his completed report as investigating officer, is also dated 23 October 1943. On Sunday, 24 October 1943, the charges were referred for trial by Headquarters, Second Air Force, Colorado Springs, Colorado, to Captain James J. Mayfield, detailed, on the same day, as trial judge advocate, for the court, which had been theretofore appointed to meet at the Army Air Base, Kearney, Nebraska, 100 miles distant from the accused's station. The accused was served with the charges on Sunday, 24 October 1943.

4. The Board of Review has considered a brief entitled "Memorandum on Behalf of the Accused", submitted by civilian counsel of Brooklyn, New York, who did not participate in the trial. This brief is supported by the affidavits of Captain David B. Scanlon, who acted as individual defense counsel at the trial, Second Lieutenant Bernard B. Bergman, who was officer of the day at the McCook Air Base on 23 October 1943, and the accused. Defense counsel, after unsuccessfully requesting the trial judge advocate to agree to at least a two days' continuance so that he "could properly prepare the defense in justice to" the accused, telephoned, on Sunday afternoon, to the president of the court, who stated that he could not comply with the defense counsel's request for a postponement, "unless he had the consent of the 2nd Air Force." Later on the same day, the president informed the defense counsel that he could not postpone the trial, and that he - the defense counsel - would have to make his application in court. The defense counsel had to leave McCook for Kearney at 8 o'clock on the morning of 25 October 1943, and, despite timely requests therefor, did not receive copies of the witnesses' statements, made at the investigation, until that same morning, on which date the case was set for trial. According to his affidavit, he "therefore did not have sufficient time to thoroughly examine these statements and bring them to the full attention of the court. These statements are most important as they show inconsistent and contradictory statements of a prosecution's witness." The defense counsel had learned, subsequent to the trial, of various items of evidence, set out in his affidavit, seemingly ample to thoroughly impeach the one witness whose testimony tends to support the finding of guilty of Specification 2, Charge I. The defense counsel's affidavit concludes:

> "I had, thus, about one half a day, after receiving the results of the formal investigation, for preparation of the case. This half day was on a Sunday, when several witnesses could not be reached. I attempted several times on that Sunday afternoon, without success to contact Major Mellon, then Base Commander, Lieutenant Patzold, Sgt. Militane and Pfc. Clem, all of whom had knowledge or information

that would have been extremely helpful for building the defense. Three of these persons were reached late that night but too late for me to get into town and confer with them.

"It is my sincere belief that these and many other important points of testimony could have been introduced into the trial if the defense had been permitted more time for preparation * * *."

5. The Board of Review has also considered an affidavit submitted by Captain James J. Mayfield, the trial judge advocate in this case, in which he states that on or about 16 October 1943, he made an informal investigation of the charges of which the accused was tried and presented to the accused at that time affidavits containing substantially the same information that was subsequently developed at the formal hearing on 23 October 1943 and thereafter at the trial on 25 October 1943. Captain Mayfield asserts further that since the accused was himself an attorney and had been advised on 16 October 1943 that the charges in question were being investigated, that he should have been prepared for trial on 25 October 1943. Captain Mayfield, in his argumentative affidavit concludes, as follows:

"In view of the fact that the accused was a graduate lawyer, thoroughly capable of protecting his legal rights and was informed of the nature of the charges against him by his Base Commander on 6 October 1943, and again by me at the informal investigation on 16 October 1943, and again by the Investigating Officer on 23 October 1943, I believe that the accused had adequate time to prepare his defense, and was at no stage of the proceedings taken by surprise."

As is shown in the paragraphs that follow, the above statements and assertions do not, except by generalities and conclusions, contradict the assertions set forth in the brief and affidavit submitted by counsel for the accused. It should also be observed that the informal investigation did not necessarily mean that the accused would be tried. Furthermore, the fact that the accused was himself an attorney did not deprive him of the right to be represented by counsel and to be entitled, after being officially informed that he was to be tried, to prepare for his defense.

6. The evidence will be discussed only to the extent necessary to show the basis for the Board's conclusion that the court abused its discretion in refusing the requested postponement, thereby injuriously affecting the substantial rights of the accused. The record proper

shows that the accused, who was the Courts and Boards Officer of his base, made careful inquiry both of the base administrative inspector and the officer in charge of the base automotive ordnance department as to the propriety of having work done by enlisted men on his personal car in the ordnance shop, provided the work was not done on Government time, and all parts were personally purchased by the accused. He was assured that no impropriety was involved; on the contrary, that the procedure outlined was customarily permitted on the post. Indeed, Lieutenant Patzold, the ordnance officer, ordered the parts for the accused, and entered into an arrangement whereby they shared the expense of materials used in the painting of both their cars, by enlisted men after hours, in the ordnance shop (R. 6-24, 25, 26, 27, 30, 34, 45, 47, 48a).

The Specifications of which the accused was found guilty allege "wrongfully obtaining the labor" of enlisted men through false representations that the accused's office handled certificates of Disability for Discharge and that he - the accused - would use his office to assist the enlisted men who did the work in obtaining such certificates.

7. Concerning Specification 1, Private First Class James P. McGrath testified, on direct examination, that he painted the accused's automobile with the understanding that the accused would assist the witness in obtaining a CDD. "He approached me," McGrath testified,

> "and told me he understood I was recommended for a CDD and asked me if I knew the operation of automobile painting. I told him I did. He asked me if I would refinish his car and in exchange he would make every effort to assist me in obtaining my CDD. * * * He told me at our first meeting that he was the Legal Officer of the Base. * * * He told me that the " (CDD) "papers went through his office" (R. 6-12, 13).

On cross-examination, McGrath admitted - and characterized as correct - his statement that he knew his CDD had been passed by the Medical Board and that he asked the accused two or three times how "they" were progressing and felt that the accused was finding out and relating to him "how the thing was progressing". He also admitted that he told the accused that he did not plan to do the hard work - the scraping and sanding - in connection with the painting of the accused's car, but to have others, who needed and wanted the experience, to do that, and that he - McGrath - would only do the spraying (R. 6-14).

According to civilian counsel's brief, the stenographic report of the investigation - which was not forwarded with the record, and is not therefore available to the Board of Review - shows that McGrath qualified his statement that the accused told him that the CDD papers went through his office, by adding, "At least he gave me to understand that"; also that in concluding his testimony at the investigation, he volunteered the following statement: "I never did more than ask the Lt. how things were coming. If he knew I felt he would tell me".

8. Concerning Specification 1, Charge I, the accused testified as follows:

> "I mentioned to Lt. Patzold I was thinking of having my car painted down town. He said they expected some equipment in and that we could both chip in and buy the paint and have the cars painted in the shop; he said he had a mechanic who could do the work and he would paint the car and sometime later I was informed the equipment had come in. I spoke to McGrath at that time and asked him whether he would be willing to paint the car and he said he would have no objection to that but he said it would have to be done pretty fast because he thought he would be out of the service in a very short period of time. A day or so went by and Lt. Patzold called and said that if I would bring the car there in the evening they would start working on it. I brought the car there. It was there for three or four nights and I know my car was painted and I know Lt. Patzold's car was painted with the very same kind of paint. Thereafter the Lt. told me that he had had expenses over $10.00 to buy the paint for the car and I gave him a check for one half of it and I think it was $5.30 - I haven't received the check back yet from the bank. On, yes, with reference to McGrath again. He came to my office. It was about five o'clock or so. It was on a Monday and I was tied up in some matters in my office and I could not leave that evening. In view of the fact that I had some passengers which I haul in order to get some more gasoline and he volunteered to drive the car back to town that night but he said he was very anxious to find out what his status was in reference to his discharge. I said I would find out and see what had happened to his papers and I did try to find out what his situation was. In addition to being Court's and Boards Officer I also answer any other questions that might come up - discharges or anything to help. Not at any time did I promise

that I would push their discharges through. They knew I had nothing to do with or in connection with those discharges. The only thing I could do was advise" (R. 6-27).

9. The testimony of Lieutenant Patzold tends to corroborate that of the accused. However, the defense counsel's examination of this witness was severely handicapped and indeed cut short by the obstreperous tactics of the trial judge advocate, who did not confine himself to objections, in the authorized manner, but proceeded on one occasion. to himself answer a question propounded to the witness by the defense counsel, and thereupon to interrupt the defense counsel's examination by abruptly taking over himself, to which disorderly procedure the court appears from the record to have given at least tacit approval (R. 6-47, 48).

10. Concerning Specification 2, Charge I, the only evidence to establish the alleged offense is that of Private First Class Joseph Daniel Christina, which is contradictory in significant particulars. For example, at one time, he testified that the very first time he met the accused, the accused told him he knew he was up for a CDD, and stated that CDD's "come through his office"; at another, he testified that on the occasion of their first meeting, he and the accused had a conversation in which no reference was made to Christina's prospective discharge (R. 6-1, 4).

The defense counsel's affidavit states that he had learned after the trial, from named witnesses whom he had had no opportunity to interview prior thereto, "that Christina was a 'blow-hard' and had a reputation in his organization for gross exaggeration". The character of his testimony in the record as it stands renders it not improvable that such impeaching testimony might well have had the effect of thoroughly discrediting Christina as a witness.

11. The right to prepare for trial is fundamental. To deny this right is to deny a fair trial. Article of War 70 provides "In time of peace no person shall against his objection be brought to trial before a general court-martial within a period of five days subsequent to the service of charges upon him." This does not mean that during war an accused may be deprived of the right to prepare his defense. It means rather that, during war, he may be tried as soon, after service of charges, as he has had a reasonable time to advise with counsel and prepare his defense. Such period will of course, vary with the facts and circumstances involved in each particular case. In some, a matter of hours will suffice; in others - even in time of war - the peacetime minimum of five days may be less than reasonable. The suspension, during war, of this peacetime limitation for which the statute, by

implication, provides, was not designed to deprive accused persons subject to military law, of the fundamental right to prepare and present a defense in good faith, even in time of war.

> "The prompt disposition of Criminal cases is to be commended and encouraged. But in reaching that result a defendant, charged with a serious crime, must not be stopped of his right to have sufficient time to advise with counsel and prepare his defense" (underscoring supplied). (Powell vs. Alabama, 287 U.S. 45).

In CM 236323 (1943), accused was found guilty of desertion in violation of Article of War 58. In explanation of the unauthorized absence and the reenlistment under another name, the defense contended that the accused was a victim of amnesia, and requested a continuance for time to contact witnesses and prepare the case. Only four days elapsed between service of the charges and arraignment. The continuance was granted but then vacated. Held: The record is legally insufficient to support the findings and sentence. It was an abuse of discretion in the circumstances for the court to deny the continuance. Where it appears that the accused has been deprived of his fundamental right to prepare and present a defense in good faith, such action of the court injuriously affects the substantial rights of the accused, and the conviction is illegal (par. 377, page 305, Bull. JAG, August 1943).

Under the circumstances, the failure of the court to grant the requested postponement was an abuse of its discretion. The record affirmatively shows that the substantial rights of the accused were injuriously affected by the accelerated tempo of the sequence of the proceedings which culminated in his trial. Considering the character of the charges (which were both preferred and investigated on Saturday, 23 October, and referred for trial and served on Sunday, 24 October), the nature of the evidence on which they were based, and that on which the accused must, of necessity, rely to establish his innocence, if indeed the charges are either false or untenable (hypotheses not convincingly precluded by the record as it now stands), the trial on Monday, 25 October 1943, at a place a hundred miles distant from the accused's station and the scene of his three alleged separate offenses, was too soon to allow a reasonable time for the preparation of the defense.

As was said in CM 126651, "The question of a continuance is one for the sound discretion of the court. It is believed, however, that when it is apparent from the record that the court has abused its discretion, the conviction should be held illegal."

12. The chronology sheet shows that although the record of trial was received by the reviewing authority on 3 November 1943, the staff judge advocate delayed his review until 22 November 1943, "awaiting brief from civilian counsel" (employed after trial). This delay - noted on the chronology sheet - emphasizes the unreasonableness of the repeated refusals of military defense counsel's timely requests for a much briefer delay, to enable him, in the prompt exercise of due diligence, to prepare the case for trial.

13. The accused is 29 years of age. War Department records show enlisted service from 3 September 1942; appointment as second lieutenant, A.U.S., 23 June 1943.

14. For the reasons set forth above, 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.

Abner C. Lifsecomb, Judge Advocate.

(On Leave), Judge Advocate.

Gabriel H. Goldberg, Judge Advocate.

WAR DEPARTMENT
ARMY SERVICE FORCES
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON 25

PLEASE ADDRESS REPLY TO
THE JUDGE ADVOCATE GENERAL

SPJGN
CM 245664

1st Ind.

11 JAN 1944

War Department, J.A.G.O., - To the Commanding General, Second Air Force, Colorado Springs, Colorado.

1. In the case of Second Lieutenant David Schuman (0-1846526), Air Corps, I concur in the foregoing opinion of the Board of Review holding that the record of trial is not legally sufficient to support the findings of guilty and the sentence, and for the reasons stated therein I recommend that the findings of guilty and the sentence be disapproved. You are advised that the action of the Board of Review and the action of The Judge Advocate General have been taken in accordance with the provisions of Article of War 50½, and that under the further provisions of that Article and in accordance with the fourth note following the Article (M.C.M., 1928, p. 216), the record of trial is returned for your action upon the findings and sentence, and for such further action or rehearing 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. For convenience of reference please place the file number of the record in brackets at the end of the published order, as follows:

(CM 245664).

Myron C. Cramer

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

Incl.
Record of trial.

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

SPJGN
CM 245677

22 DEC 1943

UNITED STATES	)	FOURTH AIR FORCE
	)	
v.	)	Trial by G.C.M., convened
	)	at McChord Field, Wash-
Second Lieutenant ALBERT	)	ington, 18 November 1943.
C. THORN, JR. (O-570527),	)	Dismissal and total
Air Corps.	)	forfeitures.

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 96th Article of War.

Specification 1: In that 2nd Lt. Albert C. Thorn, Jr., Air Corps, did, while acting as Commanding Officer of the 21st Airways Communications Detachment, McChord Field, Washington, fail and neglect to perform his duty in that he did, on or about the 4th day of October 1943, fail and neglect to ship certain enlisted men in compliance with duly and regularly issued orders by competent authority, said failure and neglect not being with any lawful reason or cause.

Specification 2: In that 2nd Lt. Albert C. Thorn, Air Corps, did, on or about the 3rd day of October, 1943, wrongfully take and use without proper authority a motor vehicle, to wit: a weapons carrier, the property of the United States and of a value of more than $50.00.

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

Specification: In that 2nd Lt. Albert C. Thorn, Jr., Air Corps, was, at (Point Defiance) Tacoma, Washington, on or about 3 October 1943, in a public place, to wit: the Point Defiance Highway and ferry landing, drunk while in uniform.

He pleaded guilty to Charge I and Specification 2 thereunder, not guilty to Specification 1 of Charge I and to Charge II, and its Specification. He was found guilty of all Charges and Specifications and was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record for action under Article of War 48.

3. The evidence for the prosecution shows that on 27 September 1943, special orders were issued by the Squadron Commander, 21st Airways Communications Squadron, transferring to the Overseas Replacement Training Center, Goldsboro, North Carolina, 25 enlisted men belonging to the company of which the accused was commander; directing that the transferees proceed by rail so as to arrive at their destination prior to 10 October 1943, and further that the "CO at point of origin will notify CO at destination forty-eight (48) hours in advance as to the time of departure and estimated time of arrival at destination." Preparations for the movement, made in advance by the accused and his first sergeant, included arrangements for departure of the transferees on a train leaving Camp McChord on the evening of 4 October 1943 (R. 7-8, 11, 16-19, Exs. 1, 2).

On the morning of 3 October 1943, the accused was in his orderly room between 8:30 and 9:00 o'clock. After illegibly scribbling his signature on the morning report - in blank - and also on a group of 5 passes, he procured a weapons carrier and driver to take him on a personal mission to Point Defiance, a distance of 18 miles from his post. In accordance with his instructions, the driver, after returning to the post in the interim, drove the same vehicle back to pick the accused up at the Point Defiance Ferry at about 10:30 that evening. The accused was driven off the ferry boat in a civilian car. He alighted staggering, his nose was bleeding, while from him there emanated the odor of whiskey. He was helped into the back of the weapons carrier, and out of it at his BOQ where he was deposited and where he staggered slightly, going up the steps (R. 11-14, 26-28, 32-41; Exs. 3, 4).

On Monday morning, 4 October, he was again in the orderly room, where he checked the preparations for the troop movement scheduled for that afternoon and was informed by his first sergeant, who had usually handled all the details of the organization's frequent similar troop movements in the past, that arrangements were complete. He then

gave the first sergeant permission to go downtown that afternoon, which the first sergeant did, forgetting to leave any instructions for paying the departing troops their ration money, one of the details which he - the first sergeant - had always theretofore personally supervised, usually without an officer present. When trucks arrived at the orderly room to convey the transferees to the point of departure, neither the accused nor the first sergeant were present, nor could they be located. The transferees were not paid their ration money on 4 October 1943, as a result of which their departure was delayed until the following day (R. 8-11, 15-20, 22-24, 29-31).

4. The only evidence for the defense was the testimony of the accused, who, after his rights as a witness had been explained to him, elected to take the stand under oath. He testified that he was made Commanding Officer of the 21st Airways Communications Squadron on 30 September 1943. There was a troop movement from his organization on 4 October. The organization had troop movements frequently. In the past they had been handled in a routine manner, the records being assembled and brought to him for his signature as officer in charge. The transportation and all details were handled in the orderly room, and no officer ever witnessed ration payment. The troop movement on 4 October was handled in the same manner, as far as he was concerned. He checked with his first sergeant on 4 October and was told that everything was in readiness. The first sergeant handled the ration money payment to the men. On 4 October the men were not paid their ration money because the first sergeant was not present in the orderly room. The troop movement was not made because the men had not received their ration money. The accused was not drunk on 3 October, although he did drink in the afternoon. That night he was at Vashon Island whence he returned in a weapons carrier. He was picked up on the boat and assisted to a civilian's car after an accident - the ferry threw him down the steps and through the door. The people, seeing that he was stunned, were kind enough to help him into and also out of the car. He met the two soldiers who were awaiting him and returned to the base in the carrier. He admits drinking frequently, but explained that on the night in question, the ferry hit the piling and he was thrown through two doors and smashed his nose. He had had three highballs that evening but his condition was the result of the accident more than from any liquor he had drunk. On cross-examination, he testified that on 4 October he arrived at the orderly room at 8:30 a.m., left for lunch at 11:30, came back at one o'clock, and left in the afternoon at 4:15. He admitted signing the morning report on 3 October. He was shown the exhibits bearing his signature, which he identified, explaining he was in a hurry when he signed those papers, viz. the morning report, and passes. He denied that he had been drinking at that time. In response to questions propounded by the court, the accused admitted that while at Officers Candidate School he had learned the responsibility of a commander, and that regardless of what happened in an organization, he was still the responsible officer (R. 42-49).

5. In rebuttal, the prosecution adduced from the testimony of the purser and a deck hand that neither could recall the ferry boat receiving a jolt on the evening in question (R. 50-58).

6. Specification 1, Charge I, alleges that the accused without lawful reason or cause, failed and neglected to perform his duty to ship certain enlisted men in compliance with orders issued by competent authority. The only orders shown direct departure of the transferees "so as to arrive" at their destination "prior to 10 October 1943". While there is no evidence that their subsequent departure on 5 October 1943 was so late as to preclude their arrival at their destination prior to 10 October 1943, the record does show that, to effectuate compliance with the orders referred to, the accused arranged to ship the men on 4 October 1943. In view of the nature and extent of the arrangements made, involving, as they already had, extensive cooperative action on the part of the railroad, the transferees, and other military personnel, the failure of the accused to get the men off according to the schedule which he himself had established - for the purpose of complying with the orders - may properly be regarded as falling within a reasonable construction of the language of the Specification, which, though inartfully drawn, fully and fairly apprised the accused of the offense with which he was charged, and, as the record affirmatively discloses, in no manner hampered or embarrassed his defense.

7. Specification 2, Charge I, alleges misappropriation of a Government vehicle. The accused's plea of guilty and the evidence adduced both support the conviction.

8. The Specification, Charge II, alleges drunkenness in uniform in a public place in violation of Article of War 95.

> "Drunkenness alone may constitute a violation of Article of War 95, where it is alleged as the sole offense, unaccompanied by any allegation or proof of disorderly conduct * * *" (CM 114900, 121290 (1918) Sec. 453 (12), p. 343, Dig. Ops JAG 1912-1940).

The evidence shows that the accused alighted from a civilian car which drove off a ferry boat at the ferry landing, where, in accordance with the accused's instructions, an enlisted chauffeur awaited him in a misappropriated weapons carrier. The accused was drunk. His nose was bleeding. He got into the back seat of the weapons carrier with two enlisted men, to be driven to the post. When he arrived there, he went directly to his quarters. The drunkenness shown was, in certain of its aspects, of a nature to bring discredit on the military service; in others, distinctly prejudicial to good order and military discipline;

in none, of a character to so dishonor and disgrace the accused as to seriously compromise his character and standing as a gentleman by demonstrating his moral unfitness below the limit of tolerance prescribed by the Manual. The record, therefore, sustains the finding of guilty of the Specification, Charge II, in violation of Article of War 96, but not the finding of guilty of Charge II, which alleges a violation of Article of War 95.

9. The accused is 38 years of age. War Department records show enlisted service from 18 March 1942; temporary appointment as second lieutenant, AUS, with assignment to active duty 9 December 1942.

10. The court was legally constituted. In the opinion of the Board of Review the record of trial is legally insufficient to support the finding of guilty of Charge II, but legally sufficient to support the finding of guilty of the Specification, Charge II, in violation of Article of War 96; legally sufficient to support the remaining findings of guilty and the sentence and to warrant confirmation thereof. A sentence of dismissal is authorized upon a conviction of a violation of Article of War 96, and mandatory upon conviction of a violation of Article of War 95.

Abner E. Lifsecomb, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

(On Leave), Judge Advocate.

SPJGN
CM 245677

1st Ind.

War Department, J.A.G.O., 17 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 Albert C. Thorn Jr. (0-570527), 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 finding of guilty of the Specification, Charge II and Charge II, as involves a finding of guilty of the Specification in violation of Article of War 96, legally sufficient to support the other findings and the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but that the 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.

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but forfeitures remitted. G.C.M.O. 228, 29 May 1944)

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

SPJGK
CM 245696

21 MAR 1944

UNITED STATES)	FORT BENNING, GEORGIA
)	
v.)	Trial by G.C.M., convened at Fort Benning, Georgia, 19 November 1943. Dismissal.
)	
Captain WADSWORTH A. NORREN)	
(0-1283299), Infantry.)	

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. Accused was tried upon the following Charges and Specifications:

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

Specification 1: In that Captain Wadsworth A. Norren, Infantry, 4th Training Regiment, Army Specialized Training Program, Basic Training Center, Fort Benning, Georgia, did, without proper leave, absent himself from his place of duty at Fort Benning, Georgia, from about 0730, 20 August 1943, to about 1430, 20 August 1943.

Specification 2: In that Captain Wadsworth A. Norren, Infantry, 4th Training Regiment, Army Specialized Training Program, Basic Training Center, Fort Benning, Georgia, did, without proper leave, absent himself from his place of duty at Fort Benning, Georgia, from about 0730, 4 September 1943, to about 1700, 4 September 1943.

CHARGE II: (Finding of not guilty).

Specification 1: (Finding of not guilty).

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

Specification 3: (Finding of not guilty).

Specification 4: (Finding of not guilty).

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

Specification 1: In that Captain Wadsworth A. Norren, Infantry, 4th Training Regiment, Army Specialized Training Program, Basic Training Center, Fort Benning, Georgia, did, at Columbus, Georgia, on or about 20 August 1943, render himself unfit for the proper performance of his military duties by the excessive use of intoxicants.

Specification 2: (Finding of not guilty).

Specification 3: In that Captain Wadsworth A. Norren, Infantry, 4th Training Regiment, Army Specialized Training Program, Basic Training Center, Fort Benning, Georgia, having received a lawful order from Major General Charles H. Bonesteel, Infantry, Commandant, The Infantry School, Fort Benning, Georgia, to report to him at 0850, 23 October 1943, the said Major General Bonesteel being in the execution of his office, did, at Fort Benning, Georgia, on or about 23 October 1943, fail to obey the same.

He pleaded not guilty to the Charges and Specifications. Specification 2 of Charge II was withdrawn by direction of the appointing authority. He was found guilty of Charge I and its Specifications, guilty of Charge III and Specifications 1 and 3 thereunder, not guilty of Charge II and the Specifications thereunder, and not guilty of Specification 2 of Charge III. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Summary of the evidence.

Accused is a captain, Infantry, assigned to the 11th Company, 4th Training Regiment, Army Specialized Training Program, Basic Training Center, Fort Benning, Georgia (Charge Sheet). Major William G. Scheding, of the 4th Training Regiment, testified that he was accused's battalion commander during the period covering 20 August and 4 September 1943. Major Scheding stated that accused was the battalion adjutant of the 4th Battalion on each of those dates, and that in such capacity his duty hours were from "0720 until 1730" (R. 31,32,33,34). According to Major Scheding, accused was not present for duty as battalion adjutant on 20 August 1943 at 7:30 o'clock in the morning. Accused performed no military duties that day. He did not see accused until half past two in the afternoon, when accused reported for duty, at which time accused "was not in full control of all his faculties" and "spoke incoherently, vaguely and could hardly keep awake". From the smell of his breath "he had been drinking intoxicants" (R.32,33,37). On 4 September 1943, accused was not present for duty at 7:30 in the morning and was not seen by Major Scheding until 5 o'clock in the afternoon, at which time accused reported to 4th Battalion Headquarters. Accused performed no military duties on that date (R. 33, 34). This witness testified

that accused did not have permission to be absent from his duties on 20 August or on 4 September, nor had accused requested or been granted official leave to be absent on either of those dates (R. 33-35). On cross-examination Major Scheding testified that on 20 August accused could stand up, walk and talk, but that he had difficulty in standing erect which was "not typical of Captain Norren" and that he was "wavering" and "he had difficulty in speaking". In the opinion of the witness, accused was moderately drunk on 20 August (R. 36-38).

Lieutenant Colonel George F. Schmidt, Medical Corps, Station Hospital, Fort Benning, testified that he had been in the general practice of medicine since 1908. He stated that he saw accused 20 August 1943 at Dispensary No. 1, in the middle of the afternoon, to determine whether or not he was under the influence of alcohol. As a result of accused's appearance, speech and general demeanor and as a result of the statement made to him by accused that he "had been drinking" by reason of "some domestic troubles", Colonel Schmidt concluded that accused was under the influence of alcohol at that time. Colonel Schmidt testified that accused was not in a normal condition and was moderately drunk. On examination by the court, the Colonel also stated that as a result of his examination he did not think that accused "could be trusted with official duties of a normal nature". On cross-examination this witness testified that he would not say that accused was grossly or conspicuously drunk, "not as far as he physically was concerned" (R. 39-43).

Cecil Jones, "operator" of Copeland's Cafe, Columbus, Georgia, testified that he saw accused in that cafe at about 9 o'clock on the morning of 20 August 1943. He saw accused drinking a bottle of beer and, in his opinion, accused was not "drunk at all" and was in full possession of all his normal faculties (R. 43,44,47). The prosecution, evidently "surprised", questioned this witness as to a statement he had made before trial to "Lieutenant Colonel Jacobs" in which the witness evidently had described accused as "fairly drunk" on that occasion. Mr. Jones attempted to rationalize his two statements by explaining that "fairly drunk means the same thing as drinking, doesn't it?" and "if he was drinking, he was under the influence" (R. 45,46).

Mr. Walter Everidge, clerk at Copeland's Cafe, testified that he also saw accused in the cafe on 20 August 1943 and saw him drinking some "beer". He talked to accused for 15 or 20 minutes "around 9 o'clock". In the opinion of this witness "accused was not drunk". He walked and talked straight and the pupils of his eyes were normal (R. 47, 48-50).

Colonel Thornton Chase, "A.G.D., 08007, Headquarters, The Infantry School, Fort Benning, Georgia", testified that Major General Charles H. Bonesteel was the Commandant of the Infantry School on 23 October 1943. Colonel Chase testified that sometime in the afternoon of 22 October he received a directive from General Bonesteel that accused report at

Colonel Chase's office at 8:50 a.m. on the morning of 23 October for the purpose of being present before "General Bonesteel" at 9 a.m. on that day. Colonel Chase said that he gave this directive to Captain Gleason in charge of the Miscellaneous Section of the Adjutant General's Office, Headquarters, The Infantry School, for transmission to accused (R. 9,10). Captain Walter F. Gleason, Infantry, The Infantry School, Fort Benning, testified that on 22 October 1943 he received from Colonel Chase an order that "The Commandant directs that Captain Wadsworth A. Norren report to him at 0850, October 23, 1943. He will first report to Colonel Chase in Room 307, The Infantry School building". Captain Gleason stated that he telephoned this order to the Adjutant of the Army Specialized Program, Fort Benning, for transmission to the accused (R. 13,14). Accused admitted verbally to Major Charles A. McDonough, Infantry, Fort Benning, who investigated this case, that -

> "At on or about 1615 hour on 22 October 1943 I [accused] was informed by Captain Robert A. Banister, 3rd Battalion Adjutant, that Major General Bonesteel had directed that I report to Room 307, The Infantry School, at 0850 hour October 23, 1943."

This verbal statement was reduced to writing and was signed by accused. The verbal statement was made and the written statement signed after Major McDonough had told accused of his rights "as a witness", that he could testify or not, under oath or not under oath, and that anything he said could be used as evidence against him (R. 27-30, Pros. Ex. A). Both Colonel Chase and Captain Gleason testified that accused did not report as directed to Colonel Chase at "Room 307" or to General Bonesteel (R. 11, 12,14,15).

Accused made an unsworn statement. He told of his work in activating different units of the 4th Training Regiment during an assignment as Battalion Adjutant of the 3rd Battalion, and of later being placed on duty with the 4th Battalion where, he believed, there was a "clash of personalities between the Battalion Commander" and himself. He stated that, at the time, he had become indebted through the purchase of an automobile, as a result of which the "activities" of his wife and himself were curtailed and their relations "became strained". "I did drink more than usual but always attempted to repair at the proper place for duty", he said. He stated that he would "go home at night from duty, late, and the door would be locked", and that he would not be admitted and would be required to leave. Referring to his duties in receiving trainees for the 4th Battalion, the night before 20 August, accused said that he had properly disposed of his men, fed them and properly discharged the train, and that he had called his battalion commander and "reported with pride that the Battalion had a thousand men". His commander replied, according to accused, "That's fine. Now you can run the Battalion". Accused said that he then departed for home, late, and

that upon his arrival the door was locked. He said he proceeded to the Officers' Club, had supper and a few drinks. After he left the club he drove his car to Copeland's Cafe and slept in the car at that place all night. He stated that the following morning he had to wait until 9:30 "Fort Benning time" until the gas station opened, inasmuch as he had run out of gasoline. With respect to the matter involving 4 September, accused stated that the night before, when he went home, his wife was not there, and that he spent the night looking for her, after which he went home and retired. He stated that he reported late that afternoon for duty. Accused said that he and his wife had since become reconciled. He believed that the reason she left him, 3 September, was because his battalion commander had ordered "reclassification and decommission". Accused stated that as far as he was concerned, because of the reclassification and his wife's absence he did not think "there was anything left in the world". He said that from 20 August to the present he had been "under a mental strain and anxiety"(R. 75-78).

It was stipulated that accused had the following enlisted service:

May 31, 1935 to May 31, 1938, enlisted with the 33rd Infantry on foreign service in Panama. Within that period, the following grades were held by the accused: Private, Private First Class, Corporal, Sergeant, grade four. Character on discharge: Excellent. May 31, 1938 until May 30, 1941, 16th Infantry, First Division, held grade of corporal. Transferred to the 13th Infantry in which the following grades were held: Corporal, Sergeant, Staff Sergeant, Master Sergeant. Discharged at the expiration of his term of service. Character: Excellent. May 31, 1941 to May 5, 1942, 13th Infantry, Grade of Master Sergeant. Discharged to accept commission as second lieutenant on May 5, 1942 and assigned to active duty (R. 73, 74).

On cross-examination, Captain Robert A. Bannister, Headquarters, 3rd Battalion, 4th Training Regiment, a prosecution witness, testified that he had known accused in a professional way since 1 May 1943 and had called on him to assist in "personnel work" on numerous occasions and that accused's "work was always satisfactory to a very high degree" (R. 26).

Major Gilbert A. Williams, Headquarters, 3rd Battalion, 4th Regiment, stated that he had known accused professionally for approximately 14 months and that accused had served under him as battalion adjutant and company executive officer when he was commander of the 3rd Battalion. He stated that the manner of the performance of his duties by accused had been "excellent", that he had never reported for work in an unfit condition, that he had been liked and respected by the men, and that in comparison with the other officers of the Major's command, accused should be placed in the upper third category. He stated that accused

had talked over his marital difficulties with him, but that he understood that these difficulties had been cleared up at a "recent date" (R. 59-62).

Captain John S. Thomas, 2nd Company, 4th Training Regiment, testified that he had known accused for a year and a half and had occasion to notice accused's professional ability. He stated that accused had been called on to give lectures to other officers and that accused discharged his duties in an excellent manner, and was a dependable worker and attentive to duty (R. 62-65).

Captain Frank H. Soyer, 4th Company, 4th Training Regiment, testified that he had known accused for about 6 months and that his personal opinion was that accused's work was superior; that he had seen a great many adjutants and could state without hesitation that accused was the best that he had ever had contact with (R. 65-67).

Captain Ned R. Hickel, 14th Company, 4th Training Regiment, testified that he had been a member of the same officer candidate class as accused and that accused was rated in the upper half of his class; that at school accused was intelligent and eager to learn and attentive to duties. This witness also stated that he had known accused since their graduation. He said with respect to accused: "As an officer, and especially in an administrative line, I would say he was superior. He is one of the best officers that I have ever known on administration". This witness stated that he knew nothing of accused's domestic difficulties. On cross-examination, he said that when accused was Adjutant of the 4th Training Regiment and when his battalion was organized, accused did fully 90% of the administrative details (R. 67-71).

By stipulation William T. McCullough, Jr., 4th Battalion, 4th Training Regiment, testified that between 21 August and 4 September 1943 he had noticed some occasions on which accused's conduct had been below standard. Accused told him of occasions when he had to sleep out in his car because his wife "beat him up". This witness told of one occasion when he met accused's wife. She was at the house of the witness and appeared very "firey" and "abusive". He testified that accused's wife struck accused 3 or 4 blows on the head with her fists (R. 71-73).

Major Scheding was recalled by the prosecution in rebuttal. He testified that he did not "have a habit of drinking" but that he would not be prejudiced toward a person who used intoxicants. He said there had been no "clash of personalities" between him and accused. With respect to accused, this witness said: "His work is very good". On cross-examination, Major Scheding testified that 20 August was the first time accused had failed to be on time, "late or absent" and that he reported it to the regimental commander with the result that reclassification proceedings were ordered. The Major also stated that about three weeks prior to 20 August accused had asked permission to "come in late" because he wanted to

contact some civilians in Columbus with respect to an accident. At that time accused "came in around twelve o'clock" and "with liquor on his breath" (R. 78, 83).

4. From the evidence it is clear that accused was absent without proper leave from his place of duty at Fort Benning, Georgia, from about 7:30 a.m. to about 2:30 p.m. on 20 August 1943, and that he was also absent without proper leave from his place of duty from about 7:30 a.m. until 5 p.m. on 4 September 1943, as alleged in Specifications 1 and 2 of Charge I. It was also proved that accused had official duties to perform from 7:30 a.m. until 5:30 p.m. on 20 August 1943 as Adjutant of the Fourth Battalion, 4th Training Regiment, Fort Benning, Georgia, and that when accused reported for duty at 2:30 p.m. that date he was unfit to properly perform such duties as a result of the excessive use of intoxicants, as alleged in Specification 1 of Charge III. It was further proved that accused received a lawful order from Major General Charles H. Bonesteel, Infantry, commanding the Infantry School, Fort Benning, Georgia, to report to him at 8:50 a.m. on 23 October 1943 and that accused failed to so report and obey the order, as alleged in Specification 3 of Charge III. The conduct so proved constituted a violation of the respective Articles of War under which the Specifications covering such conduct were laid.

5. The record of trial of this officer upon other offenses (CM 249232) now before the Board of Review should be considered in connection with action upon this record.

6. Accused is 28 years old. He is a high school graduate. He enlisted in the regular Army and served in Company G, 33rd Infantry from 31 May 1935 to 30 May 1938. Enlisted service continued until 4 May 1942. After having attended Officers' Candidate School, accused was appointed second lieutenant, Infantry, on 5 May 1942. He was promoted to first lieutenant 20 May 1943, and to captain 21 October 1943.

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

_____, Judge Advocate.

_____ Judge Advocate.

_____ Judge Advocate.

(Filed without further action in view of the execution of the sentence to dismissal against the same officer in a subsequent case, CM 249232, confirmed in G.C.M.O. 270, 8 June 1944)

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

SPJGQ
CM 245721

24 DEC 1943

U N I T E D S T A T E S	)	87TH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	Tennessee Maneuver Area, 9
Second Lieutenant CLYDE E.	)	December 1943. Dismissal
JUSTUS (0-1316420), Infantry.	)	and total forfeitures.

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: In that Second Lieutenant Clyde E. Justus 346th Infantry, did, without proper leave absent himself from his station, Camp McCain, Mississippi, from about 16 October 1943 to about 12 November 1943.

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

Specification: In that Second Lieutenant Clyde E. Justus 346th Infantry, did, at Atlanta, Georgia, on or about 28 October 1943, with intent to defraud, wrongfully and unlawfully make and utter to Piedmont Hotel, Atlanta, Georgia, a certain check in words and figures substantially as follows, to wit:

PIEDMONT HOTEL
Atlanta, Ga., Oct. 28, 1943

Pay to the
order of PIEDMONT HOTEL $25.55

Twenty-five and 55/100----------Dollars
TO The First National Bank
Shelby, N. C.

(s) Clyde E. Justus
2nd Lt. Inf. 0-1316428
87th Inf. Div., Camp McCain, Miss.

---

and by means thereof, did fraudulently obtain from Piedmont Hotel, Atlanta, Georgia, credit for $25.55, he the said Second Lieutenant Clyde E. Justus, then well knowing that he did not have and not intending that he should have any account with sufficient funds in The First National Bank, Shelby, North Carolina, for the payment of said check.

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

Specification 1: In that Second Lieutenant Clyde E. Justus, 346th Infantry, did, at Atlanta, Georgia, on or about 25 October 1943, with intent to defraud, wrongfully and unlawfully make and utter to Piedmont Hotel, Atlanta, Georgia, a certain check in words and figures substantially as follows, to wit:

PIEDMONT HOTEL
Atlanta, Ga., Oct. 25, 1943

Pay to the
order of PIEDMONT HOTEL $10.00

Ten and no/100----------Dollars
TO The First National Bank
Shelby, N. C.

(s) Clyde E. Justus
2nd Lt. Inf. 0-1316428
87th Inf. Div., Cp McCain, Miss.

---

and by means thereof, did fraudulently obtain from Piedmont Hotel, Atlanta, Georgia, $10.00, he the said Second Lieutenant Clyde E. Justus, then well knowing that he did not have and not intending that he should have any account with sufficient funds in The First National Bank, Shelby, North Carolina, for the payment of said check.

Specification 2: Same form as Specification 1, but alleging check drawn on same bank, dated 27 October 1943, payable to the order of Piedmont Hotel, Atlanta, Georgia, made and uttered to Piedmont Hotel, and fraudulently obtaining thereby $12.

Specification 3: Same form as Specification 1, but alleging check drawn on same bank, dated 23 October 1943, payable to the order of Piedmont Hotel, Atlanta, Georgia, made and uttered to Piedmont Hotel, and fraudulently obtaining thereby $15.

Specification 4: Same form as Specification 1, but alleging check drawn on same bank, dated 2 November 1943, payable to the order of Imperial Hotel, Atlanta, Georgia, made and uttered to Imperial Hotel, and fraudulently obtaining $10 thereby.

Specification 5: Same form as Specification 1, but alleging check drawn on same bank, dated 5 November 1943, payable to the order of Imperial Hotel, Atlanta, Georgia, made and uttered to Imperial Hotel, Atlanta, Georgia, and fraudulently obtaining $10 thereby.

He pleaded guilty to all of the Charges and Specifications except Charge II to which he pleaded not guilty but guilty of a violation of the 96th Article of War. He was found guilty of all the Charges and Specifications. There was no evidence of any previous conviction. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The competent evidence for the prosecution shows that on 2 October 1943, the accused was transferred from Fort McClellan, Alabama, to the 87th Infantry Division, Camp McCain, Mississippi, and while en route on 16 October 1943 to join the latter organization he absented himself without leave until he was apprehended in Atlanta, Georgia, 12 November 1943 (Pros. Exs. 1, 2, Extract copies of morning reports). During his unauthorized absence the accused wrote five checks drawn on the First National Bank of Shelby, North Carolina, in the amounts and on the dates hereinafter set forth, and received from the payees thereof cash in exchange, in the amounts indicated. At the time he cashed the respective checks the accused had no funds to his credit with the First National Bank of Shelby, North Carolina, but had previously closed his account at that bank at a time not disclosed by the record.

Date	Amount	Payee
23 October 1943	$15	Piedmont Hotel, Atlanta, Georgia
25 October 1943	$10	" " " "
27 October 1943	$12	" " " "
3 November 1943	$10	Imperial " " "
5 November 1943	$10	" " " "

The foregoing facts appear in the written stipulation entered into between the accused, his counsel, and the trial judge advocate, and accepted in evidence by the court, which appears as Prosecution Exhibit 3.

In support of Charge II and its Specification it was shown by the same stipulation that, on a date not appearing therein, the accused made out his check, dated 28 October 1943 in the sum of $25.55, drawn on the First National Bank of Sholby, North Carolina, and gave it "to the hotel manager of the Piedmont Hotel to pay a bill owed by the accused." The check, payable to the Piedmont Hotel, was dishonored when presented for payment at the bank upon which it was drawn, because on that date there were not sufficient funds on deposit or to the credit of the accused with which to pay the check (par. 2 of Pros. Ex. 3).

4. The accused, after having been advised of his rights as to testifying, elected to make an unsworn statement through his counsel to the effect that he was inducted into the service in June 1941 and served as an enlisted man until 1 April 1942 at which time he was commissioned from the Officer Candidate School, Fort Benning, Georgia. He then volunteered for duty with the paratroops where he served until he was disqualified because of injuries and transferred to the Replacement Pool at Fort McClellan, Alabama. He believed that his misconduct was due to his disappointment in being disqualified for paratroop duty which temporarily affected his mental faculties (R. 9, 10).

5. With reference to Charge I and its Specification, it was clearly established by the evidence, the written admission of the accused, and the plea of guilty, that the accused did as charged, absent himself from his station without proper leave from about 16 October 1943 to about 12 November 1943.

With reference to Charge II and its Specification the accused pleaded guilty to the giving of his worthless check to the Piedmont Hotel with intent to defraud, knowing at the time that the check was worthless and did thereby obtain credit from the hotel in violation of Article of War 95.

A plea of guilty admits all of the elements of the offense charged. It was not necessary to offer any evidence in support of the Charge. The prosecution did, however, offer in evidence a stipulation (Ex. 3) which gave a partial explanation of the facts pertaining to this Charge. According to the stipulation the accused paid his hotel bill with his worthless check of 28 October 1943, when he knew he had no funds on deposit with the bank upon which it was drawn. The record does not disclose the details of the "credit" obtained nor the nature of the fraud committed. In view of the plea of guilty it was not necessary to prove all of the elements of the offense charged and, therefore, the Board of Review concludes that the record, of which the plea of guilty is a part, is legally sufficient to support the findings of guilty of this Charge and its Specification.

With reference to Charge III and its Specifications, it was clearly established by the evidence, and admitted by the accused, that the accused did on the dates specified procure cash for his worthless checks upon five different occasions with the Piedmont and Imperial Hotels of Atlanta, Georgia, when he knew that he had no funds on deposit with the bank upon which the checks were drawn. The intention to defraud may be inferred from these facts. Such conduct brings discredit upon the military service and for that reason constitutes a violation of the 96th Article of War.

6. The Adjutant General's records show the accused to be 24 years of age. He graduated from Shelby (N.C.) High School in 1939, acted as manager of a produce market for about 14 months, attended Brevard College for one year, and then enlisted in the service on 24 June 1941. He served until 1 April 1943 when he graduated from OCS, Fort Benning, Georgia, and was commissioned second lieutenant of Infantry. He was assigned to the 3rd Battalion Parachute Training Regiment, Fort Benning.

7. The court was legally constituted and had jurisdiction over 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 of the Charges and Specifications and the sentence and to warrant confirmation thereof. Dismissal and total forfeitures are authorized upon conviction of violation of Articles of War 61 and 96. Dismissal is mandatory upon conviction of violation of Article of War 95.

William H. Pounds, Judge Advocate

Earle Stephens, Judge Advocate

Herbert B. Frederick, Judge Advocate

1st Ind.

War Department, J.A.G.O., 5 - 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 Clyde E. Justus (0-1316420), 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 of all of the Charges and Specifications and the sentence and to warrant confirmation of the sentence. I recommend that the sentence be confirmed but that the forfeitures be remitted and that the sentence as thus modified be carried into execution.

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

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

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

(Sentence confirmed but forfeitures remitted. G.C.M.O. 106, 10 Mar 1944)

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

SPJGH
CM 245724

8 JAN 1944

UNITED STATES	)	FIRST AIR FORCE
	)	
v.	)	Trial by G.C.M., convened
	)	at Army Air Base, Richmond,
Second Lieutenant STUART	)	Virginia, 3 December 1943.
D. LAWSON (0-795986),	)	Dismissal.
Air Corps.	)	

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 61st Article of War.

Specification: In that Second Lieutenant Stuart D. Lawson, 443rd Fighter Squadron, 327th Fighter Group, did, without proper leave, absent himself from his organization at Army Air Base, Richmond, Virginia, from about 19 October 1943 to about 24 October 1943.

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

Specification 1: In that Second Lieutenant Stuart D. Lawson, 443rd Fighter Squadron, 327th Fighter Group, did, at Army Air Base, Richmond, Virginia, on or about 24 October 1943, with intent to deceive Captain Raymond E. Wilson, Adjutant, 327th Fighter Group, officially state to the said Captain Raymond E. Wilson, that the reason for his delay in reporting to the 327th Fighter Group for duty was that his pregnant wife, who had accompanied him from Westover Field, Massachusetts, had had an accident enroute which caused a miscarriage, necessitating her hospitalization, and further that he had sent a telegram to his organization explaining the delay, which statements were known by the said Second Lieutenant Stuart D. Lawson to be untrue in

that his wife had not accompanied him from Westover Field, Massachusetts, to Richmond, Virginia, had not had an accident, and had not suffered a miscarriage, nor had he sent a telegram to his organization explaining his delay in reporting.

Specification 2: In that Second Lieutenant Stuart D. Lawson, 443rd Fighter Squadron, 327th Fighter Group, did, at Army Air Base, Richmond, Virginia, on or about 24 October 1943, with intent to deceive Captain Lynn D. Sifford, Jr., Assistant Flight Commander of "D" Flight, 443rd Fighter Squadron, 327th Fighter Group, his superior officer, officially state to the said Captain Lynn D. Sifford, Jr., that the reason for his delay in reporting for duty was that he had been taking care of his pregnant wife and making arrangements for her hospitalization, which statement was known by the said Second Lieutenant Stuart D. Lawson to be untrue in that he was not taking care of his wife nor making arrangements for her hospitalization.

He pleaded guilty to Charge I and the Specification thereunder, and not guilty to Charge II and the Specifications thereunder. He was found guilty of all Specifications and Charges, and 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:

a. Specification, Charge I: An extract copy (Ex. 2) of special orders dated 13 October 1943 showed accused relieved from 370th Fighter Group, Westover Field, Massachusetts, and assigned to "D" Flight, 443rd Fighter Squadron, 327th Fighter Group, Richmond, Virginia. A teletype message (Ex. 3) stated that accused departed from Westover Field at noon on 16 October for Richmond Army Air Base. An extract copy (Ex. 1) of the morning report of 443rd Fighter Squadron showed accused from assigned not yet joined to absent without leave as of 19 October and from absent without leave to duty as of 24 October 1943. Accused reported to Captain Raymond E. Wilson, adjutant of 327th Fighter Group, at Richmond Army Air Base on 24 October 1943. This was the first time he reported there (R. 8-11).

b. Specifications 1 and 2, Charge II: At about 2:45 or 2:50 p.m. on Sunday, 24 October, accused reported to Captain Wilson at his office.

Captain Wilson stated that accused had been carried as absent without leave for several days and requested an "official explanation" of his absence. Accused replied that he and his wife had left Westover Field for Richmond, she accompanied him, she had an accident and a miscarriage, he took her to a hospital in Washington, spent about $250 for hospital expenses, had quite a time making arrangements, and lost several days in getting her properly cared for before proceeding to Richmond. When Captain Wilson remarked that accused had "a lot of tough luck", the latter agreed and stated that he was quite upset because of his wife's condition. Accused stated that he had forwarded a telegram from Washington explaining his delay, but Captain Wilson did not receive it. Captain Wilson assumed that when accused reported he knew Captain Wilson was the group adjutant; there was a sign on his desk showing his name and "Adjutant"; he stated to accused "I am Captain Wilson" (R. 11-14).

At about 3:00 p.m. the same day Captain Lynn D. Sifford, Jr., assistant flight commander of "D" Flight, talked to accused at group headquarters, asked where accused had been during the past week and stated that they had been expecting him but he had not shown up. Accused replied that he had left his former station at the right time and that he had been having trouble with "arrangements with his wife to make preparations for her to be in the hospital with a youngster--a child". Captain Sifford did not recall that he had stated his name and "reason for being there" to accused, but assumed that accused knew, from the way the question was asked, that he was the commanding officer of accused. There were several officers and enlisted men in the room at the time. Captain Sifford mentioned several letters for accused which had been received, apparently mailed by his wife at New London, Connecticut during his absence, and suggested to accused that, if the story he had given was correct, he should "check up" on it before telling it to the group commander (R. 14-16, 19-21).

At about 4:00 p.m. Colonel Nelson P. Jackson, commanding 327th Fighter Group, interviewed accused in his office, in the presence of Captain Sifford, Major Thomas J. Keating, Jr. and two others. Colonel Jackson advised accused that he was not required to answer any questions and that his answers might be used against him. In answer to questions by Colonel Jackson, accused stated that his wife lived in New London, Connecticut, he had last seen her on Saturday night a week before, he signed out at Westover Field about 17 October, left about 18 October, and "in the meantime" had been in Washington at the Washington Hotel. Accused stated further that his wife was pregnant, had not had a miscarriage, expected the baby about March or April 1944; and that he had been sightseeing in Washington, and had not sent a telegram explaining his absence during the week after he left Westover. Accused also stated that he had

arrived at Richmond Army Air Base on the evening of 23 October, but did not report until the next day. He stated that he had no excuse for his absence without leave (R. 16-18, 22-28).

4. The accused testified that he enlisted 17 March 1942, was commissioned 14 January 1943, and had about 225 hours of advanced flying after his graduation. He left Westover Field on Saturday, 16 October, arrived at Richmond Army Air Base about 7:00 p.m. on 23 October, and reported his arrival at headquarters the next day. He reported at base headquarters at about 11:00 a.m., signed the register, and then went to lunch. He went to group headquarters and found some other officers reporting in. A sergeant in the classification office gave him some papers to fill out. A captain (whom he did not know at the time, but afterwards learned to be Captain Sifford, assistant flight commander) told him to take his papers to "the last door on the left" to "Captain Wilson". By mistake accused went through a long office and entered a door that "went in beside the desk". Accused did not know who Captain Wilson was, and did not see the sign on the front of the desk because he entered at the side. He handed Captain Wilson the paper and Captain Wilson, after reading it, began questioning accused. Accused did not at that time know that he was reporting "to the Adjutant in an official capacity". Later Captain Sifford (not known to accused as assistant flight commander) asked him where he had been and accused "related this story to him". Captain Sifford told him to report to the finance officer at base headquarters. On the way there, accused stopped at the post exchange, where Captain Sifford overtook him and stated that Colonel Jackson wanted to talk to him. Captain Sifford told him that he had better be sure that his "story was straight" when he talked to Colonel Jackson (R. 28-34).

On cross-examination accused testified that when he was questioned by Captain Wilson he made the following statements which he knew at the time were not true: that his wife had an accident and suffered a miscarriage, that she was hospitalized as a result of the accident, and that he had sent a telegram to the 327th Group explaining his delay. When he talked to Captain Sifford, he stated that he had been making arrangements for the hospitalization of his wife (who was pregnant) during the time he was absent, and he knew the statement was not true (R. 34-37).

5. The evidence shows and the pleas of guilty admit that accused was absent without leave from about 19 October to about 24 October 1943.

As to Specifications 1 and 2, Charge II, the evidence shows that accused departed from Westover Field, Massachusetts on 16 October 1943, under orders transferring him to "D" Flight, 443rd Fighter Squadron, 327th Fighter Group, Army Air Base, Richmond, Virginia. That night he saw his wife at New London, Connecticut, where she lived, and then proceeded to

Washington, where he spent the week in sightseeing. He arrived at Richmond Army Air Base on the evening of 23 October. The next morning he signed in at base headquarters, and after lunch proceeded to group headquarters to report. While there he was asked separately by Captain Raymond E. Wilson, adjutant of 327th Fighter Group, and by Captain Lynn D. Sifford, Jr., assistant flight commander of "D" Flight, where he had been during the past week. To Captain Wilson, he falsely stated that when he left Westover Field his wife accompanied him, that she (in fact pregnant) had an accident and miscarriage, that he had lost several days in Washington in arranging for her care and hospitalization, and that he had sent a telegram to the 327th Group explaining the delay. To Captain Sifford accused falsely stated that he had been making arrangements for the hospitalization of his wife during the time he was absent.

About an hour later, accused was interviewed by the commanding officer of 327th Fighter Group, after Captain Sifford had advised him to tell a "straight" story. At that time, accused told the truth. In his testimony, accused claimed that when he made the false statements he did not know that Captain Wilson was the adjutant, nor that he was reporting to the adjutant in an official capacity, and did not know who Captain Sifford was.

In the opinion of the Board of Review, accused was shown to be guilty of Specifications 1 and 2, Charge II, whether or not he knew the official positions of the two officers to whom he made false statements. Both officers were his superiors in grade, they were obviously present at group headquarters in an official capacity, and accused was there for the express purpose of reporting for duty under his orders. He knew that he had been absent without leave for about five days, and that in all probability he would be called on for an explanation. He was expressly sent to Captain Wilson for the purpose of presenting the papers which he had filled out as a part of reporting for duty. Under these circumstances, the contention that the statements were casually made, and not known to be official, is frivolous, and merits no consideration. The evidence shows that accused intended to deceive officers in authority over him as to the reason for his delay in reporting. The Manual includes knowingly making a false official statement among instances of violation of the 95th Article of War (MCM, 1928, par. 151).

6. a. The defense objected to the testimony of Captain Wilson as to the reasons given by accused for his absence, on the ground that accused had not been warned of his right not to incriminate himself (R. 11-13). In the opinion of the Board of Review the objection was properly overruled. This evidence was not offered as an admission or confession, but in proof of an essential element of the offense of making a false official statement.

The failure to give warning of rights under the 24th Article of War is material on the question whether a confession or admission is voluntary and admissible in evidence, but it does not create a license to make false official statements.

b. On cross-examination of accused, he was asked whether he had been punished under the 104th Article of War for breach of restriction at Westover Field, an objection was overruled, and he answered in the affirmative (R. 37). The ruling was erroneous, as such proof of other offenses is normally not only irrelevant to the issues, but prejudicial to an accused. However, in view of the fact that the guilt of accused was clearly proved by the evidence, including that of accused, it is the opinion of the Board that the error did not injuriously affect the substantial rights of accused.

7. The accused is 22 years of age. The records of the Office of The Adjutant General show his service as follows: Aviation cadet from 11 April 1942; appointed second lieutenant, Army of the United States, and active duty, 14 January 1943.

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 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. Darrow, Judge Advocate

[illegible], Judge Advocate

F. J. Lotterhos, Judge Advocate

1st Ind.

War Department, J.A.G.O., 20 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 Stuart D. Lawson (0-795986), 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 was absent without leave for about five days and, on reporting to his organization, with intent to deceive made two false official statements, orally, of the reason for his absence. 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. of S/W.
Incl.3-Form of action.

(Sentence confirmed. G.C.M.O. 129, 16 Mar 1944)

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

SPJGQ
CM 245726

4 JAN 1944

UNITED STATES	)	THIRD AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at Tallahassee, Florida, 4, 18, 25 and 26 October 1943. Dishonorable discharge and confinement for life. Penitentiary.
Private GEORGE J. VEST (6943683), 439th Fighter Squadron, III Fighter Command.	)	

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 George J. Vest, 439th Fighter Squadron, III Fighter Command, Dale Mabry Air Base Area Command, Tallahassee, Florida, did at the establishment known as, Jose Spaghetti House, located in Leon County, Florida, on or about September 1, 1943, with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Robert C. Peoples, 439th Fighter Squadron, III Fighter Command, Dale Mabry Air Base Area Command, Tallahassee, Florida, a human being, by stabbing him about the neck and chest with a deadly weapon, to wit, a knife.

He pleaded not guilty to, and was found guilty of, the Charge and Specification. Evidence of three previous convictions consisting of (a) a conviction by summary court-martial for being absent without leave for two days, (b) a conviction by summary court-martial for breaking restrictions and appearing drunk in uniform, and (c) a conviction by special court-martial for entering an area prohibited to

military personnel and being absent without leave for a period of four days, was introduced at the trial. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement 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. The competent evidence for the prosecution may be summarized as follows:

The accused, George J. Vest, at the time of the occurrence, was a private in the 439th Fighter Squadron, III Fighter Command, stationed at Tallahassee, Florida. About two o'clock in the morning of 1 September 1943, he went to the tourist home of a Mrs. Ruby Reeves in Tallahassee, where he had previously stayed from time to time, and rented a room. Between four and five o'clock of the afternoon of that day he was joined by Corporal John W. Dorsey, Private G. J. Liebscher, and Private Robert C. Peoples, the deceased. The four went into the living room, turned on the radio and were talking and laughing (R. 20). About an hour later, in company with Mrs. Reeves, they drove to the office of the Western Union, where one of the soldiers conversed with Mrs. Reeves' niece, Myrna Smith, who was employed at that office (R. 60). They purchased three bottles of liquor and returned to Mrs. Reeves' and consumed the contents of one bottle and half of another. About 6:30 p.m. they again left Mrs. Reeves' by automobile, picked up Miss Smith at the Western Union office and drove to Jose's Spaghetti House. The accused drove the car (R. 21). The main entrance to the Jose Spaghetti House was at the north end of the building and opened directly into a dance floor that extended from north to south the length of the building. Five small dining rooms opened off this dance floor on the east and a similar number on the west side. They were numbered clockwise from 1 to 10, number 1 being in the northeast corner and number 10 in the northwest corner of the building. Room number 8 was situated on the west side and near the middle of the dance floor. It was a room approximately eight by nine feet in size and contained a table, approximately five by three feet three inches in size, and six chairs. The longer dimension of the table extended east and west and there was one chair at each end and two on each side. The door of room 8 was 28 inches wide and near the northeast corner of the room. The north edge of the table extended to about the south side of the door. Two of the five small tables surrounding the dance floor were against the west wall. One was between rooms 7 and 8 and the other between rooms 8 and 9 (R. 14-16; Exs. 2, 3, 4, 6). The accused and those

accompanying him occupied room No. 8. When they were first seated Dorsey occupied the chair at the east end of the table. Miss Smith sat on the south side of the table immediately to his left and Peoples on the north side immediately to his right. Mrs. Reeves sat on Miss Smith's immediate left and Liebscher to the immediate right of Peoples. Accused sat at the west end of the table (R. 21).

Someone of the group had brought a bottle of whiskey into Jose's and placed it on the table. They ordered six bottles of coca cola and placed their orders for food, but the witnesses were not certain as to whether any one drank any more whiskey.

Very shortly after all were seated, as above outlined, Liebscher said something (not disclosed by the record) to Dorsey which provoked the latter to invite him outside to settle their differences. Liebscher made no move to accept the challenge, but Peoples told Dorsey he would go outside with him, and they did go outside together (R. 22). Dorsey testified that his difference with Liebscher arose over the latter's making too much noise and acting silly and not from Liebscher's touching him (R. 107-8); and that when he and Peoples went outside together, the latter "stuck up with Liebscher" and cooled him (Dorsey) off and took him back inside (R. 64-65). Upon their return, Mrs. Reeves, not knowing what their feeling toward each other was, exchanged seats with Dorsey, and she thereafter sat at the east end of the table (R. 22).

Thereafter, Liebscher "bothered" Dorsey again and the latter left and did not return until after the fatal difficulty between Peoples and Vest (R. 22).

Mrs. Reeves testified that after Dorsey had gone out Peoples was arguing (with whom is not disclosed) and a waitress came in and told him that if he didn't stop the arguing she was going to call somebody. Peoples said, "Go ahead and call anybody you want." Whereupon, accused said to Peoples "you'd better remember that pass." Peoples immediately sprang to his feet and said to Vest, "You just keep out of this, that is none of your affair." The reference to the pass had apparently made Peoples angry and he went around the east end and south side of the table to where Vest was seated. He then, as Mrs. Reeves recounted the incident, put his hands on Vest's shoulders and pushed him "down and down until he was almost on the floor." Mrs. Reeves did not see accused on the floor but next saw him and Peoples standing. Peoples then pushed accused back into his chair and, according to the witness, "just pushed and pushed him." Mrs. Reeves did not see Peoples with any weapon, nor did she see him strike Vest any blow that could hurt him. In addition to the acts above described, Peoples "just had a hold of him (accused) and kept kind of shaking him" (R. 22). She did

not know what terminated the struggle, but Peoples and accused walked back around the south side and east end of the table close together; Peoples going to his seat and Vest going outside the door, remarking, as he did so, that he was leaving (R. 23).

Almost immediately after leaving the room, accused returned and began rapidly to strike deceased. As she put it, "It was just like a flash when he came back and landed on him" (R. 23, 31). She did not know whether Peoples had actually resumed his seat and did not see accused with a knife, but after accused had left the room a second time she saw that Peoples was bleeding and saw him fall.

Myrna Smith, testified that Dorsey and Liebscher were arguing during the evening and then Dorsey and Peoples got into an argument (R. 72). After that had subsided Peoples advanced upon Vest as he was seated at the west end of the table, the latter stood up and Peoples seized him by the collar and pushed him up against the wall but did not strike him (R. 73). She did not see Peoples push Vest almost to the floor. She heard Vest say, "Let's quit and sit down and be quiet", and both Peoples and Vest then resumed their seats. Both appeared to be "mad". After Peoples had regained his seat, either he or Vest said something else of an argumentative nature, whereupon Vest said that he did not want to break up the party and that he was leaving. Vest left the room but returned and began stabbing Peoples with a knife that had a three or four inch blade. Peoples was seated when the attack was made and was "kind of lying down on the chair" while it was continuing (R. 70-72). They were both angry (R. 74).

Private Liebscher testified that he was so drunk at the time that he remembered nothing about the incident (R. 66-68). Corporal Dorsey was not present at the time and knew nothing about the occurrence.

Corporal Sam Valente (R. 52-53) and Miss Johnnie Little (R. 54) who were in one of the rooms across the dance floor opposite room 8, testified to seeing the accused striking the deceased with a knife while they stood in the doorway of Room 8. The accused held Peoples with his right hand as he struck him with the knife in his left hand (R. 54).

Jose Gionta, owner of Jose Spaghetti House, testified that deceased was lying across his chair while he was being struck, with his attacker leaning over or lying on him (R. 58). He threatened to call the M.P.'s, and then the accused ran from the house hurriedly and jumped in a car.

Sergeant Clarence R. Deverweare, who was sitting at the table between rooms 8 and 9, testified that accused stepped outside the door of room 8, whirled and went back inside, and then ran from the room and building, jumped in a car and left (R. 45, 51).

Mr. James M. Jones, in describing accused's departure from the building, testified that he walked out slowly but in a determined manner, and that he had a set expression on his face (R. 43).

Accused was taken into custody by E. G. Shelton, Highway Patrolman, and Sergeant Harry Thalford shortly after the difficulty. They came upon him about six or seven miles from Jose's Spaghetti House on Highway 90, in the opposite direction from Tallahassee. When the officers came up to him, accused was looking under the hood of the car. The left side of the car was "smashed up, glasses were broken, and the windshield was broken", indicating the car had recently been in an accident. Accused sought help to get the car back on the road, representing that he had borrowed it and wanted to return it to its owner in Tallahassee. A search of accused disclosed no weapons. He asked what he was "being carried in for" and, upon being told that a man had been stabbed and that he was the man who did it, he told the officers they must have the wrong man, that he knew nothing about it (R. 35, 37).

The officers who arrested accused testified that he had been drinking but was not drunk. The other witnesses testified that accused was not drunk before or at the time of the difficulty, and that, in fact, before his trouble with deceased, he had been the quietest and best behaved one of the group.

Peoples, after having been given some first aid at the scene of the trouble, arrived at the hospital at 8:10 p.m. and died two minutes later (R. 18, Ex. 9). Some fourteen wounds were found on his body. The undertaker, Mr. Culley, described them as follows:

> "There was one large puncture wound directly between the right clavicle medial side and piercing the thoracic wall incising the clavian vein. There was a hemorrhage at this point. Number 2 was a small wound immediately inferior to the above described wound, which did not pierce the wall of the thoracic cavity. Third wound was a small wound, I would say about 1/2" in depth, a puncture wound 1/4" in width, and to the right of the middle part of the sternum between the 3rd and 4th ribs, about on the level between the 3rd and 4th ribs. There was a wound, number 5 on this diagram, which was a large gaping wound, I would say about 1½" in length and about 3/4" in width, that apparently had just pierced the thoracic wall and went no farther or stopped in the thoracic wall below the distal third of the left clavicle, I would say about 2" below.

There was some hemorrhage from this wound. There was a wound from the anterior surface of the upper third of the left arm proceeding medially along the wall of the thoracic cavity and terminating in the wound described immediately before this. There was one on the back of the neck, the left side of the back of the neck, about right at the base of the neck about 2" from the spine, a gaping wound about 1" by 3/4" proceeding obliquely for about 2" to terminate against the spine. There was a wound on the left anterior surface of the neck measuring about 1" to 1½" long and about 1/2" wide proceeding down immediately beneath the skin and over the left trapezius muscle, and when we probed in this wound, I believe it was about 1½ or 2" in length. There was superficial wound over the left temporal region, number 13 on the diagram, and there was a great deal of discoloration surrounding this wound. Number 14 was a bruise and I would describe it as small broken spots on the outer tissues, greatly discolored over the right eyebrow medial position. I think that covers it" (R. 33-34, Ex. 7 and 8).

Captain Loys W. Willey, M.C., who was attending deceased at the time he died, and Mr. Culley testified that, in their opinions, Peoples died from the effects of the above described wounds and resulting hemorrhage.

4. Accused, after having been fully advised of his rights, elected to be sworn and testified in his own behalf. His testimony and that of other witnesses called by the defense may be summarized as follows:

Only his mother is living, his father having died some eleven years previously. Since the death of his father he has taken care of and contributed to the support of his mother. He is married and has a daughter, two years of age. He has been married a little over three years but has not lived with his wife for almost three years. He has, however, continued to support his wife and child (R. 90).

Accused drank considerable whiskey during the afternoon and night of 31 August 1943, before going to Mrs. Reeves' house. He began drinking again at Chris' Place in the evening of 1 September and continued to drink after returning to Mrs. Reeves' house, as well as after he reached Jose's Spaghetti House. At least once at each of the latter places, he drank a half water tumbler of whiskey per drink (R. 90-91, 92, 93).

An argument occurred at Mrs. Reeves' house between Liebscher and Dorsey, arising as a result of the former's grabbing the latter by the penis (R. 92). Upon at least two occasions after they reached Jose's Spaghetti House, Liebscher attempted to repeat this act, and

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it was that which caused the trouble between him and Dorsey and which made Dorsey want to take him out and beat him up (R. 93).

Liebscher and Dorsey were also using profanity, and accused tried to stop the arguments and the use of profanity by admonishing them to show some respect for the ladies (R. 93).

Peoples was siding with Liebscher and got mad and asked Dorsey to leave the table. Dorsey left the room, but when the food was brought in, accused went out and pursuaded him to return (R. 93).

Liebscher thereafter renewed his argument with Dorsey and when accused was unable to quiet them down, he decided to leave the party. When he started to leave, Peoples met him near the center of the table on the south side. Peoples looked angry and accused, being afraid of him, backed to his (accused's) chair at the west end of the table. When accused reached his chair, Peoples struck him in the chest with his fist and knocked him down. Accused tried three times to rise and upon each occasion he was knocked down by hard blows in the chest from the fist of Peoples. Accused then asked Peoples to forget the matter and to go back and sit down (R. 94).

Peoples returned to and resumed his seat, still looking very angry, but told accused that if he got up he would "knock his block off" (R. 94). Accused did not know whether Peoples was angry at him because he had brought Dorsey back to the party or because he (Vest) was trying to leave the party (R. 97).

For fear he would get into a fight if he remained with the party longer, accused arose from his chair and started out of the room a second time. His line of travel to the door was around the south side and east end of the table. As he approached toward the door, Peoples, looking very angry, leaped from his chair and awaited him. He (Peoples) was leaning forward with his arms up and his fists closed (R. 95). Accused had opened his knife, a knife with a blade between two and three inches long as he advanced toward the door. He had no intention of using the knife unless it became necessary to defend himself (R. 101). It was a "tight squeeze" between the chair at the east end of the table occupied by Mrs. Reeves and the wall and it was impossible to get out of the door of the room without coming within Peoples' reach (R. 95). Accused thought Peoples was going to reach out and grab him and "near kill him" so he defended himself by striking Peoples a few blows with the knife. He could remember striking only three or four blows (R. 95). He denied that he stepped out of the room just before striking Peoples (R. 96). The accused knew Peoples to be a professional boxer in good physical condition, some five inches taller than he, and

had a reach about four inches longer (R. 95). His recollection of the details of the encounter was not clear. He was angry and afraid. He did not recall whether the deceased actually grabbed him or he the deceased (R. 96-101). He had no intention of killing the deceased (R. 97). They were friends and had known each other and had worked together for about eight months. They had never had any previous arguments (R. 96).

After finally leaving Room 8 the accused walked out of the building and drove off in Mrs. Reeves' automobile for the purpose of going down the road a way and let things cool off. He was not running away. He did not know at the time that he had seriously injured Peoples. He lost control of the car when he attempted to light a cigarette (R. 96, 104).

The accused claimed he had drunk so much liquor that he did not remember all of the details of the occurrence, but he did remember the arguments and profanity and most of that which had taken place (R. 97). He did not recall what had happened to the knife after he used it (R. 105). Corporal Roy B. Tangel and First Sergeant Robert E. Wiseman testified that the accused enjoyed a good reputation for peace and good order among the men of his organization (R. 106, 107).

Corporal Robert A. Merrick testified for the accused that he was in Room 3 at Jose's and heard the disturbance in Room 8. When he looked through the door he saw the accused trying to free himself from Peoples who had a hold of him. Accused gave Peoples a "couple of shoves" and Peoples fell on the floor. He picked himself up and collapsed against the side of the door and fell again to the floor (R. 85).

5. It was clearly established by the evidence that the accused, Private George J. Vest, stabbed Robert C. Peoples, a human being, with a knife at the time and place averred in the Specification and thereby caused his death. The accused has been charged with and found guilty of murder. Murder is the unlawful killing of a human being with malice aforethought. The legal questions presented are whether the killing was unlawful and whether malice aforethought was present at the time.

"Unlawful" means without legal justification or excuse. A homicide committed in the performance of a legal duty is a justifiable one. Vest certainly was not acting in the performance of any legal duty and it therefore follows that the killing or homicide was without legal justification. Was it excusable? A homicide committed in self defense is excusable. In order that a killing may be excused on the ground of self defense, however, the killing must have been believed on reasonable grounds by the person doing the killing to be necessary to save his life or to prevent great bodily harm to himself. The

danger must be believed on reasonable grounds to be imminent, and no necessity will exist until the person, if not in his own house, has retreated as far as he safely can. When these principles of law are applied to the facts it becomes clear that the accused did not kill in self defense. While he maintained that he believed Peoples was going to inflict great bodily harm upon him, yet the weight of the evidence tended to show that Peoples was unarmed, had withdrawn to his own chair, and displayed no intention of inflicting any harm to the accused, much less great bodily harm. The accused's belief therefore, if it did exist, was not based upon reasonable grounds. Besides, the evidence was also clear that accused had reached and safely passed through the doorway of Room 8. He could have "retreated" with safety to himself and avoided further combat. Instead of doing so he returned to the room and became the aggressor. The court was under such circumstances justified in finding that the killing was not excusable on the ground of self defense but was, as the definition above terms it, "unlawful".

Was there malice aforethought? Malice does not necessarily mean hatred or personal ill will toward the person killed, nor an actual intent to take his life. The term "malice" is a technical one. Chief Justice Shaw in Com. v. Webster, 5 Cush 296; 52 Am. Dec. 711, explains it as follows:

> "* * * Malice, in this definition, is used in a technical sense, including not only anger, hatred, and revenge, but every other unlawful and unjustifiable motive. It is not confined to ill-will towards one or more individual persons, but is intended to denote an action flowing from any wicked and corrupt motive, a thing done malo animo, where the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty, and fatally bent on mischief. And therefore malice is implied from any deliberate or cruel act against another, however sudden.
>
> * * * *
>
> "* * * It is not the less malice aforethought, within the meaning of the law, because the act is done suddenly after the intention to commit the homicide is formed: It is sufficient that the malicious intention precedes and accompanies the act of homicide. It is manifest, therefore, that the words 'malice aforethought,' in the description of murder, do not imply deliberation, or the lapse of considerable time between the malicious intent to take life and the actual execution of that intent, but rather denote purpose and design in contradistinction to accident and mischance" (Commonwealth v. Webster, 5 Cush. 296; 52 Am. Dec. 711).

Peoples' death was not brought about by any accident or mischance. It resulted from Vest's purpose and design to do him bodily harm with a knife.

It follows from the foregoing that there was sufficient evidence to support a finding that the accused had malice aforethought when he killed Peoples. Even assuming that he did not intend to kill Peoples, as he contended, yet stabbing Peoples with such a dangerous weapon as a knife thirteen or fourteen times in and about the neck and chest was an act intended to do great bodily harm so wantonly performed as to evidence disregard for Peoples' life. Malice may be implied under such circumstances. 26 Amer. Jur. par. 41, page 186.

It was argued by defense counsel that if the killing was found not to be in self defense it was committed in the heat of sudden passion caused by provocation and therefore was voluntary manslaughter and not murder.

Manslaughter is defined as unlawful homicide without malice aforethought and is either voluntary or involuntary.

Voluntary manslaughter is where the act causing the death is committed in the heat of sudden passion caused by provocation (MCM, 1928, par. 149a, p. 165).

> "The law recognizes the fact that a man may be provoked to such an extent that in the heat of sudden passion, caused by the provocation, and not from malice, he may strike a blow before he has had time to control himself, and therefore does not in such a case punish him as severely as if he were guilty of a deliberate homicide.
>
> "In voluntary manslaughter the provocation must be such as the law deems adequate to excite uncontrollable passion in the mind of a reasonable man; the act must be committed under and because of the passion, and the provocation must not be sought or induced as an excuse for killing or doing bodily harm (Clark).
>
> "The killing may be manslaughter only, even if intentional; but where sufficient cooling time elapses between the provocation and the blow the killing is murder, even if the passion persists.
>
> * * * * * *
>
> "Instances of inadequate provocation are: Insulting or abusive words or gestures, trespass or other injuries to property, and breaches of contract."

By its finding of guilty the court has concluded that either the provocation was not legally sufficient to excite uncontrollable passion in the mind of a reasonable man or that there was a sufficient cooling time between the provocation and the blow for a reasonable person's passion to subside.

In the opinion of the Board of Review the court's conclusion is supported by the evidence. Peoples was entirely unjustified in attacking Vest and pushing or striking him. True it is that Peoples was physically larger and stronger than Vest and may have been a bully in picking on the accused who had offered no violence or opposition of any kind. It is also true that Vest who had always been friendly with Peoples had no apparent motive to kill or even injure Peoples. His stabbing of Peoples undoubtedly resulted from anger or passion influenced by Peoples provocation and liquor. The question however, whether the provocation was sufficient to excite a reasonable man or whether under the circumstances a sufficient time elapsed between Peoples' attack upon Vest and Vest's fatal attack on Peoples for a reasonable person's passions to cool, are for the court to determine under the evidence. In view of the surrounding circumstances, namely that Peoples' attack, while unjustified, was not of a particularly vicious nature - no apparent injury was inflicted upon Vest -; that Peoples had withdrawn to his seat and had actually seated himself; and that Vest, according to some of the witnesses, had calmly walked out of the room with a remark that he was leaving, before he returned to strike the fatal blows, the court was justified in finding that the offense was murder and not voluntary manslaughter. Having arrived at that conclusion it was mandatory upon the court under the provision of Article of War 92, to impose a sentence of life imprisonment or death.

6. The record shows the accused to be 21 years of age. He served in Company F, 28th Infantry, from 7 January 1938 to 5 November 1938. He again enlisted at Roanoke, Virginia, 31 March 1941, to serve for three years.

7. The court was legally constituted and had jurisdiction over 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 of the sentence. Dishonorable discharge, total forfeitures and life imprisonment are authorized upon conviction of a violation of Article of War 92.

William A. Rounds, Judge Advocate

Earle Hepburn, Judge Advocate

Herbert B. Fredericks, Judge Advocate

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

SPJGH
CM 245806

8 MAR 1944

(277)

UNITED STATES v. Technical Sergeant HERMAN C. HANCOCK, JR. (14072834), 470th Bombardment Squadron (M), 334th Bombardment Group (M), Greenville Army Air Base, Greenville, South Carolina.	)	THIRD AIR FORCE Trial by G.C.M., convened at Greenville Army Air Base, Greenville, South Carolina, 21-23 October 1943. Dishonorable discharge and confinement for life. Penitentiary.

REVIEW by the BOARD OF REVIEW
DRIVER, O'CONNOR and LOTTERHOS, 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 on the following Charges and Specifications:

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

Specification: In that Technical Sergeant Herman C. Hancock, Jr., 470th Bombardment Squadron (M), 334th Bombardment Group (Medium), Army Air Forces, did, at a place near Greenville, South Carolina, on or about June 29, 1943, forcibly and feloniously, against her will, have carnal knowledge of Miriam D. Gibson.

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

Specifications 1-3: (Findings of not guilty).

ADDITIONAL CHARGE I: Violation of the 93rd Article of War. (Finding of guilty disapproved by reviewing authority).

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

Specification 2: (Finding of not guilty).

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

Specification 1: In that Technical Sergeant Herman C. Hancock, Jr., 470th Bombardment Squadron (M), 334th Bombardment Group (Medium), while lawfully wed to Bertha Louise Currier, did, at Panama City, Florida, on or about July 18, 1942, unlawfully marry Croteal Beatrice Campbell.

Specification 2-4: (Findings of not guilty).

Specification 5: In that Technical Sergeant Herman C. Hancock, Jr., 470th Bombardment Squadron (M), 334th Bombardment Group (Medium), having, as the result of a certain business transaction of about September 11, 1942, between said Technical Sergeant Herman C. Hancock, Jr., H. V. Campbell of Panama City, Florida, and the Bay National Bank, become indebted to said H. V. Campbell in the amount of $228.27, which said sum did then and there become due and payable, has dishonorably failed and neglected to pay said debt.

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

Specification 7: (Finding of not guilty).

Specification 8: In that Technical Sergeant Herman C. Hancock, Jr., 470th Bombardment Squadron (M), 334th Bombardment Group (Medium), having on or about February 9, 1943, purchased, on conditional sales contract from J. C. Lewis Motor Company of Savannah, Georgia, a certain Mercury Sedan automobile, did, on or about March 9, 1943, without the knowledge or consent of the vendor, unlawfully sell or otherwise dispose of said automobile, there being still owing on said contract the sum of about four hundred and forty-eight dollars ($448.00).

Specification 9: In that Technical Sergeant Herman C. Hancock, Jr., 470th Bombardment Squadron (M), 334th Bombardment Group (Medium), being indebted to J. C. Lewis Motor Company of Savannah, Georgia, in the sum of four hundred and forty-eight dollars ($448.00), for the financing of a certain Mercury Sedan automobile, which amount became due and payable on or about March 9, 1943, has dishonorably failed and neglected to pay said debt.

Specification 10: (Finding of not guilty).

Specification 11: In that Technical Sergeant Herman C. Hancock, Jr., 470th Bombardment Squadron (M), 334th Bombardment Group (Medium), having at Plant Field, Tampa, Florida, on or about

March 2, 1943, become indebted to the Army Emergency Relief Fund in the amount of One hundred dollars ($100.00), which said sum became due and payable in three (3) monthly instalments, has dishonorably failed and neglected to pay said debt.

Specification 12: In that Technical Sergeant Herman C. Hancock, Jr., 470th Bombardment Squadron (M), 334th Bombardment Group (Medium), did, at Greenville Army Air Base, Greenville, South Carolina, on or about June 17, 1943, fraudulently obtain an Army Emergency Relief loan in the amount of $50.00, by falsely representing that he and his wife had belongings and furniture in Greenville, South Carolina, and that it was his intent to use such moneys for the purpose of bringing his wife to Greenville and meeting family expenses.

Specification 13: In that Technical Sergeant Herman C. Hancock, Jr., 470th Bombardment Squadron (M), 334th Bombardment Group (Medium), did, at Greenville Army Air Base, Greenville, South Carolina, on or about July 8, 1943, make under oath a false statement in substance as follows: I needed the money ($50 AER loan) to get my wife home. She came up here and I took her back home. My wife was here about five (5) days, which statement he did not then believe to be true.

Specification 14: In that Technical Sergeant Herman C. Hancock, Jr., 470th Bombardment Squadron (M), 334th Bombardment Group (Medium), did, at Greenville Army Air Base, Greenville, South Carolina, on or about July 8, 1943, make under oath a false statement in substance as follows: I have been married twice, which statement he did not then believe to be true.

Specification 15: In that Technical Sergeant Herman C. Hancock, Jr., 470th Bombardment Squadron (M), 334th Bombardment Group (Medium), did, at Greenville Army Air Base, Greenville, South Carolina, on or about July 8, 1943, make under oath a false statement in substance as follows: Annie Mae Lanier is the only lady I have married since my divorce from my first wife, Bertha Louise Currier, which statement he did not then believe to be true.

Specifications 16-17: (Findings of not guilty).

Specification 18: In that Technical Sergeant Herman C. Hancock, Jr., 470th Bombardment Squadron (M), 334th Bombardment Group (Medium), while lawfully wed to Annie Mae Lanier, did, at New Orleans, Louisiana, on or about June 12, 1943, unlawfully

marry Mary G. Donner, Technician Fifth Grade, 797th Post Headquarters Company, AAFTTC, Sioux Falls, South Dakota.

He pleaded not guilty to all Charges and Specifications. He was found not guilty of Charge II and the Specifications thereunder, of Specification 2, Additional Charge I, and of Specifications 2, 3, 4, 7, 10, 16 and 17, Additional Charge II, and guilty of all other Charges and Specifications. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the rest of his natural life. The reviewing authority disapproved the findings of guilty of Specification 1, Additional Charge I, of Additional Charge I, and of Specification 6, Additional Charge II; 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. Evidence for the prosecution in pertinent part is substantially as follows:

a. Specification, Charge I: On 26 June 1943, Miriam Gibson, 24 years of age, a service station attendant at the Greenville Army Air Base, Greenville, South Carolina, saw accused for the first time, and "as a matter of conversation" asked him about a cast on his arm. After a few minutes conversation accused asked for a date and when he returned later she consented to ride home with him. Miriam introduced him to her family and after her parents left to keep an engagement accused told her he was old enough to settle down, thought she was a nice girl and wanted to date her regularly. She discouraged the idea but stated that she "might date him again". The accused returned the next day (Sunday) about 12 o'clock, was invited to stay for dinner, and told Mrs. T. H. Gibson, Miriam's mother, that he wanted to marry and settle down, that he thought a lot of Miriam and that the family was just the kind he would like to be in. After dinner, accused took Miriam to a theatre at Spartanburg, South Carolina. He asked for a date for Monday night but she refused. On Monday accused called at the station and asked Miriam for a date for Tuesday evening. The cast had been removed from his arm. He stated that he was going overseas and offered Miriam the use of his car. She refused the responsibility and also his request for a date Tuesday night. On Tuesday, 29 June 1943, accused again came to the station and asked for a date. She consented to go to a "movie" with him. That evening they attended the theatre at Greer, South Carolina. They left Greer about 10:30 p.m. (R. 57-58, 65-67).

On the way back to Miriam's home, accused parked the car off the highway and started "getting fresh". Miriam asked accused to take her home.

After some argument he started the car, drove "a little way", turned off on a narrow dirt road, and "started in again". He told her that struggling would do no good, that she might as well "give in" to him, and that he would "have" her before the night was over. Miriam said he would have to kill her first, and he replied, "that's all right, too". She cried, pleaded, struggled and fought with accused. He "knocked" her head "around". He stopped for a few minutes and stated that he had planned to "do it", that nothing she could do or say would "do any good", that he had made up his mind, and that if she wanted, he would marry her. Thinking she could reach town, Miriam said they could leave at once to be married, but accused refused, saying he once had a girl under similar circumstances and she broke her promise. Accused "started in all over again". Miriam grasped the door handle in an attempt to escape but accused "knocked" her head against the side of the car and continued to slap her. She took off a shoe and tried to hit accused, but this made him "madder" and he slapped her "harder". Finally, as they were "struggling", he released her and said he was just trying to find out if she was a "nice girl", and added that she would probably never date him again. She was afraid to say that she would not, and said they could discuss it the next day, as she wanted to go home. Accused started the car and, instead of taking her home, drove at a high rate of speed, turned off on another road, and said: "I mean it this time. You can give in or fight. It won't do you any good". He managed to force her down on the seat with her head under the steering wheel and pinned her arms and legs down. She fought and struggled until exhausted and was afraid he would kill her. He succeeded in doing "what he set out to do" and made penetration. The intercourse was "Extremely painful". During the struggle all of the buttons were ripped from her blouse (Ex. P-22). "When it was over", she was hysterical and crying. Accused said "I guess I did the wrong thing" and that he was sorry. At her request he let Miriam out of the car at the home of her sister, Mrs. C. F. Ballentine, at about 2:30 a.m. (R. 62, 67-69).

When Miriam came in, she cried for about 10 minutes. Her face was swollen, red and scratched. Her skirt was wrinkled, her hair dishevelled, and all the buttons off her blouse. When Mrs. Ballentine had calmed Miriam, the latter told her that she had "just been raped". When Mrs. Ballentine gave Miriam a douche, she observed spots of blood on her pants. Mrs. Ballentine accompanied Miriam home about 4:30 a.m., gave her a sedative, and stayed with her the remainder of the night. Miriam remained in bed until about 12:30 that day, explaining to her mother that she had a toothache. It was not until later in the day that Mrs. Gibson was informed of the attack, and she immediately notified "Colonel Stout", commanding officer of the base, that her daughter had been raped (R. 57-64, 68).

On cross-examination Miss Gibson testified that on the night of the attack she had a bottle of beer before going to the theatre but nothing to drink afterwards. After accused first attempted to attack her he drove through Greenville and she thought he was taking her home, but before she realized it they were out of the town and headed towards the air base. She repeated that she wanted to go home, but did not scream because it was "very deserted" and she did not think it would do any good. During the struggle accused hit her and managed to bring his body across her to the other side of the car. He had kissed her on Saturday or Sunday, but this time kissed her by force. At no time did she consent to his advances. He used one hand to hold her down and would choke her when she fought back at him. She had been fighting him for about three hours, was not capable of making further struggle, was afraid he might finish the job, and "didn't relish the idea of being left in some field". Her pants were pulled down to her knees but not removed. She was conscious during the act, but hysterial and afraid. Accused had bought her some cigarettes during the evening, and it was possible they were placed next to the sunshield of the car (R. 69-77).

Miriam Gibson was examined by a civilian doctor and by an Army doctor on 1 July 1943. They found her hymen intact, and of the type usually found in single girls who have not indulged in intercourse. She complained of tenderness, and a complete examination could not be made without inducing severe pain. Intercourse could have occurred without rupturing the hymen, but her condition indicated there was very little likelihood of her having participated in frequent sexual relations. No bruises were observed in the pelvic region (R. 51-57).

On 3 July 1943, Second Lieutenant Joseph G. Neuwirth observed a small semicircular scab on the nose of accused near his right eye. It was red and appeared to be a recent scratch, not yet a scar. The provost marshal, Greenville Army Air Base, took accused to the hospital for an examination on 5 July 1943. Accused had a small semicircular scar on his nose, between the eyes, in a "well healed" state. He also had a "yellowish blue" bruise about the size of a silver dollar on the inside of his thigh. When asked how he sustained the injuries, accused explained that the scar on his nose was of long standing and the bruise was sustained in calisthenics. The provost marshal also observed that the sexual organ of accused was inclined to be small, of less than normal size (R. 36, 40-42).

Accused had been receiving treatments for neuritis, and his arm had been placed in a cast which was removed about 28 June. As he was not responding to treatment, he was sent to the station hospital on 30 June 1943. His clinical record (Ex. P-21) and the testimony of the doctors showed that while in the hospital accused was depressed, sullen, not cooperative and refused to eat or take medication. The only positive

After some argument he started the car, drove "a little way", turned off on a narrow dirt road, and "started in again". He told her that struggling would do no good, that she might as well "give in" to him, and that he would "have" her before the night was over. Miriam said he would have to kill her first, and he replied, "that's all right, too". She cried, pleaded, struggled and fought with accused. He "knocked" her head "around". He stopped for a few minutes and stated that he had planned to "do it", that nothing she could do or say would "do any good", that he had made up his mind, and that if she wanted, he would marry her. Thinking she could reach town, Miriam said they could leave at once to be married, but accused refused, saying he once had a girl under similar circumstances and she broke her promise. Accused "started in all over again". Miriam grasped the door handle in an attempt to escape but accused "knocked" her head against the side of the car and continued to slap her. She took off a shoe and tried to hit accused, but this made him "madder" and he slapped her "harder". Finally, as they were "struggling", he released her and said he was just trying to find out if she was a "nice girl", and added that she would probably never date him again. She was afraid to say that she would not, and said they could discuss it the next day, as she wanted to go home. Accused started the car and, instead of taking her home, drove at a high rate of speed, turned off on another road, and said: "I mean it this time. You can give in or fight. It won't do you any good". He managed to force her down on the seat with her head under the steering wheel and pinned her arms and legs down. She fought and struggled until exhausted and was afraid he would kill her. He succeeded in doing "what he set out to do" and made penetration. The intercourse was "Extremely painful". During the struggle all of the buttons were ripped from her blouse (Ex. P-22). "When it was over", she was hysterical and crying. Accused said "I guess I did the wrong thing" and that he was sorry. At her request he let Miriam out of the car at the home of her sister, Mrs. C. F. Ballentine, at about 2:30 a.m. (R. 62, 67-69).

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Accused had been receiving treatments for neuritis, and his arm had been placed in a cast which was removed about 28 June. As he was not responding to treatment, he was sent to the station hospital on 30 June 1943. His clinical record (Ex. P-21) and the testimony of the doctors showed that while in the hospital accused was depressed, sullen, not cooperative and refused to eat or take medication. The only positive

finding was based on his own statement that he had pain of the right wrist. He was not psychotic or insane. At the time of his release from the hospital on 2 July 1943, accused was nervous, could not talk clearly, and was very agitated (R. 42-51).

Accused, after being advised of his rights (Ex. P-11), made a statement under oath (Ex. P-12) to Second Lieutenant Earl E. Garnas, the investigating officer, on 8 July 1943, that when he first met Miriam Gibson he did not know whether she was respectable or not, and "just watched her"; that he was a married man and only went out for one thing, to have intercourse with a woman; and that he did not make a habit of going out with a person unless "for that particular reason". He stated that Miriam was a "great beer drinker", that they had intercourse without him fighting for "it", and that she "lay there" on the seat of the car, smoked a cigarette during the intercourse, and made no objection or outcry. Accused further stated that he did not notice a scab on his nose, and took calisthenics only one or two mornings when he first arrived at the base (R. 17).

b. Specification 1, Additional Charge II: It was stipulated that accused was married to Bertha Louise Currier on 7 November 1936; that they were divorced 20 July 1942; that this was the only divorce to which accused had ever been a party; that accused was married to Croteal Beatrice Campbell at Lynn Haven, Florida, on 18 July 1942, as shown by the marriage certificate (Ex. P-1); that accused and Croteal Beatrice Campbell lived together as man and wife until about 12 October 1942, at which time accused sent her home to her family, stating that he was about to be transferred on a permanent change of station; that on 7 December 1942 they met at Tallahassee, Florida, and spent the night together as man and wife; and that accused corresponded regularly with her until 22 January 1943, giving every indication that the ordinary relationship of husband and wife existed between them. In a deposition (Ex. P-20), dated 18 October 1943, Croteal Beatrice Campbell confirmed the fact of her marriage to accused on 18 July 1942, and stated that she received two allotment checks as his wife for the months of November and December 1942 and that she did not become aware of their "true relationship" until the investigating officer called on her about 15 July 1943. In a statement (Ex. P-12) to Lieutenant Garnas, on 8 July 1943, accused said that he did not marry Beatrice Campbell. On 12 July 1943 in a second statement (Ex. P-13) to Lieutenant Garnas accused said he met Croteal Beatrice Campbell while attending gunnery school; that after going with her a short time he thought she was pregnant and married her in Panama City, Florida, on 18 July 1942; that he lived with her for about three months in Lynn Haven, Florida; and that she said she was going to get a divorce (R. 10-11, 15-18, 21).

c. Specification 18, Additional Charge II: It was stipulated that accused and Annie Mae Lanier were married at Ridgeland, South Carolina, on 17 October 1942, as evidenced by the marriage license and certificate (Ex. P-7), and that as a result of the marriage Annie Mae Lanier was pregnant and expected a child in December 1943. Annie Mae Lanier testified by deposition (Ex. P-8) dated 11 October 1943, that she married accused in October 1942. It was further stipulated that accused and Technician Fifth Grade Mary G. Donner were married in New Orleans, Louisiana, on 12 June 1943, as shown by a copy of the marriage certificate (Ex. P-17) and record of marriage (Ex. P-18). In a statement (Ex. P-14) made to Lieutenant Garnas on 21 July 1943, accused stated that he met Mary G. Donner in Kansas City, Missouri, on 12 January 1943, corresponded with her, visited her several times while she was in Daytona Beach, Florida, and married her in New Orleans on 12 June 1943 (R. 12, 17, 19).

d. Specification 5, Additional Charge II: It was stipulated that about 20 July 1942, at Panama City, Florida, accused had J. W. Campbell, brother of Croteal Beatrice Campbell, indorse and present for payment on his behalf at the Bay National Bank a check (Ex. P-2) of the American Brass Company, to George Belury, Jr., in the amount of $228.27; that the bank cashed the check; that the check, when passed through ordinary collection channels, was dishonored, it appearing that it had been stolen from the payee and the indorsement forged; that accused, by letter (Ex. P-3) dated 7 September 1942, agreed to reimburse the bank by 11 September 1942; and that upon his default his "apparent" father-in-law, H. V. Campbell, reimbursed the bank and received a receipt for $228.27 (Ex. P-4). John William Campbell testified by deposition (Ex. P-5) that accused stated he had cashed the check for the soldier payee and asked him (Campbell) to cash the check, and that he (Campbell) complied with the request and gave the money to accused. H. V. Campbell testified by deposition (Ex. P-19) that Croteal Beatrice Campbell was his daughter, that he paid the Bay National Bank $228 and some cents in payment of the check, and that although accused told him he would repay the money, accused had not paid anything on the indebtedness (R. 11, 20-21).

e. Specifications 8 and 9, Additional Charge II: It was stipulated that on 9 February 1943 accused purchased a Mercury automobile on conditional sales contract, as evidenced by the written statement (Ex. P-10) of Sam Steinberg, vice-president of the J. C. Lewis Motor Company, dated 26 July 1943. The statement related that on 9 February 1943 accused purchased the car for the sum of $995; that a truck, the property of H. L. Lanier, "father-in-law" of accused, was traded in on the transaction for an allowance of $421; that after various charges were added there was a deferred balance of $672, payable in twelve monthly installments of $56 each; and that accused made four payments, leaving an unpaid balance of $448. The statement further set forth that on 12 March

1943 accused reported to the J. C. Lewis Motor Company that the car was demolished beyond repair on 9 March 1943 when he ran into the back of a truck; that a garage man wanted $50 to move the car off the highway and tow it to his garage; and that as accused was without funds and in a hurry to reach his base he let the garage have the car for the cost of the towing. The Steinberg statement contained the further information that the insurance company was notified, that accused called at the office of the J. C. Lewis Motor Company on several subsequent occasions, and that at no time was he able to advise what disposition had been made of the car other than that at the first chance he would "check" into the matter and let them know. In a statement made to Lieutenant Garnas, accused said that about 8 or 9 March 1943, he sold the automobile at a used car lot in Tampa, Florida, for $600 (R. 14, 17-18).

f. Specification 11, Additional Charge II: It was stipulated that accused made application (Ex. P-15) on 2 March 1943 for a loan of $100 from the Drew Field Section, Third Air Force Branch, Army Emergency Relief; that the loan was to be repaid in three monthly installments; that accused received the money; and that no part of the loan was repaid (R. 18-19).

g. Specification 12, Additional Charge II: By stipulation there was introduced in evidence a copy (Ex. P-16) of an Army Emergency Relief application by accused dated 17 June 1943. The application was for a loan of $50 to be repaid on 30 June, and recited that accused had just returned from a convalescent furlough, that his wife was in Savannah, Georgia, expecting a baby in September, that their furniture was in Greenville, South Carolina (where the loan was applied for), and that the purpose of the loan was "to bring wife here and pay for living and medical expenses until he is paid". It was also stipulated that the loan was not repaid. On 3 July 1943 accused stated to Lieutenant Neuwirth, through whom the loan was obtained, that he arrived at the base five weeks before, that his wife came with him and stayed three weeks, that she then returned to Savannah, and that she came back to the base on 17 June. In his statement (Ex. P-12) to Lieutenant Garnas, dated 8 July 1943, accused said that the purpose of the loan was that he needed money because of his wife's pregnancy and "to get her home", and that she had come to Greenville with him on 5 June and left about 9 June (R. 17-19, 35-39).

h. Specifications 13, 14 and 15, Additional Charge II: On 8 July 1943, accused made a sworn statement (Ex. P-12) to Lieutenant Garnas that he borrowed the $50 from Army Emergency Relief on 17 June 1943 because his wife was pregnant and he needed the money "for that", and "to send her - to get her home"; that she came "up here" and he took her back home; and that his wife had been at Greenville "five days to be exact".

In his application (Ex. P-16) for the loan, accused stated that his wife was in Savannah, Georgia, and that he needed the loan to bring her to Greenville and for living and medical expenses until he was paid. Accused further stated to Lieutenant Garnas, at the same time, when asked how many times he had been married, that he had been married twice, and that Annie Mae Lanier "is the only lady I have married since my divorce from my first wife, Bertha Louise Currier". Accused was married to Croteal Beatrice Campbell on 18 July 1942 and to Mary G. Donner on 12 June 1943 (R. 10-11, 16-17, 19-20; Exs. P-1, P-11, P-12, P-13, P-14, P-16, P-17, P-18).

4. For the defense:

a. Specification, Charge I: Accused testified that he first met Miriam Gibson at the base on a Saturday afternoon and on a bet with the attendant at the service station asked her for a date. She refused but later allowed him to drive her home. Her parents left the house to keep an engagement, and with Mrs. Gibson's permission he stayed and talked to Miriam until about 10:30. She declined to go to church with him the next morning. She made no objection to his kissing her three times before he left. The next morning after church he called at the Gibson home and was invited to stay for dinner. He took Miriam to the "movies" that afternoon and in the evening they drove to Spartanburg, where Miriam had some beer. On the way home, he parked on a side road and they indulged in a "necking party". He went further than the night before and had "roaming hands, so to speak". He believed he could accomplish more with her, having gone as far as he did, and asked for a date for the next night, but was refused (R. 93-96).

On Tuesday, 29 June 1943, he called for Miriam at about seven o'clock and they drove to Greer, South Carolina, where they attended the last show. They left the theater at nearly eleven o'clock, and after Miriam had two bottles of beer he drove to the same place they had parked on Sunday night and started the "same procedure". Because of the traffic he drove to a more secluded road about a mile away. She offered no objections to his "love-making", and her "reaction" was that of a girl who was "willing", so he went around to her side of the car. He "started messing around" again, put his hand on her breast, and in doing so struck his hand on a straight pin, which he removed. She unbuttoned the remaining button of her blouse and he continued with his love making. In a few minutes she "laid down on the seat, opened her legs and unzipped the skirt". Accused pulled her pants down part way and put his penis "in". He took his time, she did not seem to be "hurtin" and "it" did not feel tight to him. "It was, so to speak, pretty juicy". It went "right in". At first she helped him, and when he started "going good" she asked for a cigarette. He obtained one from under the sunshield of the car, lit it with the dash lighter, gave it to her, and continued having intercourse. She did not

struggle, and was not angry or in tears. Before the intercourse she asked if he had a "rubber" and was told he did not use them. After the act was completed they smoked a cigarette, he kissed her and said he was going to drive her home so she could take a douche, but she said it did not matter as there was a marine in Jacksonville she could marry and he would never know the difference. At about 1:30 or 2:00 a.m. he drove to her sister's house, as she said it was too late to go home. Accused did not recall having a scratch on his nose on 29 or 30 June, but had a scar, the result of a plane wreck. He received the bruise on the inside of his thigh on 4 July, when one of the women riding in a car with accused pinched his leg while they were going to a picnic. Accused explained his nervous condition in the hospital by stating that he was subject to such spells since an airplane accident and stated that he would not talk to one of the doctors because of disappointment over not being appointed first sergeant (R. 96-99, 119).

b. Specification 1, Additional Charge II: Accused testified that he left his first wife (Bertha Currier) because he "caught" her out with another man. He was subsequently notified by his mother in December 1941 or January 1942 that Bertha Currier had obtained a divorce. For that reason he was under the impression that he was free to remarry. He met Croteal Campbell while attending gunnery school at Tyndall Field, Florida, went with her a while, believed her to be pregnant, and married her (R. 83-84, 88, 101-102).

c. Specification 18, Additional Charge II: Accused testified on cross-examination that he married Annie Mae Lanier on 17 October 1942, met Mary Donner in Kansas City in January 1943, visited her in Daytona Beach about three times, and became engaged to her, he thought, in April. He visited her family with her in Washington about May, and married her in June at New Orleans. He lived with her one or two nights (R. 104, 106, 108).

d. Specification 5, Additional Charge II: With reference to the $228.27 paid to the Bay National Bank by H. V. Campbell on the American Brass Company check, accused stated that while he was acting first sergeant a soldier asked him to cash the check and that he agreed to do it, as it was apparently indorsed by an officer and the name on the soldier's "dog tags" corresponded with that of the payee on the check. He gave the check to his wife (Croteal Campbell) that evening to cash at the store where she was employed, received the money the next morning and gave it to the soldier. He did not indorse the check, had no financial interest in it, and was not aware that the check was "no good" until he returned to Panama City about a month and a half later. He did not make the check good, but made "a portion of it good" (R. 85-87, 114).

e. Specifications 8 and 9, Additional Charge II: Accused testified that he obtained a Ford truck from his "then" father-in-law,

H. L. Lanier, to trade in on a Mercury automobile, and on 9 February 1943, purchased the car from the J. C. Lewis Motor Company and was allowed $421 on the truck, leaving a balance of $672 on the purchase price of the Mercury, as shown by the invoice (Ex. D-4). At the same time he repurchased the truck for Mr. Lanier, making a $200 down payment, as shown by the invoice (Ex. D-5). The payments on both cars amounted to $101 a month. He made payments on both contracts of $303 on 9 March and $101 on 9 June 1943. He made no further payments because he was confined. After purchasing the Mercury he was transferred to MacDill Field, Tampa, Florida. While at MacDill Field, he was "alerted", received his orders, "knew" he was going overseas, and therefore immediately sold the car and his excess clothing. After selling the car he was notified that he would not be "alerted" because of his failure to pass a previous physical examination, which had resulted in his being "grounded" for six months. He did not tell the J. C. Lewis Company that he wrecked the car, but made such a statement to the Lanier family to keep them from knowing he was going overseas. On cross-examination, he admitted selling the car for $600 (R. 88-90, 111).

f. Specification 11, Additional Charge II: Accused stated that when he discovered, after his marriage to Beatrice Campbell, that she was not pregnant, he "thought" he was going to be "shipped", and sent her to Lynn Haven, Florida. He stayed in Savannah in a cadre, and on 17 October 1942 married Annie Mae Lanier. She visited him at Plant Field, Florida, and, as he was short of money the week she was there, he applied for and received an Army Emergency Relief loan of $100 on 2 March 1943. The loan was to be repaid in three months. Due to transfers accused received only two partial payments by voucher and had forgotten about the loan until he received a letter at the Greenville Army Air Base from Army Emergency Relief requesting payment. He then made arrangements for the payments to be deducted from his pay. He received no pay at the Greenville Air Base, however, due to his confinement. He did not repay the loan from the proceeds of sale of the Mercury car because at that time he had three months to pay, and expected to receive his pay (R. 88, 91-92, 112).

g. Specification 12, Additional Charge II: When accused arrived at the Greenville Army Air Base, he observed activities indicating an overseas movement, believed he would be going along, and wanted his wife with him for a month before he "shipped". He applied for a $50 loan at the Army Emergency Relief, stating that he needed the money to go to Savannah to get his wife, who was pregnant, and to pay house rent and medical expenses. He did not state that his furniture was in Greenville, but that he wanted to move a part of it from Savannah to Greenville. On cross-examination accused stated that he did not ever have any of his wives at Greenville, and had no furniture there, only a radio and his clothing. When

he applied for the loan he had just returned from a furlough on which he had married Mary Donner, and did not intend to bring any of the girls there (R. 92-93, 102, 107, 118-120).

h. Specifications 13, 14 and 15, Additional Charge II: On cross-examination accused stated that he did not ever have any of his wives at Greenville. At the time of his statement to Lieutenant Garnas on 8 July he "held out various things" because he thought he was entitled to counsel at the investigation. Later he went to Lieutenant Garnas and obtained permission to make another statement as an amendment to the first one (R. 102, 118).

i. Captain H. A. Travinski, provost marshal at Greenville Army Air Base, testified that the conduct of accused while in the guardhouse awaiting trial was excellent. He was "straw boss", kept the men in "line" and was instrumental in preventing the escape of a transient prisoner. He also constructed a volley ball court and an "airing rack" and was very cooperative. Three commanding officers accused had previously served under considered him capable, obedient, efficient, reliable and trustworthy. He served as section leader and first sergeant while stationed at Tyndall Field, Florida, and was the outstanding student in his class at the Third Air Force Communication School, both in leadership and scholastic standing (R. 100-101; Exs. D-6, D-7, D-8).

5. a. Specification, Charge I: According to the evidence for the prosecution, Miriam Gibson met accused, stationed at Greenville Army Air Base, Greenville, South Carolina, on 26 June 1943, and on 29 June 1943 accompanied him to the theatre at Greer, South Carolina. They left the show at about 10:30 p.m., and on the way home accused stopped the car and began "getting fresh". She asked to go home and after some argument accused started the car. He turned off on a side road, parked again, and said that she might as well "give in" to him as he would "have" her before the night was over. Miss Gibson said he would have to kill her first, and he replied "that's all right, too". Accused beat her about the head and would not listen to her pleas. He said he had planned to "do it", and when she attempted to get out of the car he "knocked" her head against the door. After they struggled for some time accused desisted and said he was trying to find out if she was a "nice girl". Miss Gibson again asked to be taken home, and accused drove the car at a high rate of speed, turned on to a more secluded road, and said, "I mean it this time". He forced her down on the seat of the car with her head under the steering wheel, pinned her arms and legs down, and after she had struggled until she was exhausted, succeeded in having sexual intercourse with her. She had "fought and struggled" with him for approximately three hours and at no time consented to his advances. She was conscious during the act, but hysterical and

afraid he would kill her. She immediately went to the home of her sister at about 2:30 a.m. and reported the attack. The buttons had been torn from her blouse, her face was red and swollen, her skirt wrinkled and hair disheveled.

In his testimony accused admitted the intercourse but denied using threats or physical violence to accomplish the act. He stated that she consented, and described the events of the evening and the act of intercourse in a manner to leave the impression that Miss Gibson was a girl who engaged promiscuously in sexual intercourse and was willing to do so.

The testimony of the physicians who examined Miss Gibson on 1 July 1943 showed that her hymen was intact and her condition such as to indicate that there was very little likelihood of her having participated in frequent sexual relations. The physical appearance of Miss Gibson after the attack, the fact that she reported it immediately, the contradictory statements of accused as to a scratch on his nose and a bruise on his thigh, as well as his statement that he went out with a girl for only one thing, to have intercourse, all negative the testimony of accused that Miriam Gibson consented to the intercourse.

The Board of Review is of the opinion that the evidence is convincing that accused accomplished the act of intercourse by force and without consent, and sustains the finding of guilty.

b. Specification 1, Additional Charge II: It is shown by the evidence that accused and Bertha Louise Currier were married on 7 November 1936, that they were divorced on 20 July 1942, and that, while the marriage status still existed, he contracted a bigamous marriage with Croteal Beatrice Campbell at Lynn Haven, or at Panama City, Florida, on 18 July 1942. Accused testified that in December 1941 or January 1942 his mother advised him that Bertha Currier had obtained a divorce, and that, for this reason, he thought he was free to remarry. It is clear from the evidence that he did not exercise reasonable diligence to ascertain his true marital status and he cannot rely on his belief as a defense (Dig. Op. JAG, 1912-40, sec. 454 (18); CM 123267).

c. Specification 18, Additional Charge II: The evidence shows that accused married Annie Mae Lanier on 17 October 1942, a few days after he sent Croteal Campbell to her home, and that, while still married to Annie Lanier, he contracted a bigamous marriage with Mary G. Donner at New Orleans, Louisiana, on 12 June 1943. Accused was never a party to any divorce other than the one that Bertha Currier obtained from him on 20 July 1942, two days after his marriage to Croteal Campbell. As the latter marriage was void ab initio, Annie Lanier was the lawful wife of accused at the time of his marriage to Mary Donner.

d. Specification 5, Additional Charge II: The evidence shows that accused promised to pay to the Bay National Bank, Panama City, Florida, $228.27 on 11 September 1942, to make good a check in that amount which had been cashed at the bank by J. W. Campbell for accused. On default of accused his "apparent" father-in-law, Mr. H. V. Campbell, paid the obligation. Although accused promised to reimburse Mr. Campbell, he failed and neglected to do so. When Mr. Campbell testified to the failure of accused to reimburse him as agreed, more than a year had passed.

e. Specification 8, Additional Charge II: The evidence shows that on 9 February 1943 accused purchased a Mercury automobile from the J. C. Lewis Motor Company, Savannah, Georgia, on conditional sales contract, and that about 9 March 1943, while the balance of purchase price of $672 was unpaid, he sold the automobile. It is clear from the circumstances shown that the sale of the car was without the knowledge or consent of the vendor.

Specification 9, Additional Charge II: The evidence shows that accused purchased the car on 9 February 1943, and was to pay the balance due of $672 at the rate of $56 per month. He made three payments in March and one payment in June 1943, which would keep his account current until 9 July 1943. It was shown that as of 26 July 1943 there was a balance due of $448. Accused testified that he made no further payments, because he was confined. The conditional sales contract by which accused purchased the car was not placed in evidence, nor was there any evidence to show that the balance of $448 became immediately due because of the act of accused in selling the car. It was not shown that accused was in default in the payments prior to being placed in confinement. In the opinion of the Board of Review the evidence does not sustain the finding of guilty of this Specification.

f. Specification 11, Additional Charge II: It was stipulated that on 2 March 1943 accused applied for and received a $100 loan from Army Emergency Relief at Drew Field, to be paid in three monthly installments, and that no part of the loan had been repaid. Accused testified that he had forgotten about the loan until he received a letter at the Greenville Army Air Base from the Army Emergency Relief requesting payment. The evidence does not disclose any previous demand for payment. On receipt of the letter accused arranged for the payments to be deducted from his Army pay, which was apparently acceptable to the Army Emergency Relief. Accused was confined subsequent to this arrangement. The Board of Review is of the opinion that the evidence is legally insufficient to sustain the finding of guilty of a dishonorable failure to pay the debt.

g. Specification 12, Additional Charge II: On 17 June 1943, accused made application to the Army Emergency Relief at Greenville Army

Air Base for a loan of $50. He stated that his furniture was in Greenville, that his wife was pregnant, and that the money was needed to bring her from Savannah, Georgia to Greenville and for living and medical expenses. Accused subsequently made contradictory statements with reference to the loan, saying that the money was obtained to send his wife from Greenville to her home. Accused testified that he had no furniture in Greenville and that none of his wives had ever been there. When he applied for the loan he had just returned from a furlough on which he had married Mary Donner, and he did not intend to bring any of the girls to Greenville. The evidence shows that the loan was obtained by falsely representing the purpose for which it was intended.

h. Specifications 13, 14 and 15, Additional Charge II: The evidence shows that on 8 July 1943, accused, after being advised of his rights and placed under oath, stated to Second Lieutenant Earl E. Garner, the investigating officer, that he borrowed $50 from Army Emergency Relief on 17 June 1943, to send his wife from Greenville to her home, that he had been married only twice, and that Annie Mae Lanier was the "only lady" he had married since his divorce from his first wife. The evidence sustains the findings that all these statements were knowingly false, as alleged.

6. The Charge Sheet shows that accused is 25 years of age and that he enlisted on 8 January 1942.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally insufficient to support the findings of guilty of Specifications 9 and 11, Additional Charge II, legally sufficient to support the approved findings of guilty of all other Specifications and Charges, and legally sufficient to support the sentence. A sentence of either death or of life imprisonment is mandatory upon conviction of rape, in violation of the 92nd Article of War. Confinement in a penitentiary is authorized by the 42nd Article of War for the offense of rape, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year, by section 22-2801 of the District of Columbia Code, and for the offense of bigamy, so recognized and punishable by section 22-601 of that code.

Samuel M. Driver, Judge Advocate

Arthur McGuinness, Judge Advocate

F. Lotterhos, Judge Advocate

- C O P Y -

SPJGJ CM 245806
Hq. ASF, J.A.G.O.,

1st Ind.
26 Apr 1944

To: Commanding General, Fourth Service Command, Post Office Building, Atlanta, Georgia. Attention: Service Command Judge Advocate.

1. The duly authenticated original record of trial in the case of Herman C. Hancock, Jr., 14072834, formerly Technical Sergeant, 470th Bombardment Squadron (M), 334th Bombardment Group (M), referred to in paragraph 8 of basic communication, dated 22 April 1944, was forwarded to your headquarters by registered mail on 24 April 1944.

2. There are inclosed herewith copies of opinions of this office expressing the view that in capital cases where the death penalty is not mandatory only a two-thirds vote is required for conviction (SPJGJ 1942/5564), and that in such cases a statement that the vote was unanimous would be objectionable as amounting to a disclosure of the vote of each member in violation of the oath of secrecy required by Article of War 19 (CM 232110-McCollum).

3. There are also inclosed an extract from the statement of General Enoch Crowder, Judge Advocate General, before the House Committee on Military Affairs, 22 May 1912, at the hearings on the revision of the Articles of War, a copy of an opinion of this office which refers to this problem (JAG 300.2, 13 Feb. 1925), and a copy of the review prepared by the Board of Review in CM 245806- Hancock.

4. It is not practicable to supply you with the information requested in paragraph 9 of the basic communication.

For The Judge Advocate General:

(Signed) R. E. Kunkel,
R. E. Kunkel,
Colonel, J.A.G.D.,
Chief, Military Justice Division.

5 Incls.
Incl. 1 -Cpy ltr. SPJGJ 1942/5564.
Incl. 2 -Cpy ltr. to Col. L. C. Case, 13 Mar 43 (CM 232110).
Incl. 3 -Extract from Comm. Hearings, 62nd Cong., Vol 9.
Incl. 4 -Cpy. JAG 300.2, 13 Feb. 1925.
Incl. 5 -Cpy review of B/R-CM 245806-Hancock.

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

SPJGQ
CM 245817

28 DEC 1943

UNITED STATES v. Second Lieutenant JAMES H. PHILLIPS (0-694180), Air Corps.	ARMY AIR FORCES CENTRAL FLYING TRAINING COMMAND Trial by G.C.M., convened at Randolph Field, Texas, 26 November 1943. Dismissal and total forfeitures.

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 Specification:

CHARGE: Violation of the 96th Article of War.

Specification: In that Second Lieutenant James H. Phillips, Air Corps, did, at San Antonio, Texas, on or about 22 October 1943, wrongfully, unlawfully, and feloniously have carnal knowledge of Marcie Wilma Suladie, a female then and there under the age of 18 years, not being then and there the wife of the said Second Lieutenant James H. Phillips.

He pleaded not guilty to and was found guilty of the Charge and the Specification. There was no evidence of any prior conviction. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for five years. The reviewing authority approved the sentence but remitted the confinement and forwarded the record of trial for action pursuant to the provisions of Article of War 48.

3. The evidence produced by the prosecution in support of the Charge may be summarized as follows:

Marcie Wilma Suladie was born on 30 June 1927 at Laredo, Texas (Pros. Ex. 3). On 22 October 1943, she was living at 1535 West Lynwood Avenue in San Antonio with her mother and two sisters, Dorothy Suladie, age 19 (R. 35), and Dorris Underwood, a divorcee with a 2-year old child (R. 22). They had been living in San Antonio over two years (R. 22). Her mother and sister Dorothy, worked (R. 22, 50). Marcie Wilma Suladie attended

high school, being a high junior (R. 5). She was not and never had been married (R. 15). Her nickname was "Boojie" (R. 22).

On 22 October 1943, "Boojie" Suladie got out of school at 4 o'clock and went to downtown San Antonio to meet her sister Dorothy, and her "girl friend", Mary Francis Gregory, whom she had known for about seven years, when they got off work (R. 5, 48). They met shortly after 5 o'clock and shopped for a little while and then drove in an automobile belonging to Mary Francis Gregory to the Suladie home, arriving there about 6:30 (R. 48). According to Mary Francis Gregory, they intended to "just stay around the house for the evening", and Mary Francis Gregory was going to visit with the two Suladie girls (R. 48). According to "Boojie" Suladie, they went by Mary Francis Gregory's home first, apparently intending from the beginning to go out and "get something to eat" (R. 5). In any event, all three of the girls bathed and dressed (R. 5, 48), and about 9:30 p.m. drove in the car belonging to Mary Francis Gregory to Roger's Drive Inn, an eating and drinking place situated on Broadway in San Antonio, Texas (R. 6, 49). Dorothy Suladie and Mary Francis Gregory remained in the automobile but "Boojie" got out and went inside "to get a steak" (R. 6, 49). She remained inside for an hour or an hour and a half, eating a T-bone steak and having a glass of wine (R. 6, 19, 23). She later told Mary Francis Gregory that she had had a cocktail inside (R. 52).

While she was inside, two officers, Second Lieutenants E. W. Rice and R. E. Cone, drove up beside the Gregory car and struck up a casual acquaintance with Dorothy Suladie and Mary Francis Gregory (R. 49). When Marcie Wilma Suladie came out, she found the two girls talking to the two lieutenants (R. 7). She was introduced to them, and after talking to them for a while, decided that she would sit down in their car, which was parked right next to the automobile belonging to Mary Francis Gregory (R. 6). After they had talked for a while, Marcie Wilma Suladie "just to tease" the officer, said that she would like to drive his car around the block (R. 7). The officer said, "Go ahead and drive it", so she drove the car to Houston Street, where they happened to meet the accused who was driving a Dodge coupe, and who was accompanied by Second Lieutenant Norman E. Mohney (R. 7). The lieutenant, whose car Marcie was driving, knew the accused and invited the accused to follow them (R. 7). Marcie Wilma Suladie added her invitation, saying, "Yeah, follow us; we're going out back to Rogers'; my sister is there; we left them all there" (R. 17). She drove the car back to Roger's Drive Inn, apparently driving fast and recklessly, and was followed by the accused (R. 7). At Roger's they stood around or sat around and talked until possibly 12:30 or 1 o'clock (R. 7). The officers were drinking. Marcie Suladie appears to have had at least one drink with them (R. 19). The officers wanted to get something to eat but couldn't because the kitchen was closed (R. 8). Marcie suggested that they go out to her house where they could "drink as long as they wanted to" (R. 8, 19). Mary Francis Gregory says that the "party" finally broke up when she and Dorothy Suladie said that they had to go home because they had to work the next day (R. 50), and that she had no intention of continuing the "party" at the Suladie home (R. 53). Mary Francis Gregory invited Marcie to ride with them, but she said that some of the officers were coming out to her house and that she would go with them to show them the way (R. 53). Dorothy Suladie and Mary Francis

Gregory left in the Gregory car (R. 8). "Just a little while afterwards" all of the officers except the accused left in Lieutenant Rice's car, saying "they wanted to go to town for something" (R. 8). The accused and Marcie Wilma Suladie followed them in the Dodge coupe driven by the accused (R. 8), but soon lost them (R. 9). The accused and Marcie Suladie drove around the main part of town for a while looking for them and then, according to Marcie Suladie, drove out to an eating place "almost to Randolph Field" because they remembered that one of the officers had said that he was hungry and thought that they might have gone there (R. 9). They found this place closed (R. 9). In the meantime Mary Francis Gregory had driven straight to the Suladie home, let Dorothy Suladie out, and had gone directly home (R. 51).

After finding the place near Randolph Field closed, the accused and Marcie Suladie drove back toward town. On the way she told him to stop at the first filling station so that she could go to the rest room (R. 9). Not finding a filling station open, he pulled off to the side of the road and told her to relieve herself there; when she hesitated, he said "Well, I'm not going to hurt you" or something like that, and apparently she did get out of the car and relieved herself (R. 9). Marcie Suladie then decided that she had better call her mother "because it was so late"; and they drove to the Gunter Hotel where she did telephone her mother (R. 9).

The accused had had what Marcie Suladie described as "a couple of drinks" at Roger's Drive Inn. There was a whiskey bottle on the seat of his car, and as the two drove around, the accused took several drinks from this bottle (R. 26) and Marcie Suladie also took "two or three sips out of the bottle" (R. 77).

They went out to Leo's on the Fredericksburg Road "to get something to eat before we got home", and did eat there. They then started toward her home, and according to her, got lost near where she lived. He stopped the car in a residential district near where she lived and she got out to look at the street sign (R. 10).

She got back in the car and he kissed her. She did not object, saying, "I didn't think anything about it" because "he was awfully nice". According to her, she did say, "Come on, let's go because my mother will be worried". He said, "Just a minute" or something like that and continued to kiss her. They were sitting on the seat of the Dodge coupe; he was behind the wheel; she was sitting on his right. He "started getting kind of fresh" and put his hand on her leg under her dress. She says that she moved his hand and told him, "Don't please" and he stopped. She again suggested going home but "he kind of started to get fresh again", saying that they would go "in a minute" (R. 10). He continued to run his hand up her leg but he did not touch her private parts. He "kept on" and she "started struggling", trying to get away. While this was going on at least one automobile passed. She tried to scream loudly enough but "they didn't hear" her as he had his hands over her mouth. He pushed her down on the seat and got on top of her. She was unable to explain exactly what happened in detail but did try to get

up. She was not scared at first because she thought that she could reason with him and because he had been "so nice and everything". She tried to scream but he said that he would "smother her" "if she wouldn't let him" (R. 11). She said that she was frightened because she was "kind of afraid to die, I guess". "After awhile", he had intercourse with her. She did not know how long the act of intercourse took but said that it "seemed like a long time" (R. 12). Sometime while all of this was going on she asked him to open the door of the car because it was hot, her real purpose being to try to get away (R. 12). He opened the left door of the car. No part of her clothing was removed, she having on her step-ins the whole time (R. 31-32). She stated that she understood the meaning of "woman's private parts", "man's private parts" and "intercourse", and that he put his private organ in hers (R. 32). At some time either during or immediately after the act of intercourse she started crying and became hysterical. After the act was completed, she got out of the car and started walking. He followed her and put her back in the car (R. 12). He then drove to her home. He said "Is there anything I can do for you, please let me", and "a bunch of stuff like that"; she told him that he had taken her "self respect and there wasn't anything he could do" (R. 13). She testified that he said, "Are you going to prosecute?" to which she replied, "Don't worry; nothing will happen to you" (R. 25).

After he drove away Marcie Suladie was still hysterical; she did not want her mother to know what had happened, so she "threw herself" on the grass in front of her home until she could calm herself (R. 13). While she was still there a Lieutenant Fluitt, whom she described in her sworn statement to the investigating officer as her brother-in-law, but whom she testified at the trial was merely a "good friend of my family" (R. 23-24), came out and found her (R. 15). It was then about 4:00 a.m. Apparently Lieutenant Fluitt was visiting Marcie Suladie's sister, Mrs. Dorris Underwood (R. 42). Mrs. Underwood described him as "just a very good friend". Mrs. Underwood explained the presence of Lieutenant Fluitt at that hour by saying that she was worried about Marcie's absence and had asked Lieutenant Fluitt to stay until she got home (R. 42).

Lieutenant Fluitt and Mrs. Underwood brought Marcie Suladie in the house. Mrs. Underwood described her sister's appearance as follows: The two-piece suit which she had had on had two buttons off the front of it; her skirt was turned around; her sleeves were torn under the arms; her eyes were swollen and her hair was stringing down "all messed up"; she had scratches on her arms and neck with a red place on her neck (R. 42). Mrs. Underwood told her mother to go to bed so that she would not know what had happened; she told her mother that a boy had "insulted" Marcie and her mother went to bed (R. 43). Lieutenant Fluitt told Mrs. Underwood that Marcie had told him what had happened, and at his suggestion, Mrs. Underwood took her sister into the bathroom and undressed her. She found that her step-ins were torn "a little bit" and that they were "very blood stained". She found that her sister had a scratch on her arm and a few scratches on her legs around the ankles and on the inside of her upper leg and a red spot on her neck (R. 44). She gave her sister a douche, put alcohol on the scratches, and put her to

bed (R. 15, 44). Mrs. Underwood testified that her sister was sober (R. 44). She further testified that the underwear which her sister had on had "loose legs" (R. 46), so that it was possible to have an act of intercourse without removing them (R. 47).

Marcie Suladie testified that she had never had sexual intercourse before the act of intercourse with the accused (R. 13). She admitted that at some time during the evening she had "jokingly" referred to herself to the accused as "jail bait" (R. 19). She said that she used this expression because "everybody uses it for girls under 18; just kidding; that is all" (R. 19). She testified that at no time during the evening did she "get any buzz out of the drinks" that she drank or feel intoxicated in anyway (R. 33). She denied that she "picked up" the accused or that the accused "picked her up" on the night in question, saying that she was "introduced to him" (R. 33).

The next day Mrs. Underwood took her sister, Marcie, to Dr. S. W. Allen, a San Antonio physician (R. 29, 37). Dr. Allen examined her about 11:00 a.m. on 23 October 1943. His examination revealed that she had a small tear in the posterior phase of her hymen, "a little bit on the right side". There was a little blood, indicating to the doctor that it was a fresh tear (R. 37). She was nervous and had a few "scrapes" on her arms and legs but these were of such a "minor superficial" nature that no treatment was prescribed. The only suggestion he made was that she go home and be quiet (R. 38). Dr. Allen testified that the tear in the hymen could have resulted from sexual intercourse, and that it was his opinion that prior to the act of intercourse which caused the tear she was a virgin (R. 38). He said that he did not think that her vagina had ever been penetrated before "because it was so small, even after the tear, it would have been very difficult to insert a finger" (R. 39). He said that the tear which he found in her hymen might have been caused by a finger (R. 38) but he doubted that it could have been caused by a douche (R. 39). Dr. Allen stated that he had never previously examined Marcie Suladie and did not see her afterward (R. 40).

On 27 October 1943, the Provost Marshal at Randolph Field sent Staff Sergeant Charlie F. Fuller, an investigator in his office, to the Central Instructors School to bring the accused to the office of the Provost Marshal. When the accused replied in the affirmative to the question as to whether he desired to make a statement, he was taken to the office of the trial judge advocate where, after being warned of his rights, he made a voluntary statement (R. 55), which was introduced in evidence as Prosecution Exhibit 4.

In this statement the accused said that he left Randolph Field about 7:30 p.m. on the night of 22 October 1943 with Second Lieutenant Norman E. Mohney and went to San Antonio. The two lieutenants had dates with two girls, whom they picked up about 8:30. They went to a night club with these girls, where they consumed a bottle of rum. They took the girls home about 11:30 and started to a cafe to get something to eat. They accidently met Lieutenant Cone and Marcie Suladie, who was introduced to them as "Boojie".

She and Lieutenant Cone invited them to follow them out to Roger's Drive Inn, which they did. After spending some time there, "Boojie" invited them to come out to her house and have some more drinks. She got in the car with them and Lieutenant Mohney decided to go with the other officers. The accused and Marcie Suladie were to follow them. The other officers drove too fast and were lost downtown. He and "Boojie" started driving around. She picked up a quart of whiskey which he had in the car, opened the bottle and they started drinking. He said that he was pretty drunk. They drove around, stopping occasionally to "neck". The first time they stopped, after they had "necked" a while, she got out of the car, went around to the back, took her clothes up and relieved herself. They kissed a good many times and "she didn't seem like she cared much as I could do just about anything I wanted to and she didn't seem to care any". He said that she was also pretty drunk. They finally stopped about six blocks from her house and parked in a residential district. They "necked right smart"; he put his hand under her dress; he opened his pants and took his penis out; she was in his arms, and he laid her on the seat and had intercourse with her. He said that "she seemed pretty eager to neck and everything and I was figuring like any man, well that is, that she was going to be a push-over". He stated that "she didn't seem to mind much" until they "got down to serious business" and then "she didn't want to go on with it". He said, "She struggled some; she seemed to care; she didn't want to do it and I was pretty well drunk and was not much reason left to me". He said that "she didn't try to use any force or anything to stop me". After the act of intercourse was over, she started to cry and became hysterical. While he was attempting to have intercourse and while he was having intercourse, she did not try to get out of the car, but she did get out after it was over. He put her back in the car, tried to quiet her down, and took her home. He said that he had no idea that she was a virgin. He also said that while having intercourse with her, the door at her head was open because it was pretty hot. He said that he had never done anything like this before in his life (Pros. Ex. 4).

4. The accused having been advised of his rights in regard to testifying in his own behalf elected to remain silent. On behalf of the accused, Second Lieutenant Elwyn W. Rice testified that he and Lieutenant Cone ran into Dorothy Suladie and Mary Francis Gregory at Roger's Drive Inn about 11:00 p.m. on the night of 22 October 1943 and struck up a conversation with them (R. 62). Marcie Suladie subsequently arrived and started talking to them too. He said that she wanted them to buy her some wine but that they did not do so. About 12:30 the accused and Lieutenant Mohney arrived and Marcie Suladie became interested in the accused (R. 61). He said the "party" broke up about 1 o'clock when the Drive Inn closed, and that as it was breaking up, Marcie Suladie invited them to her house to "have a little party". He testified that Marcie Suladie gave him the impression "that she knew her way around"; "that she knew what she was doing all the time" and that "she seemed like a flirt" to him (R. 64). He said that she carried herself, and acted like a flirt (R. 64). He said that she did not act like

a lady; that she was very friendly and that "she spoke a little rough" (R. 66). He said that she was particularly interested in the accused and seemed to devote her special attention to him (R. 67).

Second Lieutenant Norman E. Mohney told of accompanying the accused on the evening of 22 October 1943. He said that he first saw Marcie Suladie after midnight in front of the Gunter Hotel driving Lieutenant Cone's automobile (R. 68). They said, "Follow us", which they did (R. 68). Marcie Suladie drove fast, ran a stop sign and had to go "clear off on the other side of a street to miss a bus" (R. 68). They finally met them at Roger's Drive Inn (R. 69). They started talking to the girls. Marcie Suladie was "friendly" with everyone and particularly friendly toward the accused (R. 69). She had a drink while he was there. Lieutenant Mohney said that she was not necessarily vulgar, but she was willing to listen "to a few shady stories" including a little poem called "Four Prominent Bastards Are We" (R. 69). The party broke up with Marcie Suladie suggesting that they go to her house where "we could drink until 4 or 5 o'clock in the morning" (R. 70). He said that he and the accused started out the evening with a fifth of rum, which they consumed, and that they subsequently bought a fifth of whiskey (R. 70). He said that the next day there was not much left of the whiskey which they had bought (R. 71).

Major Pierce C. Barrette, Medical Corps, a psychiatrist, testified that he had examined the accused and came to the conclusion that he was "dealing with a rather superior type of flying officer, whose habits were well formed, who was amiable, who had good perception, good judgment, good recall, was or showed no disturbance of motor mechanism" (R. 72). Major Barrette further testified that "he had many admirable qualities and a few that might be considered to be weaknesses but nothing very surprisingly bad to him at all" (R. 72). He also concluded that the accused was "probably more susceptible to alcohol than the average" (R. 73), and that after he had consumed about a quart or a quart and a half of whiskey, the accused was such a person who "could not make a judgment between right and wrong" (R. 74).

5. The accused is charged with what is commonly known as "statutory rape", that is, having sexual intercourse with a female under an arbitrary age fixed by statute. The misconduct complained of occurred in the State of Texas and the statute alleged to have been violated is Article 1183 of the Texas Penal Code, which, among other things, provides:

> "Rape is the carnal knowledge of a female under the age of eighteen years other than the wife of the person * * *; provided that if she is fifteen years of age or over the defendant may show in consent cases she was not of previous chaste character as a defense."

It was clearly shown by the evidence that on 22 October 1943 and at San Antonio, Texas - the time and place averred in the Specification - the accused had carnal knowledge of a female, namely Marcie Wilma Suladie. Not only did she testify to this fact, but the accused's written confession

or statement admitted the act. It was also clearly established by the evidence that Marcie Wilma Suladie was not the wife of the accused and at the time of the occurrence on 22 October 1943 she was under the age of 18 years, having been born 30 June 1927. All of the elements of the offense were therefore clearly shown by the evidence. There was no attempt to deny them. As to females over 15 years of age the statute provides the possible defense that the female was not of a previous chaste character. The defense produced no evidence to substantiate such a conclusion. It therefore necessarily follows that the accused without doubt violated the statute when he had sexual relations with Marcie Suladie. A lengthier discussion of the details would serve no good purpose. The commission of such a statutory offense in turn constitutes a violation of Article of War 96 (CM 163707). The Board of Review is of the opinion that the record is legally sufficient to support the findings of guilty of the Charge and the Specification and to support the sentence imposed.

6. The recordshows accused to be 25 years of age. He was commissioned second lieutenant, Air Corps, 1 October 1943. He attended high school through the tenth grade, was in the trucking business for two and a half years, employed as a clerk for one year and then enlisted as an aviation cadet 24 October 1942. He served as an aviation cadet through the various stages of training and was commissioned second lieutenant (Pilot), Air Corps, 1 October 1943.

7. The court was legally constituted and had jurisdiction over 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 as approved by the reviewing authority and to warrant confirmation thereof. Dismissal and total forfeitures are authorized upon conviction of a violation of Article of War 96.

William A. Rounds, Judge Advocate.

Earle Hepburn, Judge Advocate.

Herbert B. Frederick, 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 James H. Phillips (0-694180), 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. I recommend that the sentence as approved by the reviewing authority be confirmed but that the forfeitures be remitted and that the sentence as thus modified be carried into execution.

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-Drft. ltr. for sig. S/W.
Incl. 3-Form of action.

(Sentence as approved by reviewing authority confirmed but forfeitures remitted. Execution suspended. G.C.M.O. 75, 19 Feb 1944)

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

SPJGH
CM 245831

8 JAN

UNITED STATES v. Second Lieutenant ROBERT B. ROLLINS (0-564162), Air Corps.	ARMY AIR FORCES WESTERN TECHNICAL TRAINING COMMAND Trial by G.C.M., convened at Lincoln Army Air Field, Lincoln, Nebraska, 1 December 1943 and 14 January 1944. Dismissal, total forfeitures and confinement for one (1) 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: Violation of the 93rd Article of War.

Specification: In that 2nd Lieutenant Robert B. Rollins, 331st Base Headquarters and Air Base Squadron, did, at Lincoln, Nebraska, on or about 20 September 1943, with intent to defraud, falsely make and forge the name "J. L. Farrell, Capt AC" to a certain promissory note in the following words and figures, to wit:

$100.00 NEGOTIABLE NOTE Loan No 5203
Amount of Loan
Lincoln Nebraska, September 20 1943

FOR VALUE RECEIVED, the undersigned, jointly and severally promise to pay to the order of General Loan Service, Inc. (Licensee) at its office at 112 So. 11 Lincoln, Nebraska, the principal sum of One Hundred and no/100 - - - - Dollars, together with charges thereon, from the date hereof, until fully paid, at the rate of

* * * * * * * * *

This Note is secured by Comaker

SIGNATURES	ADDRESSES
/s/ Robert B. Rollins	3236 Dudley City
2nd Lt. A.C.	3425 W. Pershing Rd.
/s/ J L Farrell Capt A.C.	

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

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

Specification: In that 2nd Lieutenant Robert B. Rollins, 331st Base Headquarters and Air Base Squadron, did, at Buckley Field, Colorado, on or about 14 October 1943, wrongfully and unlawfully make and utter to The Denver National Bank, a certain check, in words and figures as follows, to wit:

NCB Ashland, Nebr. Oct 14 1943 No.

THE CITIZENS NATIONAL BANK
76-192 of Ashland 76-192

Pay to the
Order of Cash $25.00

Twenty-five & no/100 Dollars

For 0-564162 Federal 10 Reserve Member System /s/ Robert B. Rollins
2nd Lt. A.C.

United States
No acct.

and by means thereof did obtain from said Denver National Bank the sum of $25.00, lawful money of the United States of America, he the said 2nd Lt Robert B. Rollins then well knowing that he did not have and not intending that he should have any account with said The Citizens National Bank of Ashland for the payment of said check.

He pleaded guilty to the Specification, Charge I, except the words "with intent to defraud"; not guilty to Charge I, but guilty of a violation of the 96th Article of War; and not guilty to the Specification, Charge II and to Charge II. He was found guilty of all Charges and Specifications 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 one year. 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:

a. Specification, Charge I: On 10 September 1943 the accused made application at the General Loan Service, Incorporated, Lincoln, Nebraska, for a loan of $100. He was advised by Mr. Robert W. Gohde, secretary of the company, that loans were not made on single signatures and that it would be necessary to have a co-maker. Accused said he could obtain the signatures of Captain John L. Farrell and another person. After checking the credit rating of Captain Farrell, Mr. Gohde informed accused he could have the $100 if Captain Farrell signed the note. On 20 September 1943 a promissory note (Ex. A) in the sum of $100, payable in two monthly installments of $52.29 each, was signed by accused in the presence of Mr. Gohde and accused left with the note to obtain the signature of Captain Farrell. Mr. Gohde was absent from the office when accused returned with the note. It was stipulated that the testimony of Mrs. Alice Weber, bookkeeper for the General Loan Service, would show that accused returned later in the day with the "loan note" which bore his signature and the "purported" signature of Captain Farrell; that she accepted the note and gave him a check of the company (Ex. B) for $100; and that accused indorsed the check and received $100. When the note became overdue notices were sent to accused and attempts were made to reach him by telephone. The first notice was sent by mail on 25 October. Captain Farrell testified that accused was his assistant in the "operations field test" and that he had known accused for approximately five months. The name "John Farrell" appearing on the promissory note (Ex. A) was not signed by him and he did not give accused authority to sign his name (R. 8-12).

b. Specification, Charge II: It was stipulated that if Mr. Eugene I. Franklie, a teller in the Denver National Bank, Buckley Field, Colorado, were present he would testify that on 14 October 1943 accused presented his check (Ex. C) in the sum of $25.00 drawn on The Citizens National Bank, of Ashland, Nebraska; that the check was cashed and accused received $25.00; and that the check was presented to the drawee bank through usual channels and payment was refused. Mr. C. N. Turner, cashier of The Citizens National Bank of Ashland, Nebraska, testified that the check (Ex. C) was presented to his bank on 18 October 1943 and payment refused because accused did not at any time have an account with the bank and had not made any arrangements with the bank to cover the check or similar instruments. Mr. Turner was acquainted with accused and, so far as he knew, accused did not come into the bank between 7 October and 1 November 1943 (R. 13-15).

4. For the defense: The accused testified that he was 29 years of age, married and had one child 13 months old. His father had been dead for about twenty years and his mother was still living. He had studied electrical engineering at "Georgia Tech" for about two years and then played professional baseball at Phoenix, Arizona until he enlisted in the Regular Army in 1939. He served as an enlisted man for about three years, attained the grade of staff sergeant, attended Officer Candidate School at

Miami Beach, and was commissioned on 16 September 1942. His service as an enlisted man had been characterized as "excellent" and "superior". After he was commissioned, he was stationed at McClellan Field for about 60 days and then went to the Pratt Whitney School at East Harbor, Connecticut. During his two months at that school he became indebted to the extent of twenty-three or twenty-four hundred dollars in gambling with different officers. This amount had all been paid at the date of trial from the sale of his car and personal effects and out of his pay checks (R. 15-17).

With reference to the forgery charge accused testified that when he applied for the loan he was asked for "recommendations", gave the names of Captain Farrell and another officer, told Mr. Gohde that either of them would sign his note, and left his application for the loan. When he returned three or four days later he asked if the "recommendation came back". Mr. Gohde informed him that it had but that the note would have to be co-signed. Accused took the note to the front of the office, which was separated from the loan company, and after looking up the home address of Captain Farrell, wrote the latter's name on the note below his own signature. He returned to the loan office fifteen to thirty minutes later, was given a check for the executed note and upon indorsing the check received $100. He had no intention of defrauding the loan company by using the name of Captain Farrell (R. 17).

Accused identified the check (Ex. C) cashed at Denver and stated that he had been sent to Buckley Field to observe the courses in "winterization". When he was ready to leave he did not have enough money to defray his bills for quarters and mess and pay for his "berth" back home. He wrote the check on the bank in Ashland, where he had worked and was well known, with the intention of using his travel pay upon his return to cover the check when it arrived at the bank. He returned on Saturday, received his money on Monday, went to the bank and asked the girl on duty if the check had been presented. He received a negative reply but found out later that it had been returned (R. 18).

On cross-examination accused admitted that he did not have permission of Captain Farrell to sign his name to the note. It was his intention that the note would be paid and Captain Farrell would never know anything about it. When he was first notified that the loan was delinquent about 25 or 26 October his wife talked to Mr. Gohde in an effort to obtain an extension of the payments. She was told it could not be done and was referred to another loan company. She tried at different agencies to procure a loan, without success, and informed Mr. Gohde by telephone of her failure. Accused knew that the loan would not have been made if the loan company had been aware that the signature of Captain Farrell was not genuine. He used Captain Farrell's name because he worked with him and knew him better than anyone else. Accused did not ask him to indorse the note because of "pride" (R. 18, 21-22).

Accused further testified on cross-examination that he wrote the check (Spec. Chg. II) on 14 October, left Denver the next day, arrived in Lincoln on 16 October and reported to the "field". It did not occur to him to telephone the bank but he went there on the morning of 18 October and told one of the girls that he had to write a check in Denver and asked if it had been presented. He was informed that it had not and the girl did not know if she would be able to notify him when it did arrive. He had the money with him to cover the check but did not deposit it as he had no account in the bank and did not know he could make a deposit in that amount to cover one check. He knew that the Denver bank would not have cashed his check had he disclosed the fact that he had no account in the bank on which the check was drawn. His intention was to pay the check as soon as it arrived at the drawee bank (R. 18-23).

5. a. Specification, Charge I: It is shown by the evidence and admitted in the testimony of accused that he forged the signature of Captain John L. Farrell to a promissory note as alleged and did so without the knowledge or authority of the officer whose name was thus used. Accused by his plea and in his testimony denied any intent to defraud. It appears from the evidence, however, that accused knew the significance and legal effect of the purported indorsement. The acts of accused clearly support an inference of the necessary intent to defraud (CM 221488, Musselman).

b. As to the Specification, Charge II, the evidence is uncontradicted that accused made and uttered the check as alleged and received $25, full face value, therefor, knowing he had no account in the bank on which the check was drawn. It may be inferred from the fact that he made no arrangements with reference to the check with the drawee bank that he did not intend to have any account with such bank for payment of the check upon its presentation.

6. The accused is 29 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 21 October 1939; appointed temporary second lieutenant, Army of the United States, and active duty, 16 September 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 93rd or 96th Article of War.

Samuel M. Driver, Judge Advocate

_____, Judge Advocate

H. Lotterhos, Judge Advocate

1st Ind.

War Department, J.A.G.O., 5 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 Second Lieutenant Robert B. Rollins (0-564162), 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 forged the name of another officer as co-maker on a promissory note in the amount of $100 and made and uttered a check for $25 on a bank in which he had no account. I recommend that the sentence to dismissal, total forfeitures, and confinement at hard labor for one year be confirmed and carried into execution and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

3. Attention is invited to a recommendation for clemency attached to the record of trial and signed by the President, seven other members of the court, the trial judge advocate, defense counsel and assistant defense counsel.

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.

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

(Sentence confirmed. G.C.M.O. 167, 11 Apr 1944)

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

SPJGK
CM 245832

6 JAN 1944

UNITED STATES V. Second Lieutenant ROBERT S. KNAPEK (0-751999), Air Corps.	ARMY AIR FORCES CENTRAL FLYING TRAINING COMMAND Trial by G.C.M., convened at Brooks Field, Texas, 20 November 1943. Dismissal.

OPINION of the BOARD OF REVIEW
TAPPY, 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 Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: (Nolle prosequied).

Specification 2: In that Second Lieutenant Robert S. Knapek, 53rd Base Headquarters and Air Base Squadron, did, in the vicinity of and at or near Norman, Oklahoma, on or about 17 September 1943, disobey paragraph 16a(1)(d), Army Air Forces Regulations numbered 60-16, issued by the Commanding General, Army Air Forces, in the execution of his office, reading as follows:

"16. Minimum altitudes of flight.
"a. Except during take-off and landing, aircraft will not operate
"(1) below the following altitudes:
"* * *
"* * *
"* * *
"(d) 500 feet above the ground elsewhere than as specified above."

by flying a military airplane at approximately fifty (50) feet above the ground, when not necessary to the performance of his mission and not during take-off or landing of said aircraft.

Specification 3: (Finding of not guilty).

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

Specification: In that Second Lieutenant Robert S. Knapek, 53rd Base Headquarters and Air Base Squadron, having been duly placed in arrest at Brooks Field, Texas on or about 21 September 1943, did, at Brooks Field, Texas, on or about 19 October 1943 break his said arrest before he was set at liberty by proper authority.

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

3. The accused and Second Lieutenant John B. George, Air Corps, took off for a local flight from Pampa Air Field, Pampa, Texas, in two AT-6 type airplanes on the morning of 17 September 1943. The plane piloted by accused bore field No. 040 and the plane piloted by Lieutenant George bore field No. 021. These numbers were painted on the side of the fuselage in large figures about 18 inches tall and 10 inches wide (R.10-11; Ex. E).

Later in the morning of that date, these two airplanes were observed by Commander W. J. Wicks, Commanding Officer, U.S. Naval Air Station, Norman, Oklahoma, flying at a low altitude in the vicinity of Highway No. 9 about 20 miles due west of Norman. Commander Wicks was driving his car along this highway at a slow rate of speed, the highway being under construction, when he heard an airplane in the vicinity diving at great speed. He alighted from his car and saw two AT-6 type airplanes zoom over his head and fly along the highway at an altitude of about fifteen feet above the ground. The planes made another pass over the highway and he then observed the field numbers 040 and 021 on the planes. Again these two planes made a circle and came down in a simulated strafing dive across the highway. Once again Commander Wicks clearly observed the field numbers 040 and 021 on the planes. The area in which this performance took place was sparsely populated and the terrain was very rough and hilly with numerous patches of trees here and there. The first pass by these two

planes was by far the lowest. The last two were of an altitude of about fifty feet. The weather was clear and unlimited (Ex. C).

4. Army Air Force Regulations No. 60-16, dated 9 September 1942, prohibit the operation of Army aircraft below the altitude of 500 feet, except during take-off, landing and under certain other conditions therein specified (R.11; Ex. B).

5. The accused was placed in arrest in quarters the morning of 21 September 1943 by order of Colonel Stanton T. Smith, then Commanding Officer of Brooks Field. On that date a written order placing accused in arrest was delivered to him by Captain Alva W. Robinson, Adjutant at Brooks Field. Accused signed a first indorsement acknowledging receipt of the arrest order and told Captain Robinson he understood its contents (R.15-16; Ex. H-1). On the morning of 19 October 1943, at about 0130 o'clock, an automobile entered the north gate of Brooks Field, Texas, driven by a student officer, who presented an identification card to the guards at the gate. Corporal R. N. Johle and Private First Class S. W. Almasy were on duty as guards at the gate. The name R. S. Knapek appeared on the identification card, and Private Almasy read off the name while Corporal Johle wrote it down on the record (Ex. I) which was kept of all student officers entering the field (R.19-24). Both guards testified that to the best of their knowledge and belief the accused was the officer who was in the car when it entered the gate at Brooks Field on 19 October 1943 (R.20-24).

6. The accused and Lieutenant George testified for the defense, but since their testimony related solely to the offense alleged under Specification 3 of which accused was found not guilty, a summary of their testimony is deemed unnecessary. Accused did not deny the commission of the offenses alleged in the Charge and Specification 2 thereof, laid under the 96th Article of War and the Additional Charge and its Specification, laid under the 69th Article of War. Nor was he interrogated by either defense counsel or the prosecution upon these alleged offenses.

7. The evidence conclusively shows that accused violated Army Air Force Regulations No. 60-16, issued by the Commanding General, Army Air Forces, dated 9 September 1942, as alleged in Specification 2 of the Charge, in violation of the 96th Article of War, and that he breached his arrest before he was set at liberty by proper authority, as alleged in the Specification of the Additional Charge in violation of the 69th Article of War. The findings of guilty of each of these Specifications and of the Charge and Additional Charge are sustained not only by the accused's pleas of guilty, but by the uncontradicted evidence presented by the prosecution. In the opinion of the Board of Review the evidence establishes accused's guilt beyond a reasonable doubt.

8. War Department records show that accused is 22 years of age. He graduated from high school and speaks and reads several foreign languages. He enlisted in the regular Army 19 July 1939. He was appointed aviation cadet 18 October 1942, and was commissioned second lieutenant, Army of the United States, 28 July 1943, and ordered to active duty on the same date.

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 and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of either the 96th or the 69th Article of War.

Thomas M. Jaffey, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

(On Leave), Judge Advocate.

1st Ind.

War Department, J.A.G.O., 6 - 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 Second Lieutenant Robert S. Knapek (0-751999), 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. Accompanying the record of trial is a communication from the Commanding General, Randolph Field, Texas, dated 26 January 1944, with affidavits thereto attached showing that subsequent to his trial accused by written order was restricted to the limits of Brooks Field and that he violated the restriction by one or more visits to San Antonio, Texas, between 24 and 27 November 1944. It is evident that the accused has no proper appreciation of the duties and responsibilities of a commissioned officer. I recommend that the sentence be confirmed and carried into execution.

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

Myron C. Cramer

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

4 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. C.G. to JAG, w/incls.

(Sentence confirmed. G.C.M.O. 172, 17 Apr 1944)

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

SPJGN
CM 245866

5 FEB 1944

UNITED STATES	)	XIII CORPS
v.	)	Trial by G.C.M., convened at Fort Dix, New Jersey, 1 December 1943. Dismissal.
First Lieutenant VERNON P. WALLIS (O-1171819), 176th Field Artillery.	)	

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that First Lieutenant Vernon P Wallis, Headquarters, 176th Field Artillery Battalion, did, at A P Hill Military Reservation, Virginia on or about 30 October 1943, with intent to deceive Major Rayford P Graves, Executive Officer, 176th Field Artillery Battalion, officially state to the said Major Rayford P Graves that he, First Lieutenant Vernon P Wallis, did not know how many persons were in the command car in which he, First Lieutenant Vernon P Wallis, returned from Fredericksburg, Virginia, to the vicinity of A P Hill Military Reservation, Virginia, which statement was known by the said First Lieutenant Vernon P Wallis, to be untrue.

Specification 2: In that First Lieutenant Vernon P Wallis, Headquarters, 176th Field Artillery Battalion, did, at A P Hill Military Reservation, Virginia, on or about 30 October 1943, with intent to deceive Lieutenant Colonel Arthur Emmerson, Commanding Officer, 176th Field Artillery Battalion, state to the said Lieutenant Colonel Arthur Emmerson that no female was in

> a command car in which he, First Lieutenant Vernon P Wallis, returned from Fredericksburg, Virginia, to A P Hill Military Reservation, in the early morning of 30 October 1943, and that he, First Lieutenant Vernon P Wallis, did, state to the said Lieutenant Colonel Arthur Emmerson, that First Lieutenant Stanley G. Anderson, Headquarters 176th Field Artillery Battalion, was alone in a command car at the time it started to Fredericksburg, Virginia, from A P Hill Military Reservation, Virginia, in the early morning of 30 October 1943, which statements were known by the said First Lieutenant Vernon P Wallis, to be untrue.

He pleaded not guilty to and was found guilty of the Charge and its Specifications excepting from Specification 2 the words "no female" and "and that he, First Lieutenant Vernon P. Wallis, did state to the said Lieutenant Colonel Arthur Emmerson, that First Lieutenant Stanley G. Anderson, Headquarters, 176th Field Artillery Battalion, was alone in a command car at the time it started to Fredericksburg, Virginia, from A. P. Hill Military Reservation, Virginia, in the early morning of 30 October 1943" of which he was found not guilty and substituting for the former the words "he, First Lieutenant Vernon P. Wallis, did not know that a female" of which he was found 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 might direct, for two years. The reviewing authority approved only so much of the sentence as provides for dismissal and forwarded the record of trial for action under Article of War 48.

3. On the early morning of 30 October 1943, the accused's organization received information by telephone that one of its command cars, operated by one of the organization's officers, had been involved in an accident between the A. P. Hill Military Reservation, Virginia, and Fredericksburg, Virginia, in which several persons had been injured. The executive officer at the instruction of the battalion commander undertook an investigation. He ascertained that Lieutenants Andrew F. Dolan and Stanley G. Anderson were not in their quarters and that the accused, who had returned to his quarters shortly before, had gone to Fredericksburg with the absent Lieutenants on the previous evening but, that upon their return, they had separated in the vicinity of the camp. About 15 minutes later, at 0245 o'clock, the executive officer again interviewed the accused, advised him that the accident was serious and his testimony continued: "I asked him how many persons — I don't remember whether I said officers or enlisted men or how many people were in the command car when he left Lieutenant Anderson in the vicinity of the camp area early in the morning". To this question the accused replied that "he did not know". After reporting to the battalion

commander, the executive officer returned to the accused a third time and directed him to report to the battalion commander (R. 9-17).

The battalion commander, who was unable to testify except after refreshing his memory from notes made by the executive officer during the investigation, recalled interrogating the accused about "the journey to Fredericksburg". The battalion commander's testimony continued:

> "I asked Lieutenant Wallis who the occupants of the car were, if a woman was in the car. Lieutenant Wallis stated no woman was in the car. I asked him who returned to Fredericksburg in the car with Lieutenant Wallis and he stated he did not know.
>
> "The Law Member: You said Lieutenant Wallis. Do you mean Lieutenant Wallis or Lieutenant Anderson.
>
> "The Witness: Lieutenant Wallis.
>
> "Q. I wonder if you can correct that statement. You stated you asked Lieutenant Wallis who was in the car, was there a woman in the car, and further, who was with Lieutenant Wallis in the car when it returned from Fredericksburg to the vicinity of A. P. Hill.
>
> "A. When it returned. Lieutenant Wallis later stated he did not know who was in the car with Lieutenant Anderson."

The accused had sketchily related to the battalion commander the events of the previous evening which included his going to Fredericksburg with the other two lieutenants, eating at a restaurant and returning to the A. P. Hill Military Reservation where he had parted company with Lieutenant Anderson, but the battalion commander was unable to testify accurately concerning the conversation. Shortly thereafter it was learned that a woman had been killed in the accident and the accused was so advised in a fourth conversation with the executive officer who again directed him to report to the battalion commander. The accused, during this second conversation with the battalion commander, related the preceding events more fully, stating that he and another lieutenant were in the front seat of the car when it left the town for the camp, that someone whom he presumed was Lieutenant Anderson had gotten into the back seat, that he did not know a woman was with the latter until the car reached the camp and that he did not know who was in the car when it left the camp to return again to the town. The battalion commander, replying to the question, "Colonel, did the accused at any time tell you that there was not a woman in the car from Fredericksburg to the bivouac area?", said "No. He did not tell me that there was not one." Upon

examination by the court the battalion commander, relative to such questions, admitted that the only positive statement made by the accused was that he did not know. On the first interview the battalion commander did not know any of the facts but was motivated by a "hunch" that a woman had been in the car and on the second interview he knew that a woman had been killed. Still the accused at no time had ever told him that Lieutenant Anderson had been the only occupant of the car at any time although he had stated that he did not know who else was in the car when it last left the reservation and had finally stated that he had been hesitant in making a full statement because Lieutenant Anderson was a married man and he, the accused, did not with his limited knowledge wish to say anything that might be derogatory to such officer (R. 16-19, 24-43).

4. The defense's motion for findings of not guilty was over-ruled and the accused, after explanation of his rights as a witness, testified that the executive officer first asked him if he knew anything about an accident to which he replied in the negative. Being later summoned to the battalion commander he reiterated this statement and also named the officers he had accompanied to town the previous evening. Shortly afterwards he had been again called before the battalion commander who told him that a woman had been killed in the accident in which Lieutenant Anderson had been involved and asked him how it happened that he, the accused, did not know there was a woman in the car when it returned to Fredericksburg. This, he explained, occurred because he had been unaware of her presence in the car from the town to the camp, that upon arrival at the camp, he and Lieutenant Dolan realized the presence of a woman, that he and Lieutenant Dolan had told Lieutenant Anderson to take her back to town in a taxi and not in the command car, and that he had then departed without seeing the command car depart on the final trip from the reservation to the town upon which the accident occurred. A large radio upon the back of the front seat of the command car interfered with his seeing who had gotten into the car when it left Fredericksburg and he had not observed that Lieutenant Anderson was accompanied by a woman until they reached the camp where the above mentioned request had been made about her return which he presumed had been followed. During all the conversations with the executive officer and the battalion commander, he understood that the questions propounded to him concerning the woman being in the car related solely to the trip upon which the accident occurred and that since he did not see the car leave his answer that he did not know was correct (R. 44-64).

The accused's battalion commander was recalled as a character witness by the defense and ascribed to the accused an excellent character and of potentially great value to the service. He had previously recommended the accused for promotion (R. 65).

5. The executive officer, recalled by the court, testified that he had questioned the accused twice on the morning of 30 October 1943, during which conversations the accused possibly was not fully awake. He was unable to testify that he had asked the accused about the car's occupants upon its final trip from the reservation to the town because the accused had gotten out and "wouldn't know where it went". However, he stated that he did ask how many were in the car when it came from the town to the reservation to which the accused replied that he did not know. Indicative of his testimony is the following:

> "Q. Major, you stated that you were endeavoring to find out if any of the officers or enlisted men or how many had been injured on a trip of this car, and yet, you asked the accused about the trip from Fredericksburg to the bivouac area. Did you ask him any question about the trip on which the accident occurred?
>
> "A. The trip from Fredericksburg to the bivouac area - - the question I asked him was upon the arrival at the bivouac area, which was the end of the trip and as to how many were in the car when it returned, I did not ask him, although that was what I was attempting to find out. I don't recall having asked him that. That was what I was attempting to find out" (R. 66-72).

6. Attached to the record is a recommendation for clemency signed by five members of the court. There is also attached a commendation from the executive officer of the 211th Field Artillery Battalion.

7. The first Specification alleges that the accused on 30 October 1943, with intent to deceive his organization's executive officer officially stated that he, the accused, did not know how many persons were in a certain command car in which the accused returned to the A. P. Hill Military Reservation from Fredericksburg, Virginia, which statement was known by the accused to be untrue. The part of the second Specification of which he was found guilty similarly alleges that the accused stated to his commanding officer on the same date that no female was in the car. By the court's findings the words "no female" were excepted and the words "he, First Lieutenant Vernon P. Wallis, did not know that a female" were substituted therefor. Knowingly making a false official statement with intent to deceive a superior officer is manifestly prejudicial of good order and military discipline and therefore violative of Article of War 96.

The evidence for the prosecution shows that the accused at least on the occasion of the first two conversations with the executive officer was not fully awake which militates strongly against

his having at such times an intent to deceive. Likewise the six separate conversations occurring within a short time with two different officers about the car's three trips, most of which were referred to as "return" trips, were not conducive to clarity but more probably to confusion which tends to corroborate accused's contention that his remarks concerned the final trip from the reservation to the town upon which the accident occurred and also militates most strongly against his having at such times an intent to deceive. The prosecution's evidence, furthermore, is so utterly inconclusive as to what the accused actually said and as to which trip of the car was being referred to during the various conversations that its combined effect is so confusing and contradictory within itself that it wholly fails to measure up to the exactitude required, particularly in cases involving the making of false statements, to establish beyond a reasonable doubt the commission of the offenses alleged. The executive officer's testimony, as evidenced by the quoted excerpts, is not only inconsistent within itself but also is conflicting with that of the battalion commander who, even after refreshing his memory from another's notes which was possible but probably immaterial error under the view of the record herein taken, was unable to testify definitely about what questions he actually propounded or what answers the accused actually made. Certainly neither his testimony nor that of the executive officer so singled out the trip of the car about which they were asking that the accused was or could have been free from mistake in believing that they were asking about the trip upon which the accident occurred. His replies, according to his coherent and unimpeached account, were not shown to be incorrect beyond a reasonable doubt even though in some particulars they tax belief.

At best the evidence shows that the accused, motivated by an understandable hesitancy, while probably answering the propounded questions truthfully, delayed making a complete disclosure until the importance thereof was forcefully brought to his attention from which temporizing his superior officers inferred and therefore attributed to him untruthful statements. Failure to make a full disclosure is not tantamount to making specified and particularized false statements with a deceitful intent (CM 136021 (1919) Dig. Ops. JAG, 1912-40, Sec. 454 (49)). The evidence, therefore, is insufficient to support the findings of guilty of the Specifications and the Charge.

8. The accused is about 29 years old. The War Department records show that he has had enlisted service from 12 July 1941 to 15 October 1942 when he was commissioned a second lieutenant upon completion of Officers Candidate School since which latter date he has had active duty as an officer, that on 24 March 1943 he was commended by his commanding officer for thoroughness, efficiency and outstanding performance of duty in training replacements, and that on 20 May 1943 he was promoted to first lieutenant.

9. 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 the Charge and its Specifications.

Abner E. Lipscomb, Judge Advocate

On leave, Judge Advocate

Gabriel H. Golden, Judge Advocate

SPJGN
CM 245866

1st Ind.

War Department, J.A.G.O., 9 FEB 1944 - To the Commanding General, XIII Corps, Fort Du Pont, Delaware.

1. In the Case of First Lieutenant Vernon P. Wallis (0-1171819), 176th Field Artillery, I concur in the foregoing opinion of the Board of Review holding that the record of trial is not legally sufficient to support the findings of guilty and the sentence, and for the reasons stated therein I recommend that the findings of guilty and the sentence be disapproved. You are advised that the action of the Board of Review and the action of The Judge Advocate General have been taken in accordance with the provisions of Article of War 50½, and that under the further provisions of that Article and in accordance with the fourth note following the Article (M.C.M., 1928, p. 216), the record of trial is returned for your action upon the findings and sentence, and for such further action or rehearing 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. For convenience of reference please place the file number of the record in brackets at the end of the published order, as follows:

(CM 245866).

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.

SPJGN
CM 245908

25 JAN 1944

UNITED STATES	)	SECOND AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at Army Air Base, Kearney, Nebraska, 24 November 1943. Dismissal.
	)	
Second Lieutenant EUGENE P. RILEY (0-649114), Air Corps.	)	

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

1. The Board of Review has examined the record of trial in the case of the officer 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 95th Article of War.

Specification 1: In that Second Lieutenant Eugene P. Riley, Jr., Air Corps, 518th Base Headquarters and Air Base Squadron, did, at Miami Beach, Florida, on or about December 20, 1942, with intent to defraud, wrongfully and unlawfully make and utter to the Helen Mac Military Book Shop, a certain check in words and figures as follows, to-wit:

12/20 1942
85-69

First National Bank, Laurel, Miss.
Write Name and Location of your bank on this line

PAY TO THE
ORDER OF Helen Mac $5.00

Five & 00/100 - - - - - - - - - - - - - - - - - - Dollars
100

Roney Plaza
0649-114

(S) Eugene P. Riley, Jr.

and by means thereof did fraudulently obtain from the said Helen Mac Military Book Shop, merchandise and cash in the amount of Five & 00/100 Dollars ($5.00), he, the said Second Lieutenant Eugene P. Riley, Jr., then well knowing that he did not have and not intending that he should have sufficient funds in the said First National Bank of Laurel, Mississippi, for the payment of said check.

Specification 2: Same form as Specification 1, but alleging check dated 22 May 1943, payable to the order of Cash, made and uttered to the Utah Hotel Company at Salt Lake City, Utah, and fraudulently obtaining thereby $10.00.

Specification 3: Same form as Specification 1, but alleging check dated 17 May 1943, payable to the order of Cash, made and uttered to Second Lieutenant Charles L. Fain at Salt Lake City, Utah, and fraudulently obtaining thereby $10.00.

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

Specification 1: Finding of not guilty.

Specification 2: In that Second Lieutenant Eugene P. Riley, Jr., Air Corps, 518th Base Headquarters and Air Base Squadron, did at Army Air Base, Grand Island, Nebraska, from on or about 30 May 1943 to on or about 23 August 1943, enter into and upon a course of conduct of a nature to bring discredit upon the military service in that, the said Second Lieutenant Eugene P. Riley, Jr., Air Corps, did wrongfully and knowingly make and utter a series of checks, to-wit:

5/30 1943

Citizens and Peoples Nat. Bank
(Name of Bank)
Pensacola, Fla.
(Town Where Bank is Located)
PAY TO THE ORDER OF B. P. P. E. No. 604 $10.00

Ten & 00/100 - DOLLARS
With Exchange
For value received, I represent the above amount is on deposit in said bank subject to this check and is hereby assigned to payee, and I guarantee payment with exchange and costs in collecting.
0-649114 (S) Eugene P. Riley, Jr.

Pensacola, Fla.
Grand Island, Nebraska 6/1 1943

Citizens & Peoples
~~The Commercial~~ National Bank

PAY TO THE
ORDER OF Cash $5.00

Five & 00/100 - - - - - - - - - - - - - - - - DOLLARS

For 0-69114 (S) E. P. Riley, Jr.

F Monroeville, Ala., 194 No.
N
B FIRST NATIONAL BANK
PAY
TO THE
ORDER OF Cash $10.00

Ten & 00/100 - - - - - - - - - - - - - - - - - - - DOLLARS

(S) Eugene P. Riley

Pensacola, Fla.
~~San Antonio, Texas~~ 194 No.

Citizens & Peoples National Bank
~~National Bank of Fort Sam Houston~~
Pensacola, Fla.

PAY TO THE
ORDER OF Cash $10.00

Ten & 00/100 - - - - - - - - - - - - - - - - - - DOLLARS

(S) June W. Riley
By Lt. Eugene P. Riley

for the purpose of wrongfully and fraudulently obtaining cash, goods, wares and merchandise therefor, and in furtherance of said course of conduct of a nature to bring

discredit upon the military service did by means thereof wrongfully and fraudulently obtain from certain persons, firms and corporations, to-wit: Benevolent Protective Order of Elks 604; Nick Jamson, doing business under the firm name and style of Palace Shoe Shop; Sarah Galst; and, G.I Model Laundry, each separately and severally, cash, goods, wares and merchandise therefor of the value of about $35.00, then well knowing that he did not have and not intending that he should have sufficient funds in the Citizens And Peoples National Bank, Pensacola, Florida, First National Bank, Monroeville, Alabama, the said banking institutions upon which said checks were drawn as aforesaid, for the payment of said checks.

The accused pleaded not guilty to each of the Charges and Specifications and was found not guilty of Specification 1 of Charge II but guilty of both Charges and of all other Specifications thereunder. Evidence of his previous conviction on 21 April 1943 for a violation of Article of War 96 based on the issuance of numerous checks without sufficient funds was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for a period of two years. The reviewing authority approved only so much of the sentence as provided for dismissal the service and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that the accused on 21 November 1942, opened a checking account with the First National Bank of Laurel, Mississippi, and deposited $75 therein. This sum, by 9 December 1942, was reduced to $3.67 by a series of checks and service charges. "Between December 5 and December 22, 1942, inclusive, payment was refused on 17 checks drawn by (the accused) for insufficient funds, and the balance of $3.67 was absorbed by charges for these insufficient fund checks, and the account was closed on December 22, 1942". Two days before, on 20 December 1942, the accused, in return for certain merchandise and cash, gave Helen Mellet, the owner of the Helen Mac Military Book Shop, a check in the sum of $5, made payable to Helen Mac. This was deposited by her the following day, but was ultimately returned to her with the notations "Acct. seems to be closed" and "DO NOT PUT THROUGH AGAIN" (R. 6-2, 6-41).

A few weeks later Mrs. June Warden Riley, the wife of the accused, established a checking account with the Citizens and Peoples National Bank of Pensacola, Florida. Her husband had previously instructed the Office of Dependency Benefits to send her an allotment of $150 per month out of his pay as a second lieutenant. The Citizens and Peoples

National Bank was designated as her depositary and was notified of the arrangement. The first allotment check was received by it on 15 January 1943. No person other than Mrs. Riley was authorized to draw against her account. The accused had no account of his own nor any joint account with his wife in the same bank (R. 6-33, 6-37, 6-38).

In May of 1943 his duties took him to Salt Lake City, Utah. On the 17th of that month he requested Second Lieutenant Charles L. Fain, whom he had met for the first time the day before, to cash a check for $10. His new acquaintance paid him that sum and received in exchange an instrument drawn upon the Citizens and Peoples National Bank and signed "Mrs. Eugene P. Riley, Jr." and "Lt. Eugene P. Riley, Jr.". Both signatures were in the handwriting of the accused. The check upon being presented for payment was dishonored (R. 6-7, 6-8; Exs. 7, 8).

Five days later the accused cashed another purported Citizens & Peoples National Bank check for $10 at the Hotel Utah of Salt Lake City. It was executed in the same manner as the one to Lieutenant Fain and was also returned unpaid because of the unauthorized signature (R. 6-4, 6-5; Exs. 5, 6).

Shortly thereafter the accused was assigned to the Army Air Base at Grand Island, Nebraska. A third $10 check upon the Citizens & Peoples National Bank was cashed by him at the Elks Club in that town on 30 May 1943. Unlike the first two which had been made payable to "Cash" and which had been signed "Mrs. Eugene P. Riley, Jr." and "Lt. Eugene P. Riley, Jr.," the last one was made to the order of B.P.O.E. No. 604 and bore the signature of "Eugene P. Riley, Jr." only. It was dishonored for the same reasons as its predecessors (R. 6-16, 6-36; Exs. 13, 14).

On 1 June 1943, the accused passed another Citizens & Peoples National Bank check in the sum of $5 payable to "Cash" to Nick Jamson, the proprietor of the Palace Shoe Shop in Grand Island. A portion of this sum was applied by Mr. Jamson as compensation for certain services rendered by him and change for the balance was given by him to the accused. The instrument was signed "E. P. Riley, Jr." and was also dishonored (R. 6-19, 6-20; Exs. 15, 16).

A fifth check in the sum of $10 was drawn upon the Citizens & Peoples National Bank by the accused in August of 1943. It was undated, made payable to "Cash", signed "June W. Riley By Lt. Eugene P. Riley," and given to the G. I. Model Laundry Company of Grand Island for services rendered. Payment was refused on the ground that the signature was not authorized. Mrs. Riley's balance when this check was presented does not appear in the record. The amounts she had on deposit on 17 May, 22 May, 30 May, and 1 June 1943 were $47.92, $35.42, $14.17, and $10.67, respectively (R. 6-28, 6-29, 6-30, 6-37; Ex. 20).

The accused had an account with the First National Bank of Monroeville, Alabama. In August of 1943 the balance standing to his credit aggregated ten cents. No deposit had been made by him since 7 February 1940. His father had an account which was apparently of a more substantial nature in the same bank. The accused had, however, not been given authority to draw against it. On 22 August 1943 he obtained $10 from Lieutenant Sarah Galst of the Army Nurse Corps for a check in that sum addressed to the First National Bank of Monroeville, Alabama, made payable to the order of "Cash" and executed by "Eugene P. Riley". When she attempted to cash it at the Officers' Mess, she was told that they would not accept the accused's checks. She then requested the accused to redeem it, "and he said he would come down and pay me, but he never did". The check was finally turned over by her for collection to Captain Harry R. Balfe of the Army Air Corps. He presented it for payment and in due course it was returned dishonored on 10 September 1943 with the notation "We have no authority to pay this check, however, we do have authority to pay check for this same amount signed E. P. Riley, Jr., on E. P. Riley's account" (R. 6-22, 6-23, 6-42, 6-43; Exs. 17, 18).

4.The accused, after his rights relative to testifying or remaining silent had been explained to him, took the stand on his own behalf. He did not deny passing the checks in question and had paid all of them since the charges against him had been preferred. Both he and his wife, however, attempted to show that he was not motivated by any wrongful intent. To that end they testified that practically all of the monies in her name in the Citizens and Peoples National Bank were allotment funds which had been deducted from his pay; that they had planned to create a joint account against which he could draw in like manner and to the same extent as she did; that she obtained a signature card from the bank for that purpose; that she signed it but neglected to deliver it to the bank; and that she did not inform him of her omission. As a result the accused was under the "impression that it was a joint account. I did not know it was not until this investigation came up". The misunderstanding was intensified by the method employed in disposing of a check which the accused wrote against the account shortly after his arrival in Salt Lake City. As related by Mrs. Riley:

> "he gave a check for $20 and wired me he was giving this check and I called the bank to let me know if the check came in and I would pay it, because he had never given a check, and I was in the bank that same day so I said what will you do about it and they said do you want to give me another check. And without even thinking about it, I didn't even tell Riley the check was cleared and that was that, and to all knowledge I think I know that Riley believed it was cleared - - he still argues with me and now I can't find either of the checks" (R. 6-21, 6-24, 6-27, 6-31, 6-50, 6-55, 6-59, 6-61, 6-69).

As to the First National Bank of Monroeville, Alabama, the accused testified that he had written other checks against his father's account and that they had all been honored. His wife went a step farther and said that all members of the family drew on Mr. Riley, Sr.'s account. The accused admitted that he had not utilized this privilege for two years prior to his transaction with Lieutenant Sarah Galst. It was not until 1 September 1943 that E. P. Riley, Sr. expressly authorized the check accepted by her to be paid out of his account. This date was subsequent to the one on which the charges were preferred (R. 6-44, 6-45, 6-59, 6-67, 6-74).

The accused denied that he knew on 20 December 1942 that he had overdrawn his account with the First National Bank of Laurel, Mississippi. On the contrary, he insisted that he believed in good faith that he had ample funds on hand to satisfy the checks which he executed. Upon cross-examination, however, he admitted drawing against the account in an aggregate sum greatly in excess of $75, the amount of the original deposit, and that his final check alone, dated 9 January 1943, was for $84.26. When asked to explain, he said, "I planned when I got to Miami I was supposed to be paid on the first of December, and I wasn't paid, and as quick as I could get the pay I would deposit it at the bank. * * * I had travel pay coming at Laurel and I thought I would get it" (R. 6-60, 6-66, 6-67, 6-68, 6-69, 6-72, 6-75, 6-76).

5. Specifications 1, 2, and 3 of Charge I allege that the accused on 20 December 1942, 17 May 1943, and 22 May 1943, respectively, "with intent to defraud, wrongfully and unlawfully" made and uttered certain described checks the first in the sum of $5 and two in the sum of $10 each and "by means thereof did fraudulently obtain" from the persons cashing them cash and merchandise in the amounts thereof, "then well knowing that he did not have and not intending that he should have sufficient funds" in the drawee banks for their payment. These acts are charged in violation of Article of War 95. Specification 2 of Charge II alleges that the accused on or about 30 May 1943 to on or about 23 August 1943 entered "into and upon a course of conduct of a nature to bring discredit upon the military service in that" he "did wrongfully and knowingly make and utter" a certain series of checks "for the purpose of wrongfully and fraudulently obtaining cash, goods, wares and merchandise therefor" and in furtherance of said course of conduct did by means thereof wrongfully and fraudulently obtain "from certain persons, firms and corporations * * * cash, goods, wares and merchandise therefor of the value of about $35.00," "then well knowing that he did not have and not intending that he should have sufficient funds" in the drawee banks. This offense is charged under Article of War 96.

Since the evidence indicates that during the year preceding the trial the accused had made a deliberate practice of passing worthless checks, his protestations with respect to the propriety of his motives can logically be treated only with skepticism. Having issued checks totaling more than

$300 against his original deposit of $75, his assertions of ignorance as to the actual condition of his account with the First National Bank of Laurel, Mississippi, are not credible. Where, as here, the status of the accused's account results from his own acts, he is properly chargeable with knowledge of it: CM 202601; CM 236070.

His contention that he had authority to draw against his father's account with the First National Bank of Monroeville, Alabama, is untenable. He conceded that he had not written any check against Mr. Riley, Sr.'s funds during the past two years, so that if it be assumed that the power did once exist, its long disuse is indicative of abandonment. The fact that Mr. Riley, Sr. had to give the bank express permission to pay Lieutenant Galst's check for $10 out of his account, shows clearly that the right to withdraw was vested in him alone. The form and signature of the check to Lieutenant Galst tends to cast further doubt upon the position of the accused. If he had meant to draw against his father's account instead of his own, it is only reasonable to suppose that he would have shown his intention by directing payment out of Mr. Riley, Sr.'s funds or perhaps by signing the instrument "Eugene P. Riley, Sr., By Eugene P. Riley, Jr.". His failure to do either is evidence that he intended his check to be charged against his own account with the bank amounting to ten cents.

The testimony of the accused and his wife concerning the proposed establishment of a joint account with the Citizens and Peoples National Bank of Pensacola, Florida, contains a number of discrepancies. She stated that shortly after the accused went to Salt Lake City a check for $20 was executed by him, that she happened to be at the bank when it was presented for payment, and that she caused it to be cleared by signing a check of her own (R. 6-59). This experience of the accused was offered by the accused as grounds for his impression that he could draw against his wife's account. However, Mrs. Riley was unable to produce the $20 check referred to; nor did she explain why she then failed to file the joint signature card executed by the accused (Def. Ex. 1) upon being so forcibly reminded of the need for it. She testified that she carried it around in her purse and that "it was there and I forgot it wasn't in the bank" (R. 6-55). Her memory should certainly have been stirred upon the presentation of the alleged $20 check. The manner in which the accused executed the five checks against the Citizens and Peoples National Bank also discredits the story of a proposed joint account. Two of them were signed by him with both his wife's name and his own, two contained his name alone, and the last read "June W. Riley By Lt. Eugene P. Riley". If the accused honestly believed that he had a joint account he would not have indulged in this variety of signatures but would have signed the checks with his name only.

The redemption of the dishonored checks by the accused and his kin, after charges had been preferred, will not absolve him. The offense

was committed at the time the checks were issued and subsequent conduct can have no effect upon the issue of guilt.

Defense counsel in the course of the trial, referred to a prior conviction of the accused on similar charges. This was an irregularity, but, having been committed by the defense, it cannot be availed of by the accused to impair or destroy the prosecution's case, unless obviously prejudicial. The record contains nothing which indicates that the accused was harmed in any way by his counsel's inadvertent remarks. There was more than ample evidence to sustain the findings of guilty, and, considering the nature and gravity of the offense, the sentence imposed was most moderate.

6. The accused is about 29 years of age. The records of the War Department show that he had enlisted service from 27 January 1942 to 11 July 1942, when he was commissioned a second lieutenant, and that since the last 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. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence. Dismissal is authorized upon a 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

Benjamin R. Sleeper, Judge Advocate

Gabriel H. Golden, Judge Advocate

(334)

SPJGN
CM 245908

1st Ind.

War Department, J.A.G.O., 5 - 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 Second Lieutenant Eugene P. Riley (0-649114), 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 as approved by the reviewing authority and legally sufficient to warrant confirmation thereof. I recommend that the sentence of dismissal be confirmed and ordered executed.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the foregoing recommendation, 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 as approved by reviewing authority confirmed. G.C.M.O. 119, 10 Mar 1944)

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

W. D. (335)

SPJGQ
CM 245933

30 DEC 1943

UNITED STATES v. Second Lieutenant JACK PALMER (0-740668), Air Corps.	ARMY AIR FORCES CENTRAL FLYING TRAINING COMMAND Trial by G.C.M., convened at San Marcos Army Air Field, San Marcos, Texas, 23 November 1943. Dismissal, total forfeitures, and confinement for five (5) 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. The accused was tried upon the following Charges and Specifications:

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

Specification: In that Second Lieutenant Jack Palmer, Air Corps, did, without proper leave, absent himself from his station at San Marcos Army Air Field, San Marcos, Texas, from about 11 August 1943 to about 30 August 1943.

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

Specification 1: In that Second Lieutenant Jack Palmer, Air Corps, being indebted to Mrs. Salim Serur in the sum of Sixty-Three Dollars and Sixty-Seven Cents ($63.67) for rent, merchandise and telephone, which amount became due and payable on or about 11 July 1943, did, at San Marcos, Texas, from 11 July 1943, to date, dishonorably fail and neglect to pay said debt.

Specification 2: In that Second Lieutenant Jack Palmer, Air Corps, being indebted to the Hospital Fund, Post Hospital, Army Air Forces Navigation School, San Marcos Army Air Field, San Marcos, Texas, in the sum of Sixteen Dollars ($16.00) for subsistence, which amount became

due and payable on or about 10 August 1943, did, at Army Air Forces Navigation School, San Marcos Army Air Field, San Marcos, Texas, from 10 August 1943, to date, dishonorably fail and neglect to pay said debt.

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

Specification 1: In that Second Lieutenant Jack Palmer, Air Corps, did, at Laredo, Texas, on or about 14 August 1943, with intent to defraud, wrongfully and unlawfully make and utter to the Post Exchange, Fort McIntosh, Laredo, Texas, a certain check, in words and figures as follows, to wit:

"San Antonio, Texas, August 14, 1943 No.____

30-65
NATIONAL BANK OF FORT SAM HOUSTON
at San Antonio

PAY TO THE
ORDER OF Post Exchange $ ~~10.00~~
00 10.00
Ten and xx ---------- DOLLARS

/s/ Jack Palmer, 2nd Lt., A.C., 0-740668"

Endorsed: "Pay to the order of
Laredo National Bank
For Deposit Only
Post Exchange"

and by means thereof, did fraudulently obtain from the Post Exchange, Fort McIntosh, Laredo, Texas, merchandise and lawful money of the United States in the total sum of Ten Dollars ($10.00), he, the said Lieutenant Jack Palmer, then well knowing that he did not have, and not intending that he should have, sufficient funds in the National Bank of Fort Sam Houston, San Antonio, Texas, for the payment of said check.

Specification 2: In that Second Lieutenant Jack Palmer, Air Corps, did, at San Antonio, Texas, on or about 25 July 1943, with intent to defraud, wrongfully and unlawfully make and utter to The Blue Bonnet Hotel, San Antonio, Texas, a certain draft, in words and figures as follows, to wit:

"San Antonio, Texas, July 25 19 43

On Demand
Pay to the Order of THE BLUE BONNETT HOTEL $10.00
00
Ten and xx _____ 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 from the Blue Bonnet Hotel of San Antonio, Texas
VALUE RECEIVED AND CHARGE SAME TO ACCOUNT OF

/s/ Gp. 1, A.A.F.N.S. San Marcos, Tex.
Jack Palmer, 2nd Lt., A.C., 0-740668
Armstrong Hotel,
San Marcos, Texas"

To Natl. Bank of Ft. Sam
Houston, San Antonio, Texas

and by means thereof, did fraudulently obtain from the Blue Bonnet Hotel, San Antonio, Texas, lawful money of the United States in the total sum of Ten Dollars ($10.00), he, the said Lieutenant Palmer, then well knowing that he did not have, and not intending that he should have, sufficient funds in the National Bank of Fort Sam Houston, San Antonio, Texas, for the payment of said draft.

Specification 3: Same form as Specification 1, but alleging check drawn on same bank dated July 9, 1943, payable to the order of Thompsons Restaurant, made and uttered to Thompsons Restaurant at San Antonio, Texas, and fraudulently obtaining thereby $20.00.

Specification 4: Same form as Specification 1, but alleging check drawn on same bank dated August 2, 1943, payable to the order of cash, made and uttered to Top Hat Night Club at Austin, Texas, and fraudulently obtaining thereby $10.00

Specification 5: Same form as Specification 1, but alleging check dated July 14, 1943, drawn on same bank, payable to C. T. Bass, made and uttered to C. T. Bass at San Marcos, Texas, and fraudulently obtaining thereby $4.00.

Specification 6: Same form as Specification 1, but alleging check dated July 18, 1943, drawn on same bank, payable to Baker Hotel, made and uttered to Baker Hotel at Dallas, Texas, and fraudulently obtaining thereby $20.00.

Specification 7: Same form as Specification 2, but alleging draft drawn on same bank, dated July 22, 1943, payable to the order of Gunter Hotel, made and uttered to the Gunter Hotel at San Antonio, Texas, and fraudulently obtaining thereby $10.00.

Specification 8: Same form as Specification 2, but alleging draft drawn on same bank, dated August 9, 1943, payable to the order of Gunter Hotel, made and uttered to the Gunter Hotel at San Antonio, Texas, and fraudulently obtaining thereby $10.00.

Specification 9: Same form as Specification 1, but alleging check drawn on same bank, dated July 13, 1943, payable to the order of Howell Drug Store, made and uttered to Howell Drug Store at San Marcos, Texas, and fraudulently obtaining thereby $10.00.

Specification 10: Same form as Specification 1, but alleging check drawn on same bank, dated July 14, 1943, payable to the order of White Bell Cafe, made and uttered to White Bell Cafe at San Marcos, Texas, and fraudulently obtaining thereby $10.00

Specification 11: In that Second Lieutenant Jack Palmer, Air Corps, on or about 30 August 1943, at or near Laredo, Texas, having procured to be issued for his own use and benefit a certain military pass in words and figures as follows, to wit:

"OFFICERS PASS, LAREDO ARMY AIR FIELD
Laredo, Texas

VOID AFTER
Date 14 Aug 43 No. Temp

Name	Rank	ASN	Branch
Irvin Wilson	2nd Lt.	-0668	A.C.

is granted the privilege of visiting the City of Nuevo Laredo, Mexico, in uniform, when not on duty. Bearer to return to the U.S. not later than 11:00 P.M. on the day of the visit.

By Order of COLONEL KENNEDY.

(SEAL)
(Laredo Army Air Field)
(Official)
(Laredo, Texas)

/s/ Wilbur H. Greenstreet
Provost Marshal 1st Lt., A.C."

did, wrongfully and with intent to deceive, attempt to use such pass by posing as, and using the fictitious name, "Irvin Wilson", then well knowing that said name "Irvin Wilson" was fictitious and that his use of such name was a misrepresentation.

Specification 12: In that Second Lieutenant Jack Palmer, Air Corps, did, at or near Sequin, Guadalupe County, Texas, on or about 26 March 1943, contract a bigamous marriage with one Oleta Marie Rust, without having first obtained a legal divorce from his lawful wife, Inez Tobias Palmer, to whom the said Second Lieutenant Jack Palmer was duly and legally married on or about 24 January 1943, at or near Reno, Washoe County, Nevada, the said Inez Tobias Palmer being still alive.

He pleaded guilty to, and was found guilty of, all Charges and Specifications. No evidence of previous convictions was submitted 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 ten years. The reviewing authority approved the sentence, reduced the confinement thereof to five years, and forwarded the record for action under Article of War 48.

3. Although the law member explained to accused the meaning and effect of his pleas of guilty and accused stated he understood them, he desired his pleas to stand (R. 12). The prosecution offered only one witness, in person - the accused's commanding officer - whose testimony was directed to the establishment of the offense of absence without leave. All other evidence adduced for the Government was in the form of agreed stipulations signed by accused and defense counsel. In pertinent part such evidence may be summarized as follows:

Charge I (AW 61). Accused went absent without authority from his organization and station at the San Marcos Army Air Field, San Marcos, Texas, on 11 August 1943, and remained thus absent until he was apprehended 19 days later by the military police at the International Foot Bridge, Laredo, Texas, as he re-entered the United States from Mexico, on 30 August 1943. He was temporarily confined at Fort McIntosh, Texas, and returned to his proper station the next day, 31 August 1943 (R. 14, 17; Pros. Ex. 4, 5, 6).

Charge II (AW 95) Specification 1. On 11 July 1943, and upon demand, accused gave his landlady, Mrs. Salim Serur, of San Marcos, Texas, his person check in the amount of $63.67 in payment of three weeks' room rent for himself and wife, including debts to her for merchandise at $13.91 and long distance telephone toll charges at $19.76. On telephone inquiry the bank on which the check was drawn

The State Bank and Trust Company of San Marcos, Texas, informed Mrs. Serur that accused's account was insufficient to meet the check and she did not deposit it. This indebtedness remained unpaid until at least 10 November 1943, a period of four months (R. 18; Pros. Ex. 7, 8).

Specification 2. On 7 August 1943 accused gave the Hospital Fund, San Marcos Army Air Field, a draft signed by him, in the amount of $16.00 in payment of his meals while a patient in the station hospital (Pros. Ex. 10). After deposit, it was returned by the bank on which drawn, marked "insufficient funds." Until and including 10 November 1943, a period of three months, this debt was never paid (R. 18-19; Pros. Ex. 9, 10, 10A).

This evidence alone is sufficient to legally support the findings of guilty of these two offenses as alleged - dishonorable failure and neglect to pay debts.

Charge III, Specifications 1 to 10 inclusive. The competent evidence of record conclusively establishes that during the period between 9 July and 14 August 1943, accused issued ten checks, in amounts varying from $4.00 to $20.00 and totalling $114.00, in purported payment for merchandise, meals, services, or for cash received by him at hotels, a night club, a cafe, a restaurant, a drug store, from an individual and an Army Post Exchange, all drawn on the National Bank of Fort Sam Houston, San Antonio, Texas, and which were all dishonored and returned by that bank because of "insufficient funds" (R. 19-20; Pros. Ex. 13-13A; Pros. Ex. 11 to 29 inclusive).

Specification 11. On 30 August 1943, when accused sought entry into the United States from Mexico at Laredo, Texas, he told the military police at the International Foot Bridge that he was Second Lieutenant Irvin Wilson of the United States Army Air Corps, and displayed to them as a means of identification an officer's pass made out to "Irvin Wilson, 2nd Lt., 0668, A.C." of the Laredo Army Air Field (Pros. Ex. 32). He stated that his wallet had been stolen or lost in Mexico. (He identified a woman who came in with him as "Marie Wilson" (Pros. Ex. 34)). However, he admitted later on the same day to the Provost Marshal of Fort McIntosh that he was, in fact, Jack Palmer, 2nd Lt., A.C., Serial No. 0-740668 (Pros. Ex. 34). A Lieutenant Kister had "picked up" a pass for Mexico for accused from the Provost Marshal at the Laredo Army Air Field (Pros. Ex. 31) and had gone with him into Mexico on 14 August 1943.

Specification 12. On 24 January 1943 accused was married to Inez H. Tobias of San Francisco at Reno, Nevada, by Judge A. J. Maestretti of the Second Judicial District Court (Pros. Ex. 40). Accused agreed in writing to the stipulated testimony of his wife, Inez Henrietta Tobias Palmer, which reads in pertinent part as follows:

"At the time I married the accused, 2nd Lt. Jack Palmer, he was a Cadet at Mather Field, California. On March 4th, 1943, he graduated and was subsequently informed that he was to be stationed at San Marcos Army Air Field, San Marcos, Texas. Some time in the latter part of March 1943, I left San Francisco, California, for New Braunfels, Texas, and when I arrived there, my husband, 2nd Lt. Jack Palmer, did not meet me at the station. I finally reached him by telephone at San Marcos Army Air Field, San Marcos, Texas. He came to New Braunfels, Texas, and we registered as husband and wife at the Hotel Faust, New Braunfels, Texas, on March 23, 1943. We lived at the Hotel Faust as husband and wife until April 3, 1943, at which time I left for San Francisco, California.

"I have never taken any action or steps toward getting a divorce from the accused, 2nd Lt. Jack Palmer, nor toward getting an annulment of our marriage, nor have I ever communicated with him with reference to getting a divorce or annulment, nor have I ever advised him that an annulment or a divorce was obtained, nor has any divorce or annulment been obtained.

"The only support I have received from my husband, 2nd Lt. Jack Palmer, after our marriage was the $100.00 he sent me by telegram to come to Texas, and $25.00 after that, and two allotment checks for $150.00 each. All in all, I received a total of $425.00 from him. With reference to the allotment checks. I had received a notice from the Office of Dependency Benefits, Newark, New Jersey, dated April 1, 1943, first effective date, and April 9, 1943, first acknowledgement date, showing that an allotment had been made in the sum of $150.00 per month to Mrs. Inez T. Palmer, 1417 - 4th Street, Sacramento, California."

On 26 March 1943, two months after his first lawful marriage, accused went through a second marriage ceremony (R. 27; Pros. Ex. 41, 42, 43) with Oleta Marie Rust, before a Justice of the Peace at Sequin, Texas. It is an unavoidable inference of fact that at the time when accused entered into the bigamous marriage with Miss Rust, his lawful wife was living with him at New Braunfels, Texas. She was there on a visit from about 23 March until 3 April 1943, when she returned to San Francisco (Pros. Ex. 39).

The accused, having been advised by the defense counsel of his rights as a witness, elected to remain silent (R. 32), but the defense called one witness, First Lieutenant Farrell E. Hupp, F.D., who testified, in substance, that on 2 November 1943 accused delivered

to him an assignment of his salary, $353.24, for the purpose of paying off his debts (Def. Ex. 1), out of which Hupp had paid $299.14 and had on hand a balance of $54.10. Palmer paid three of the bad checks (Specifications 5, 9, 10 of Charge III) (R. 29) but Mrs. Serur ($63.67), the Hospital Fund ($16.00), and the Post Exchange at Laredo ($10.00) have not been paid (R. 30, 31). Hupp only pays those claims against accused which are presented to him for that purpose (R. 30).

4. A judicial confession, in the strictest sense, is a plea of guilty made by accused, in a fit state of mind to plead, before a court competent to try the pending charge and which, upon entry of that plea, is competent to enter judgment and to fix the penalty (Heim v. U.S., 47 App. D. C. 485, L.R.A. 1918 E 87, writ of certiorari denied in 247 U.S. 522). The Commanding Officer, Station Hospital, San Antonio Aviation Cadet Center, San Antonio, Texas, states accused was under observation from 1 October to 27 October 1943 "and has been found by a Board of Medical Officers to show no present evidence of neuropsychiatric disease" (Pros. Ex. 1). This evidence was introduced only for the express purpose of explaining the delay in bringing this case to trial (R. 13).

5. War Department records disclose that accused was 22 years of age on 18 September 1943. Although the proof adduced by the evidence in this case establishes the lawful marriage of accused on 24 January 1943, his War Department 201 file reveals that his oath of office signed and sworn to by him on 6 March 1943 gives as the name of his nearest relative his mother, Mrs. Roy A. Palmer. Also on 6 March 1943 he submitted through channels to The Adjutant General of the Army an "application for appointment and statement of preferences for Reserve Officers" in which, over his manual signature, he states in answer to question 5 that he is "single." Also on the same date he accomplished and signed a "classification questionnaire of Reserve Officers" in which he indicates in question 5 therein that his marital status is "single", which document is part of his War Department record. He graduated from high school in 1939 and enlisted 9 November 1939. He has been a private, QMC, and became an aviation cadet on 26 March 1942. On 6 March 1943 he was appointed a second lieutenant, non pilot, Air Reserve, and called to active duty. He has specialized in navigation.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed at the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence as approved by the reviewing authority and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Articles of War 61 and 96, and is mandatory upon conviction of a violation of Article of War 95.

William A. Rounds, Judge Advocate.

Earle W. Blum, Judge Advocate.

Herbert B. Dickman, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 5 - 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 Jack Palmer (0-740668), 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 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, and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

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

Myron C. Cramer

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 as approved by reviewing authority confirmed. G.C.M.O. 117, 10 Mar 1944)

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

(345)

19 FEB 1944

SPJGH
CM 245977

UNITED STATES	)	TRINIDAD SECTOR AND BASE COMMAND
	)	
v.	)	Trial by G.C.M., convened at Port-of-Spain, Trinidad, B.W.I., 11 November 1943. Dismissal and total forfeitures.
	)	
Second Lieutenant EDWARD J. LARKIN (O-1584495), Quartermaster Corps.	)	

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 not guilty).

Specification 2: In that Second Lieutenant Edward James Larkin, Quartermaster Corps, having received a lawful order from the Commanding General, Trinidad Sector and Base Command, to wit, to be restricted to the limits of his post for three (3) months, as promulgated in General Court-Martial Order No. 195, Headquarters, Trinidad Sector and Base Command, dated 3 September, 1943, did, at the Post of Port of Spain, on or about 26 September, 1943, fail to obey same by leaving Dock Site Camp, Post of Port-of-Spain, in a motor vehicle.

Specification 3: In that Second Lieutenant Edward James Larkin, Quartermaster Corps, did, on or about 26 September, 1943, wrongfully and without proper authority, operate a Government motor vehicle in violation of standing orders, to wit, Circular 9-15, Headquarters, Trinidad Sector and Base Command, dated 26 September, 1942.

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

Specification: In that Second Lieutenant Edward James Larkin, Quartermaster Corps, did, on the Eastern Main Road, Trinidad, B.W.I., on or about 26 September, 1943, through neglect, suffer

a Chevrolet sedan, value of about six hundred and fifty dollars ($650.00), military property of the United States, to be damaged, by operating it in a negligent manner, and while under the influence of intoxicating liquors.

He pleaded not guilty to all Charges and Specifications. He was found not guilty of Specification 1, Charge I, and guilty of all other Specifications and of the Charges. He was sentenced to be dismissed the service, and to forfeit all pay and allowances due or to become due. Evidence of one previous conviction (Ex. A) by general court-martial of being drunk and disorderly in uniform in a public place, in violation of the 96th Article of War, was introduced. 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 may be summarized as follows: The court took judicial notice of general orders defining the limits of Post of Port-of-Spain as including all "Army leased areas and installations" on the Island of Trinidad, B.W.I. located west of the western boundary of Fort Read, exclusive of certain named installations; and of the location of the Army leased areas and installations on the Island of Trinidad located west of the western boundary of Fort Read. From 3 September 1943 to 26 September 1943 accused was operations officer of the 20th Quartermaster Truck Company and the post motor pool, at Post of Port-of-Spain, and was stationed at Dock Site Camp, which was included in the area of the Post of Port-of-Spain. The duties of accused included supervision over personnel and equipment so far as operations were concerned. It was possible for accused, within his duty as operations officer, to have left the limits of the camp while observing the conduct of a driver. Accused had no specific authority from his commanding officer to operate motor vehicles. The court also took judicial notice of the following: general court-martial orders dated 3 September 1943, approving a sentence adjudged 18 August 1943 and restricting accused to the limits of his post for three months; circular dated 26 September 1942 prohibiting the operation of Government motor vehicles by officers, except in cases of emergency when authorized drivers are not available; and circular dated 13 May 1943 providing a speed limit for Government passenger cars on open country roads of 30 miles per hour. All orders and circulars of which judicial notice was taken were promulgated by Headquarters, Trinidad Sector and Base Command (R. 5-6, 44-45, 55).

On the evening of 25 September 1943, the accused attended a dance at the Dock Site Officers' Club. When he arrived about nine o'clock he was sober. He had some drinks at the bar, and four witnesses who observed

his condition during the course of the evening, at various times between 9:15 and 12:15, were of the opinion that he was drunk and described him as being "under the influence of liquor", with "glassy" eyes, "angry", "boisterous", "weaving", "pretty shaky on his feet", and apparently without "proper control of his faculties" (R. 6-19).

Lieutenant Colonel John J. Hascall, who was present at the dance that evening, remarked that he would like to obtain transportation back to his station at Fort Read. Accused, who was standing nearby, volunteered to furnish the transportation. At about 12:15 Colonel Hascall, accused, two naval officers, and a woman left the club together, in a Government Chevrolet sedan, No. TS 106, of a stipulated value of about $650, operated by Private Hugh J. McCoy, a driver from the 20th Quartermaster Truck Company, who had a trip ticket to "pick up" Colonel Hascall. At the direction of Colonel Hascall, McCoy drove the party to 31 DeVerteuil Street, in the city of Port-of-Spain, which was outside the limits of the Post of Port-of-Spain, and the passengers entered a private residence at that address. Accused had at least one drink there. After about 45 minutes accused left the house, opened the car door on the driver's side, and told McCoy to move over, and that he (accused) was going to drive. McCoy did not move and accused repeated the instruction. Accused then stated that he was responsible for transportation and again told McCoy to move over. McCoy moved to the other side of the seat and accused seated himself behind the wheel. Accused "seemed" to have been drinking and was "feeling high", but walked and talked all right. In the meantime Colonel Hascall came out of the house and seated himself in the rear of the car. He said, "let's go driver", and later said, "to Fort Read, driver". On both occasions accused replied, "you have a Second Lieutenant driving you, sir". They started to Fort Read with accused driving (R. 19-21, 24, 29-30, 32).

Accused drove "pretty good" but "seemed confused" as to the proper side of the road on which he should pass other cars. (On Trinidad, approaching cars pass to the left.) McCoy asked accused three or four times to let him take the wheel, because it was a bad road to drive on, even in the daytime. While driving at approximately 35 miles an hour, the accused, according to McCoy, passed a car coming from the opposite direction and went on to the left shoulder of the road. The car was "bouncing up and down" and went into a ditch on the left side of the road. The accident occurred near Tunapuna, about 9 miles from the Dock Site Camp, and outside the limits of the Post of Port-of-Spain. McCoy did not remember accused overtaking any vehicle going in the same direction, and according to him the only other vehicle involved was the oncoming car they passed just prior to the accident. Because of the narrow road accused was forced to go to his left when the car went by, but it was after they passed the car that they went into the ditch (R. 22-26).

McCoy testified that prior to the accident the windshield, fenders and radiator grill of the vehicle were in good condition, but the front end had been in "bad shape" for some time. The front wheels were not in alignment and the "tie rods" were worn, causing the car to "shimmy" at a speed of 35 miles per hour and at lower speeds on bumpy roads or when turning a corner. McCoy had driven the car six weeks, 3,000 to 4,000 miles, without an accident. He testified that his driving was not affected by the defects. Subsequent to the accident the car was found to have the left front fender smashed, the windshield broken, the steering wheel bent, and the front seat broken loose (R. 27-29, 43-44).

Colonel Hascall testified that on the ride to Fort Read he had dozed off, but the lurching of the car awakened him. There seemed to be considerable "side sway", as if the car was not going in a straight line. He saw a car, about 250 feet ahead, "well within the headlight range", traveling in the same direction. As accused was driving faster than the car ahead, Colonel Hascall became frightened and "yelled" at accused to stop the car, but accused paid no attention. At about that time, in an attempt to avoid the vehicle ahead, accused turned the car sharply to the left; there was a "violent blow", a "violent bump", and the car went into the ditch. Colonel Hascall had been at the club from 2 to 3 hours and recalled having a "tin" of beer and a rum and "Coke" (R. 30-38).

At the time of the accident, Corporal Chauncey W. Williamson was riding in the left rear seat of a taxicab along the "Eastern Main Road" near Tunapuna. The taxicab was traveling about 30 miles per hour along the left hand side of the road about two feet from the edge of the pavement. It had not been raining. Williamson noticed lights approaching from the rear, saw these lights "swing" to the left, and looked to the left and saw a car inthe ditch. It had passed the taxicab as it went off the road and came to a stop about even with the front of the taxicab. Williamson, after having the driver stop the cab, went back to the scene and found all of the occupants of the car injured. He identified accused as one of the occupants of the car that went into the ditch. The taxicab had rounded a curve shortly before Williamson observed the lights of the car behind them, but the road was straight and about 20 feet wide where the accident occurred. Williamson believed they had passed a vehicle going in the opposite direction shortly before the accident. According to Williamson, not more than five seconds elapsed from the time he first noticed the approaching lights until the car was off the road (R.36-43).

4. For the defense: One witness testified that when he saw accused at the club at about 9:30 or 9:45 on the evening of 25 September 1943, accused was sober; two others, that when they talked to accused for about ten minutes between 11:30 and midnight the same evening accused was sober

and walked and talked in a normal manner; and another, that he was not acquainted with the capacity of accused for alcohol or his "mannerisms" but the actions of accused appeared normal when observed about 10:30 and about 11:30 that evening, and that he could not say that accused was either sober or drunk. Sergeant James B. Lazar, employed at the club, observed that about 12:15 that evening Colonel Hascall was talking "loud" and appeared to be drunk and "weavy". Private McCoy, recalled as a witness for the defense, stated that he did not hear Colonel Hascall tell accused to stop the car (R. 45-54).

The accused elected to remain silent (R. 55).

5. a. Specification 2, Charge I: It is shown by the evidence that accused, stationed at Dock Site Camp, which was a part of Post of Port-of-Spain, Trinidad, B.W.I., was restricted to the limits of his post for a period of three months by an order dated 3 September 1943 approving a general court-martial sentence adjudged on 18 August 1943. On the evening of 25 September 1943 accused attended a dance at the Dock Site Officers' Club. Early on the morning of 26 September, after the dance, accused went beyond the limits of his post by going in a car to a residence off the post and along a highway leading to Fort Read to a point about nine miles from Dock Site Camp. The evidence sustains the finding of guilty of this Specification.

b. Specification 3, Charge I: The evidence also shows that there was in effect at the time a circular dated 26 September 1942, applicable to Trinidad, prohibiting the operation of Government motor vehicles by officers except in cases of emergency when authorized drivers are not available. The car in which accused was riding on 26 September after the dance was a Government vehicle, Chevrolet sedan, No. TS 106, operated by an authorized driver, Private Hugh J. McCoy. After accused came out of the residence to which the car first proceeded after the dance, he directed McCoy to move over. Accused, operations officer at the post with supervision over personnel and equipment at the motor pool, then entered the driver's seat and drove the car along the road toward Fort Read. In so doing, he directly violated the standing order contained in the circular referred to.

c. Specification, Charge II: At the dance, during the evening of 25 September, between about 9:15 and about 12:15, accused took some drinks. Four witnesses who observed him at various times during that period were of the opinion that he was drunk, and noted that he was "under the influence of liquor", with "glassy" eyes, "angry", "boisterous", "weaving", "pretty shaky on his feet", and apparently without "proper control of his faculties". Three witnesses for the defense who observed accused at about 9:45 and between 11:30 and midnight, were of the opinion that he

was sober, and another, who saw him about 10:30 and about 11:30, could not say that accused was either sober or drunk. The court found accused not guilty of being drunk at the club on 25 September (Spec. 1, Chg. I). While accused was at the residence to which he went after the dance, he had at least one drink. When accused came out to the car, McCoy observed that he seemed to have been drinking and was "feeling high" but that he walked and talked all right. After accused began to drive the car, taking Lieutenant Colonel John J. Hascall to Fort Read, McCoy asked him three or four times to let him drive, because the road was bad to drive on.

After accused had proceeded approximately nine miles he passed a car traveling in the opposite direction and approached a taxicab traveling in the same direction on the left side of the road, in accordance with the traffic rules in Trinidad. The road at this point was straight, hard surfaced, 20 feet in width, and dry. Colonel Hascall saw the cab 250 feet in front of them. Accused, traveling at a speed of about 35 miles per hour, overtook the cab and swung to the left of it, off the road and into the ditch, damaging the car and injuring the occupants.

The evidence in the case discloses no valid excuse for the manner in which accused operated the car. Any attempt to explain what accused was attempting to do when he drove off the highway would be purely speculative. Accused was not confronted with any emergency requiring a precipitant exercise of judgment for an error in which he could not be blamed. The accident was not due to mechanical defects in the car. The record shows that at certain speeds the front wheels would "shimmy", but there is no suggestion in the evidence that a "shimmy" would cause the operator to lose control of the car or that at the time of the accident the wheels had developed a "shimmy". Under all the circumstances the conclusion is unescapable that the accident resulted from gross negligence on the part of accused.

Notwithstanding the finding by the court that accused was not drunk, in violation of the 96th Article of War, at the club on 25 September, the evidence shows that he had consumed some liquor during the dance and had at least one more drink afterwards, so that he was to some extent under the influence of liquor at the time he operated and damaged the car in a negligent manner.

6. The accused is 24 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service 26 November 1940 to 6 December 1941; Enlisted Reserve Corps (inactive) 6 December 1941 to 27 January 1942; enlisted service from 27 January 1942;

appointed temporary second lieutenant, Army of the United States, from Officer Candidate School, and active duty, 11 December 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 83rd or 96th Article of War.

Samuel N. Driver, Judge Advocate

[illegible], Judge Advocate

J. Gallentos, Judge Advocate

1st Ind.

War Department, J.A.G.O., 25 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 Second Lieutenant Edward J. Larkin (0-1584495), Quartermaster Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. The accused failed to obey a general court-martial order restricting him to the limits of his post (Spec. 2, Chg. I), operated a Government motor vehicle contrary to standing orders forbidding officers to operate them (Spec. 3, Chg. I), and negligently suffered the vehicle to be damaged while operating it while under the influence of intoxicating liquor (Spec., Chg. II). He was found not guilty of Specification 1, Charge I. At the time of the offenses accused was under sentence of a general court-martial for being drunk and disorderly in uniform in a public place on 1 August 1943 and the papers accompanying the record of trial show that previously he had been officially reprimanded in writing for drunkenness and conduct unbecoming an officer and a gentleman on 26 April 1943. I recommend that the sentence to dismissal and total forfeitures be confirmed, that the forfeitures 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-Rec. of trial.
Incl.2-Drft. ltr. for sig. S/W.
Incl.3-Form of Action.

(Sentence confirmed but forfeitures remitted. G.C.M.O. 151, 4 Apr 1944)

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

SPJGQ
CM 245979

-7 JAN 1944

UNITED STATES v. Sergeant JOHN W. WILLIAMS (36181073), 326th Flexible Gunnery Training Group, Army Air Force Flexible Gunnery School, Las Vegas Army Air Field, Las Vegas, Nevada.	ARMY AIR FORCES WESTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Las Vegas Army Air Field, Las Vegas, Nevada, 19, 20 November 1943. Dishonorable discharge, total forfeitures and confinement for three (3) years. Disciplinary Barracks.

HOLDING by 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 soldier named above.

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Sergeant John W. Williams, Headquarters & Headquarters Squadron, 326th Flexible Gunnery Training Group, Army Air Force Flexible Gunnery School, Las Vegas Army Air Field, Las Vegas, Nevada, did, at Clark County Courthouse, Las Vegas, Nevada, on or about 10 October 1943, attempt to commit the crime of sodomy by feloniously and against the order of nature having carnal connection per os with Sergeant Hugh W. Duncan, ACU, Attached Headquarters & Headquarters Squadron, 326th Flexible Gunnery Training Group, Army Air Force Flexible Gunnery School, Las Vegas Army Air Field, Las Vegas, Nevada.

Specification 2: In that Sergeant John W. Williams, Headquarters & Headquarters Squadron, 326th Flexible Gunnery Training Group, Army Air Force Flexible Gunnery School, Las Vegas Army Air Field, Las Vegas,

> Nevada, did, at Clark County Courthouse, Las Vegas, Nevada, on or about 10 October 1943, wrongfully conduct himself in a lewd and indecent manner by permitting his penis to be handled by Sergeant Hugh W. Duncan, ACU, Attached Headquarters & Headquarters Squadron, 326th Flexible Gunnery Training Group, this station.

He pleaded not guilty to and was found guilty of the Charge and the Specifications. There was no evidence of previous convictions. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for three (3) years. The reviewing authority approved the sentence and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial pursuant to Article of War 50½.

3. The competent evidence of the prosecution shows that First Lieutenant D. H. LaFollette and Sergeant A. H. Kennedy, acting Provost Marshal and assistant respectively, were searching in the town of Las Vegas, Nevada, for a Sergeant Duncan on the night of 10 October 1943. They were attracted by a noise caused by someone on the darkened porch of the Court House, between 9 and 10 p.m. o'clock. Upon investigating with a flash light they found at one end of the porch in a dark alcove thereof Sergeant Duncan and the accused. Without the flash light it was extremely dark and practically impossible to see anything (R. 6-7, 13). By means of the flashlight they saw the accused standing up and another soldier (Duncan) either sitting down or kneeling, facing the accused (R, 8, 13) and about six inches from him (R. 9). Neither man moved. The first words spoken were by Duncan who said, "We are only sleeping" (R. 9). The fly of the trousers of each was unbuttoned to the top button. The fly part was sticking out but the penis of each was neither out nor visible (R. 10, 15). The officer placed both soldiers under arrest.

After having been properly warned of his rights (R. 18) by the investigating officer, on 11 October 1943, accused while in confinement at the local Police Station stated that he had previously made a statement, without having been warned of his right to remain silent, to a Captain McCloskey and that he might as well "go ahead and make the same type of statement" to the investigating officer (R. 19). The investigating officer immediately advised him that he had the right to remain silent or to make a statement which statement might be used against him. Following this warning the accused made a statement which was reduced to writing and signed by him (Pros. Ex. B). Lieutenant LaFollette, after he had apprehended the accused in the manner described above, told him that "there was no sense in lying to him - he knew what he (accused) was doing and he had better tell him; that he was going to find out the truth anyway; and that it would go an awful lot easier for him (the accused) if he would 'tell us the truth'" (R. 21).

Over the objection of defense counsel, the accused's statement to the investigating officer was admitted in evidence. In it the accused claimed that he had been working very hard at all hours during the previous week and was mentally fatigued. On Sunday afternoon 10 October 1943 he wandered around Las Vegas had a few beers and a sandwich. He saw Duncan sitting on the lawn of the Union Pacific Station. Duncan looked familiar to him so he stopped to talk with him and discovered that he did not know him, but that he came from the same city, New York, where accused himself had lived for 8 years. Duncan invited him to have a drink. After procuring a drink at one of the local bars they sat on the Courthouse steps and talked and the subject of sex arose.

> "By mutual agreement again, we got up off the steps and walked in on the porch and I felt of his penis through his pants and he felt of mine. His penis was soft and mine was too, at the time. He played with it and it became hard. He unbuttoned my pants and took it out and started playing with it. We were sitting back in the shadows. We were both sitting down and he took it out and started playing with it. I do not know whether or not he unbuttoned his own pants and played with his at the same time. I do know at the time that Lt. LaFollette came up there, his pants were unbuttoned. Possibly we were up there perhaps two minutes. And I got rather disgusted with myself and had just stood up and put my penis in my pants and made the remark that we had better be going to town. Right at that particular moment, Lt. LaFollette came up on the steps. I had not had time to button my trousers. And that is the sum and substance of the whole thing. I had started something I regretted — but I regretted it too late. What the outcome will be, I do not know."

The accused emphatically denied the commission of sodomy at the time; claimed he was "just looking for a thrill"; and that all Duncan was doing at the time was just playing with his (accused's) penis with his hands (Pros. Ex. E).

4. The accused elected to remain silent. Captain Charles A. Honn, Air Corps, called as a witness by the defense, testified that he had known the accused since December 1942 that his work was performed exceptionally well and that he was a very faithful worker. He had not heard of anything against his reputation (R. 26).

5. Except for accused's confession, the evidence of record would be insufficient to support the finding of guilty of either Specification

of the Charge. It therefore becomes necessary at the outset, in view of objections strenuously urged by defense counsel to its introduction, to determine whether the confession was properly admitted as a part of the evidence against accused.

It is the contention of defense counsel, that the matters above detailed, together with the fact that the confession was made to an investigating officer while accused was in confinement, were sufficient to show that the confession was not voluntarily made. He vigorously contended that the evidence as above set out showed that in the first instance accused was under the impression that he had irrevocably involved himself by making the statement to Captain McCloskey, and secondly that to constitute a proper warning, Lieutenant Ward should have advised him that his previous statement was not admissible in evidence, and finally that Lieutenant LaFollette was not in a position to make it easier for him.

The circumstance that a confession is made to a superior officer in the course of a judicial investigation, and while the accused is in confinement, does not of itself establish the involuntary nature of the confession nor render it inadmissible in evidence. These are merely evidentiary matters that require the exercise of greater caution than might otherwise be necessary in determining that the confession has, in fact, been voluntarily made.

No contention was made by the defense in the instant case that the investigating officer failed to fully advise accused of the rights and privileges accorded him by Article of War 24, or to warn him that any statement he might make could be used against him upon a trial by courts-martial. Neither was there any argument offered that the investigating officer in any wise coerced, intimidated, over-reached, or over-persuaded accused, or that he held out any hope of reward or other type of inducement, to secure the confession. To the contrary, the evidence shows that the investigating officer exercised more than ordinary care in advising accused of his rights. The evidence of record wholly fails to show any affirmative fact or circumstance, immediately connected with the making of the confession which would cast suspicion upon its voluntary character. The accused apparently recited in detail the incriminating portions of his confession without interrogation. The evidence shows that the investigating officer brought no pressure to bear to secure the confession but merely told accused he would be glad to take his statement if he desired to make one.

While the tactics employed by Lieutenant LaFollette on the previous night, plus his representations that he would make it easier for accused if he told him the truth, would have rendered inadmissible in evidence any statement then made amounting to a confession, because of the promise

of a benefit, there is nothing to indicate those circumstances were instrumental in causing accused to make a confession to the investigating officer.

Assuming that the statement to Captain McCloskey would have been inadmissible if it had been offered in evidence, there is nothing in the record to justify the belief that accused understood that confession would, or could, be used against him at the trial. There was a considerable lapse of time between the making of the first statement and the subsequent confession. Meanwhile accused had his rights fully explained to him. These circumstances present nothing from which it must be concluded that the subsequent confession of accused was involuntary, or made under any misapprehension of fact with regard to the validity of his first confession.

Where an accused has been fully apprised of his rights after an inadmissible statement has been made by him, and before he subsequently reaffirms it at a formal investigation, his reaffirmation, if made voluntarily, is admissible in evidence. CM 210693 (1938); Dig. Op. JAG, 1912-40, sec. 395 (10), which holds that:

> "Where accused confessed, after being informed that if he remained silent he would be confined, but that if he satisfactorily explained his actions he would be released, and he subsequently reaffirmed his statement at a formal investigation of the charges, after having been fully apprised of his rights, the confession is held to be voluntary and admissible in evidence."

In the light of the precedent just quoted, the Board is of the opinion that the confession in the instant case was voluntarily made and was, therefore, properly admitted in evidence.

Notwithstanding the confession, however, the evidence is deemed legally insufficient to support the finding of guilty of Specification 1 of the Charge, (an attempt to commit sodomy).

The evidence of record, without the confession, is insufficient to prove beyond a reasonable doubt the commission of either offense. The confession admits the commission of the acts charged in Specification 2, namely, "permitting his penis to be handled by Sergeant Hugh W. Duncan" in a lewd and indecent manner, and supplies sufficient legal and competent evidence in the record to support the findings of guilty of that Specification. The same confession, however, denies the commission of the crime of sodomy and discloses no overt act nor intention to commit that crime. Having accepted the confession in evidence as the only

evidence of the accused's conduct during the time complained of, and having found the accused guilty of the very acts admitted in that confession as described in Specification 2, the court may not then infer from those same facts, that the accused committed some other act, or attempted to commit some other act, basing such finding on the very same confession in which commission of the act is denied and no attempt to commit it is disclosed. The burden of proving beyond a reasonable doubt the attempt to commit sodomy still rests upon the prosecution. This has not been done. The mere fact that sodomy might have resulted if these two soldiers had not been interrupted while engaged in other lewd sexual practices is a conclusion based on mere conjecture, suspicion and speculation. There was no evidence of an overt act from which it could be inferred with any degree of certainty that they attempted to commit sodomy. The circumstances are not sufficiently compelling to exclude from consideration all other hypothesis except that of guilty of attempted sodomy per os.

> "An attempt to commit a crime is an act done with intent to commit that particular crime, and forming part of a series of acts which will apparently, if not interrupted by circumstances independent of the doer's will, result in its actual commission" (p. 190, M.C.M.).

The evidence of record is insufficient to support the finding of guilty of Specification 1 of the Charge.

6. The record shows the accused to be 29 years of age. He was inducted at Kalamazoo, Michigan on 1 June 1942 to serve for the duration of the war, plus six months.

7. The court was legally constituted and had jurisdiction over the person and subject matter. For the reasons set forth the Board of Review is of the opinion that the record of trial is not legally sufficient to support the finding of guilty of Specification 1 of the Charge, but is legally sufficient to support the findings of guilty of Specification 2 of the Charge and the Charge. An examination of the Table of Maximum Punishments (par. 104, M.C.M.) fails to disclose any offense closely related to that described in Specification 2 of the Charge. It therefore follows that the accused may be punished "at the discretion of the court" and that the conviction of Specification 2 of the Charge alone is legally sufficient to sustain the sentence imposed by the court in the subject case.

William A. Rounds, Judge Advocate.

Charles Blum, Judge Advocate.

Herbert K. Frederick, Judge Advocate.

1st Ind.

War Department, J.A.G.O., - To the Commanding General, Army Air Forces Western Flying Training Command, 1104 West Eighth Street, Santa Ana, California.

1. In the case of Sergeant John W. Williams (36181073), 326th Flexible Gunnery Training Group, Army Air Force Flexible Gunnery School, Las Vegas Army Air Field, Las Vegas, Nevada, I concur in the foregoing holding by the Board of Review and for the reasons stated therein recommend that the findings of guilty of Specification 1 of the Charge be disapproved. 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. In view of the disapproval of the finding of guilty of Specification 1 of the Charge, and because it rather definitely appears that accused is not a confirmed homosexual and that his conduct was, therefore, in effect more drunk and disorderly conduct than homosexuality, it is recommended that the sentance be mitigated to confinement at hard labor for a period not to exceed six months and forfeiture of two-thirds of his pay per month for six months. If this view and recommendation is not concurred in, then the instructions contained in Restricted War Department Circular No. 3, 3 January 1944, should be complied with.

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 245979).

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

1 Incl.
W.D. Cir. No. 3,
3 Jan. 1944.

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

(361)

SPJGH
CM 245991

29 FEB 1944

UNITED STATES	)	81ST INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Camp San Luis Obispo, California, 2 December 1943. Dishonorable discharge (suspended) and confinement for ten (10) years. Rehabilitation Center.
Private WESLEY F. CRUFF (37283086), Service Company, 322nd Infantry.	)	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Wesley F. Cruff, Service Company, 322nd Infantry, APO #81, c/o Postmaster, Los Angeles, California, did, at Camp Rucker, Alabama, on or about 10 August 1942, desert the service of the United States and did remain absent in desertion until he was apprehended at Reno, Nevada, on or about 27 October 1943.

He pleaded not guilty to the Charge and Specification. He was found guilty of the Specification, except the words "did, at Camp Rucker, Alabama, on or about 10 August 1942, desert the service of the United States and did remain absent in desertion until he was apprehended at Reno, Nevada, on or about 27 October 1943", substituting therefor the words "did, at Camp Rucker, Alabama, on or about 10 August 1942, desert the service of the United States and remain absent in desertion until 17 August 1942, and did on or about 24 August 1942, while en route between Fort Sill, Oklahoma and Camp Rucker, Alabama, desert the service of the United States and did remain absent in desertion until on or about 27 October 1943", and guilty of the Charge. He was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for ten years.

The reviewing authority approved "only so much of the findings of the court as finds that accused did on or about 24 August 1942, while en route between Fort Sill, Oklahoma, and Camp Rucker, Alabama, desert the service of the United States and did remain absent in desertion until on or about 27 October 1943", approved the sentence, ordered it executed, but suspended the dishonorable discharge, and designated the Ninth Service Command Detention and Rehabilitation Center, Turlock, California, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 56, Headquarters, 81st Infantry Division, 9 December 1943.

3. The prosecution introduced in evidence morning reports (Exs. A, B, C and D) of the organization of accused, and substituted an extract copy (Ex. E), showing accused from duty to absent without leave, 10 August 1942; from absent without leave to absent in confinement in the hands of military authorities at Fort Sill, Oklahoma, 17 August 1942; from absent in confinement at Fort Sill to detached service en route to join his company, 24 August 1942; from detached service en route to join to absent without leave, 24 August 1942; to apprehension and confinement by military authorities at Reno, Nevada, 27 October 1943; and to confinement in 81st Division stockade, 7 November 1943. No objection to this evidence was interposed. The certificate to the extract copy (Ex. E) shows that the morning report entries were submitted at "APO 81 c/o PM Los Angeles, Calif" (R. 6-A to 6-B).

4. The accused elected to remain silent (R. 6-B).

5. The accused was charged with a single offense, desertion on 10 August 1942, terminated on 27 October 1943. By exceptions and substitutions, the court found him guilty of two offenses, desertion on 10 August 1942, terminated on 17 August 1942, and desertion on 24 August 1942, terminated on 27 October 1943. This finding divides the period of unauthorized absence into two separate periods, constituting thereby two separate offenses and changing the identity of the offense charged. As a result, it was requisite for the reviewing authority to disapprove the finding of guilty of one or the other of the two offenses included (CM 235559, Bartold).

The reviewing authority disapproved the finding as to the period from 10 August to 17 August 1942, and approved the finding as to the period from 24 August 1942 to 27 October 1943. There is no competent evidence in the record to show the beginning of an absence without leave for the latter period. The applicable morning report entries were obviously of hearsay character and could not be based on personal knowledge of the officer making the morning report. Even though no objection is interposed, such evidence is not competent, as has been repeatedly held (Dig. Op. JAG, 1912-40, sec. 395 (18); 1 Bull. JAG 212; CM 224325; 2 Bull. JAG 60; CM 229552).

6. The Board of Review is, therefore, of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence.

Samuel M Drewes, Judge Advocate

Robert J Glennon, Judge Advocate

H H Fothuhos, Judge Advocate

1st Ind.

War Department, J.A.G.O., 1 MAR 1944 - To the Secretary of War.

1. Herewith transmitted for action of the Secretary of War under Article of War 50½ as amended by the act of 20 August 1937 (50 Stat. 724; 10 U.S.C. 1522), is the record of trial in the case of Private Wesley F. Cruff (37283086), Service Company, 322nd Infantry.

2. I concur in the opinion of the Board of Review and, for the reasons stated therein, recommend that the findings and sentence be vacated and that all rights, privileges and property of which accused has been deprived by virtue of said sentence be restored.

3. Inclosed is a form of action carrying into effect the recommendation above made.

Myron C. Cramer

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

2 Incls.
Incl.1- Record of trial.
Incl.2- Form of Action.

(Findings and sentence vacated by order of the Acting Secretary of War. G.C.M.O. 133, 24 Mar 1944)

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

SPJGK
CM 246046

9 MAR 1944

UNITED STATES	)	FORT KNOX, KENTUCKY
	)	
v.	)	Trial by G.C.M., convened at Fort Knox, Kentucky, 29 November 1943. Dismissal, total forfeitures and confinement for six (6) years and six (6) months.
	)	
First Lieutenant JAMES B. BENFIELD (0-1576921), Infantry.	)	

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OPINION of the BOARD OF REVIEW
LYON, HILL and ANDREWS, 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 Charge and Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that 1st Lieutenant James B. Benfield, Infantry, Company A, 10th Armored Replacement Battalion, Armored Replacement Training Center, did, at Louisville, Kentucky, on or about August 24, 1943, with intent to deceive wrongfully, and unlawfully, make and utter to Geiger & Ament, Louisville, Kentucky, a certain check in words and figures, to wit: August 24, 1943, Geiger & Ament, Louisville, Kentucky, two hundred and sixty-five dollars ($265.00), and by means thereof did fraudulently obtain goods or services from Geiger & Ament, Louisville, Kentucky, in the value of two hundred and sixty-five dollars ($265.00), while the said 1st Lieutenant James B. Benfield, then well knowing that he did not have and not intending that he should have sufficient funds in the Citizens Union National Bank for the payment of said check.

Specification 4: In that 1st Lieutenant James B. Benfield, Infantry, Company A, 10th Armored Replacement Battalion, Armored Replacement Training Center, did, at Louisville, Kentucky, on or about September 15, 1943, with intent to de-

ceive wrongfully, and unlawfully, make and utter to Seelbach Hotel, Louisville, Kentucky, a certain check in words and figures, to wit: September 15, 1943, Seelbach Hotel, Louisville, Kentucky, three dollars and twenty-five cents ($3.25), and by means thereof did fraudulently obtain goods or services from Seelbach Hotel, Louisville, Kentucky, in the value of three dollars and twenty-five cents ($3.25), while the said 1st Lieutenant James B. Benfield, then well knowing that he did not have and not intending that he should have sufficient funds in the Citizens Union National Bank for the payment of said check.

Specification 5: In that 1st Lieutenant James B. Benfield, Infantry, Company A, 10th Armored Replacement Battalion, Armored Replacement Training Center, did, at Louisville, Kentucky, on or about September 24, 1943, with intent to deceive wrongfully, and unlawfully, make and utter to Rodes-Rapier Company, Louisville, Kentucky, a certain check in words and figures, to wit: September 24, 1943, Rodes-Rapier Company, Louisville, Kentucky, fifty dollars ($50.00), and by means thereof did fraudulently obtain goods or services from Rodes-Rapier Company, Louisville, Kentucky, in the value of fifty dollars ($50.00), while the said 1st Lieutenant James B. Benfield, then well knowing that he did not have and not intending that he should have sufficient funds in the Citizens Union National Bank for the payment of said check.

Specification 20: In that 1st Lieutenant James B. Benfield, Infantry, Company A, 10th Armored Replacement Battalion, Armored Replacement Training Center, did, at Fort Knox, Kentucky, on or about May 15, 1943, borrow ten dollars ($10.00), from Technician 4th Grade Leroy B. Webster, Headquarters Company, Headquarters and Service Battalion, Armored Replacement Training Center, to the prejudice of good order and military discipline.

Specification 21: In that 1st Lieutenant James B. Benfield, Infantry, Company A, 10th Armored Replacement Battalion, Armored Replacement Training Center, did, at Fort Knox, Kentucky, on or about June 1, 1943 borrow twenty dollars ($20.00) from Technician 4th Grade Leroy B. Webster, Headquarters Company, Headquarters and Service Battalion, Armored Replacement Training Center, to the prejudice of good order and military discipline.

Specification 22: In that 1st Lieutenant James B. Benfield, Infantry, Company A, 10th Armored Replacement Battalion, Armored Replacement Training Center, did, at Fort Knox, Kentucky, on or about July 30, 1943, borrow ten dollars ($10.00) from Technician 4th Grade Leroy B. Webster, Headquarters Company, Headquarters and Service Battalion, Armored Replacement Training Center, to the prejudice of good order and military discipline.

The accused was originally tried upon 25 Specifications laid under Article of War 96. He was found guilty of the Charge and all Specifications except Specifications 23 and 24 of which he was found not guilty. He was sentenced to dismissal, total forfeitures and confinement for a period of ten years. The reviewing authority by his action dated 15 November 1943 disapproved the sentence and ordered a rehearing and in the same action expressly withdrew from further prosecution all specifications except Specifications 1, 4, 5, 20, 21, 22 and 25. The record of trial now under consideration involves those specifications except Specification 25 which for some reason (not stated in the record) appears to have been withdrawn. At the rehearing the accused pleaded not guilty to and was found guilty of the Charge and all Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for fifteen years. The reviewing authority approved only so much of the sentence as provided for dismissal, total forfeitures, and confinement for six years and six months, designated the 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. Summary of the evidence.

Testimony concerning Specifications 1, 4 and 5 of the Charge was offered by Matthew W. King, of the Citizens Union National Bank of Louisville, Kentucky, by Mary Agnes Ridge, bookkeeper for the same bank, by Nolte C. Ament, a jeweler, of the Geiger-Ament Company, Louisville, by Mr. M. A. Brown, credit manager of the Seelbach Hotel, Louisville, and by Lois Rankin, assistant to the credit manager of the Rodes-Rapier Company, of Louisville. Mr. King stated that on 11 August 1943, he was at Fort Knox for the purpose of receiving applications for deposit accounts with the Citizens Bank. He was the only person from the bank present there on that day, and all specimen signature cards were made out in his presence. He testified that he received a signature card and opened an account in the name of Lieutenant James B. Benfield. The card was made out in witness' presence and marked with his initials, and reached the bank's office in Louisville on 12 August 1943. This card was introduced as Exhibit 1. Mr. King stated that it was customary to receive 20 or 25 (new) accounts a day at Fort Knox, and admitted his inability to identify the signature on the specimen signature card as the signature of the accused (R. 9-11).

Upon being requested to point out accused in the court room, witness erroneously indicated one of accused's counsel (R. 9).

Miss Ridge, who had never seen accused, testified that she had kept the original ledger sheet or record account of a Lieutenant James B. Benfield with the Citizens Bank. This was a record of original entry always kept in her possession, entries on it being made by her or under her personal direction, and was introduced as Exhibit 7. Reference to it shows that the account was set up on 12 August 1943, with a deposit of $300. Two other deposits were made during the life of the account, one of $100 on 16 August 1943, and one of $50 on 20 August 1943. The account was closed

on 29 September 1943. The largest balance shown, other than the original deposit, was $170, on 16 August 1943. Witness stated that she was familiar with the signature of the James B. Benfield who maintained the account and implied that she made or refused payments from the account upon that signature and the financial balance of the account. James B. Benfield had no other account with the Citizens Bank, and none after 29 September 1943 (R. 21-26; Ex. 7).

a. Specification 1.

Mr. Ament definitely identified accused as the person who came into the jewelry store of Geiger and Ament, Louisville, Kentucky, on 24 August 1943, and purchased a diamond wedding ring valued at $250. A young woman clerk made the sale, and Ament talked to accused "when it come (sic) to the matter of identification". In witness' presence accused made out and gave to witness a check, dated 24 August 1943, drawn on the Citizens Union National Bank of Louisville, in the amount of $265, payable to Geiger and Ament. This check was introduced as Exhibit 2, and was the only check ever given by accused to that firm. For it accused received the diamond ring and $15 in cash (R. 11-13).

Miss Ridge testified, and Exhibit 6 showed, that on 24 August, the balance in the account in accused's name in the Citizens Bank was $5.75. The $265 check was presented to the Citizens Bank by "the Lincoln Bank" on 26 August, and was returned by her for insufficient funds (R. 22). It has never been paid by Citizens Bank nor redeemed in any way (R. 23, 31).

Within ten days after the sale of the ring, Mr. Ament several times "called for " accused by telephone, and finally talked to someone who "seemed cognizant of the check". The man to whom Ament talked told him that "he would make it good * * * the following Tuesday or Wednesday". Though he wrote two letters to accused at Fort Knox, the last one registered, he never received any reply. The check was not again presented for payment, and the ring was eventually returned "for credit" (R. 12, 13, 30, 31).

Ament admitted that at a previous trial of accused he had been unable to identify him as the person who presented the check for the ring. He stated, however, that this was because of the way in which accused was holding his hand at his face, and because he (witness) had not wanted "to make a wrong identification", but that he had recognized accused as he walked out of the room at the previous trial, and that he now had no doubts concerning accused's identity (R. 14).

b. Specification 4.

Mr. M. A. Brown was unable to identify accused at the trial by the sound of accused's voice, and stated further that at the time of the alleged offense the person known to him as Lieutenant Benfield had worn a small moustache, which it appears accused did not wear at the time of trial (R. 14).

Mr. Brown testified that on 15 September 1943, in his position as credit manager for the Seelbach Hotel, he had examined the A.G.O. card and "credentials" of a lieutenant who obtained a room at the hotel under the name of Lieutenant James B. Benfield, and who had been asked to pay in advance the rent for his room and a deposit for the key, since he had no established credit at the hotel. The registrant offered a check for $3.25, dated 15 September 1943, drawn on the Citizens Union National Bank, payable to the Seelbach Hotel, and signed "James B. Benfield, 2nd Grp Vehicle Team O-1576921". This check was introduced as Exhibit 3. Mr. Brown examined accused's A.G.O. card, compared picture, signatures, serial numbers and name, and approved acceptance of the check. He also received from the clerk a registration card for Room 931 which had been signed "Lt. J. B. Benfield, A.R.T.C., Fort Knox". It was customary to have guests sign their own registration cards (R. 15, 19; Exs. 3, 4).

Miss Ridge testified, and Exhibit 6 showed, that on 15 September, the balance in the account in accused's name in the Citizens Bank was $2.75. The $3.25 check was presented to the bank by its own Fourth Street office on 17 September 1943 and was returned by her for insufficient funds (R. 22). It has never been paid by the Citizens Bank, and accused never spoke to Mr. Brown about making it good (R. 18, 23).

c. Specification 5.

Miss Rankin testified that she did not know accused but that she remembered accepting a check for $50, dated 24 September 1943, payable to the Rodes-Rapier Company, and signed by "(1st Lt.) James B. Benfield." This check, drawn on the Citizens Union National Bank, was introduced as Exhibit 5. She further stated that in her capacity as assistant to the credit manager of the company, with the duty of obtaining the approval of that official when more than $25 in change was due on checks, she had compared the signature on the check with that on the A.G.O. card of the officer who tendered it. She said that the person who gave the check received from her $40 in cash and $10 in merchandise from the shirt department of the store (R. 19, 20).

Miss Ridge testified, and Exhibit 6 showed, that on 24 September 1943, the balance in the account in accused's name in the Citizens Bank was $0.75. The $50 check was presented to the bank, and returned by her on 28 September 1943, for insufficient funds. This check was never paid by the Citizens Bank (R. 23, 32).

Miss Ridge also testified that she had returned for insufficient funds twenty-two other checks drawn on the account in the Citizens Bank in the name of Lieutenant James B. Benfield. These checks were issued on various dates between 14 August 1943 (which was three days after the account was opened) and 24 September 1943 (which was five days before the account was closed). They varied in amount from $10 to $100, and their total amount was $634.95. Three of them were twice presented and payment refused. All these checks "looked genuine * * * when they were presented", by comparison with the signature of the James B. Benfield who maintained the account (R. 24-26).

d. Specifications 20, 21 and 22.

Technician Fourth Grade Leroy B. Webster, Headquarters, Replacement Center, Fort Knox, Kentucky, testified that accused, whom he had known for "about six months" as of the date of trial, had approached him on 15 May, 1 June, and 30 July 1943, and on each such occasion had borrowed from him $10, $20 and $10, respectively. On the first occasion accused told witness that "he was a little short of money". At all times mentioned witness was an enlisted man (R. 27-29).

A receipt by accused of a copy of the record of a former trial was introduced for the purpose of establishing his signature (R. 33; Ex. 7).

Counsel for accused stated that accused's rights as a witness had been explained to him and that he desired to remain silent (R. 29). He offered no evidence.

4. There is no reasonable doubt of accused's guilt upon any of the Specifications. The evidence with respect to his borrowings from Webster is concrete and undisputed in any respect.

While Mr. King was unable to identify accused as the person who opened a deposit account with the Citizens Bank at Fort Knox on 11 August, it is clear that accused subsequently thereto drew checks upon that bank. Mr. Ament positively identified him as having done so, while Mr. Brown and Miss Rankin testified that they examined the A.G.O. card of the utterer of their check for the purpose of comparing signatures. It may therefore be properly inferred that it was accused who opened the account in the Citizens Bank. When it is further considered that the court had before it the signature on the bank's specimen signature card and a proved specimen of accused's handwriting, its conclusion that he opened the account becomes proof against all attack.

That he drew the checks alleged in Specifications 1, 4, and 5 was likewise proved beyond doubt. There was positive identification of him as the person who issued the one for $265. Witnesses as to the other two stated that they had compared signatures on the checks with that on the Officer's Identification Card of the issuer. Under all the circumstances the court was warranted in inferring that this card was in the possession of its rightful owner at those times. The court is not bound to exclude from its determination unreasonable hypotheses of innocence (M.C.M., 1928, par. 78a).

That the checks were not paid was testified to by all three recipients thereof; that the reason for non-payment was lack of sufficient funds was proved by the clerk in the bank whose particular duty it was to determine the adequacy of the funds in accused's account. No more competent evidence could have been offered.

That accused knew that he did not have sufficient funds in his account to pay the checks may be inferred from several circumstances. An

examination of the ledger sheet (Exhibit 6) shows that between 14 August and 30 August, accused issued ten checks in amounts ranging from $3. to $125, and totalling $442, all of which were honored. The twenty-two checks issued between 14 August and 24 September which were dishonored totaled $634.95. The three checks alleged in the Specifications totaled $318.25. Altogether accused issued $1395.20 worth of checks on total deposits of $450, and on an account of which the total balance was $300 the day it was opened and never above $170 thereafter. From the very fact of dishonor, and the testimony of Miss Ridge concerning the scarcity of deposits, it is apparent that accused had not made provision for the necessary funds to pay the checks. The evidence is most persuasive that he did not intend to have enough money in the account to pay the checks, particularly when it is considered that he never did supply the money to pay the checks, nor make good his obligations other than by returning the ring "for credit". There is no error in the court's findings.

5. The introduction of testimony concerning the twenty-two checks dishonored but not made the subject of charges was objected to by defense counsel. The court correctly overruled the objection.

> "Where criminal intent, motive, or guilty knowledge in respect of an act is an element of the offense charged, evidence of other acts of the accused, not too remote in point of time, manifesting that intent, motive or knowledge, is not made inadmissible by reason of the fact that it may tend to show the commission of an offense not charged." (M.C.M., 1928, par. 112b). (Underscoring supplied).

Accused's conduct in uttering checks with reckless abandon when he must have known the status of his account is substantial evidence of his guilty knowledge and his motive to provide himself with money in this fashion. That his conduct was violative of Article of War 96 needs no citation.

6. War Department records show that accused is 29-8/12 years of age. He graduated from De Ridder, Louisiana, High School but did not attend college. He enlisted in the Army on 14 January 1942. In recommending him for attendance at Officers' Candidate School, his commanding officer, Captain Bert R. Kuss, Air Corps, stated that he had demonstrated outstanding qualities of leadership and that his character was excellent. He attended The Quartermaster School, Camp Lee, Virginia, and was commissioned a Second Lieutenant, Quartermaster Corps, Army of the United States, on 14 August 1942. He was promoted to First Lieutenant, Army of the United States, Air Corps, on 9 February 1943. No explanation appears in the records concerning the manner in which he was transferred to the Infantry, which is the branch designated in the record of the court-martial, or of the manner in which his promotion to First Lieutenant in that branch or in the Quartermaster Corps was obtained.

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

Lucy A. Gore, Judge Advocate.

John Hammond, Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 25 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 First Lieutenant James B. Benfield (0-1576921), 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 as approved by the reviewing authority and to warrant confirmation thereof. Accused was found guilty, upon rehearing, of three specifications of wrongfully and unlawfully making and uttering checks (in the total amount of $318.25), knowing that he did not have, and not intending that he should have, sufficient funds in the drawee bank for the payment of such checks; and, of three specifications of borrowing money from an enlisted man ($40.00), all in violation of Article of War 96. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for fifteen years. The reviewing authority approved only so much of the sentence as provided for dismissal, total forfeitures, and confinement for six years and six months. I recommend that the sentence as approved by the reviewing authority be confirmed, but that the forfeitures and four years and six months of the confinement be remitted (leaving two years confinement to be served), that the sentence as thus modified be carried into execution, and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

3. Consideration has been given to a letter from Colonel Edwin C. Greiner, Cavalry, Commanding, Second Group, Armored Replacement Training Center, Fort Knox, Kentucky, dated 8 October 1943, attached to the record of accused's first trial, and addressed to the officer exercising general court-martial jurisdiction, Fort Knox, Kentucky, in which it is stated that although accused had performed his line duties in a very satisfactory manner, he had continued to get his finances seriously involved, had failed to obey the orders of his commanding officer that he was not to issue checks unless he knew they were covered by sufficient funds in the bank, had made several false official statements concerning the same, had failed to meet his just obligations, and had on numerous occasions borrowed money from enlisted men.

4. Consideration has also been given to a letter from Edith Anne Benfield, accused's wife, dated 29 December 1943, to the President of the United States, to two letters from Mr. R. C. Benfield, accused's brother, both dated 9 January 1944, to the President of the United States and to

The Judge Advocate General, respectively, all requesting clemency for accused, and to a letter from accused through channels, to The Adjutant General, dated 18 September 1942, in which accused requested immediate service in the combat zone, with three indorsements, in which accused's request was not favorably considered in view of the acute shortage of Quartermaster officers within his command.

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 designed to carry into effect the recommendation hereinabove made, should such action meet with approval.

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

7 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. accused's wife to Pres. of U.S.
Incl.5-Ltr. fr.R.C.Benfield, to Pres. of U.S.,9 Jan.1944.
Incl.6-Ltr.fr. R.C.Benfield to JAG, 9 Jan.1944.
Incl.7-Ltr. to AG fr. Accused 18 Sep.1942,w/3 inds.

(Sentence confirmed but forfeitures and four years and six months of confinement remitted. G.C.M.O. 188, 25 May 1944)

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

SPJGN
CM 246092

20 JAN 1944

UNITED STATES	)	WARNER ROBINS AIR SERVICE COMMAND
v.	)	Trial by G.C.M., convened at Daniel Field, Augusta, Georgia, 10 November 1943. Dismissal, total forfeitures and confinement for five (5) years.
Second Lieutenant TROY W. SPARKS (0-741945), Army Air Forces Replacement Pool.	)	

OPINION of the BOARD OF REVIEW
LIPSCOMB, SLEEPER and GOLDEN, 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 Specifications:

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Second Lieutenant Troy W. Sparks, Army Air Forces Replacement Pool, Daniel Field, Augusta, Georgia, did, at Daniel Field, Augusta, Georgia, on or about 26 October 1943, feloniously take, steal, and carry away about One Hundred and One Dollars ($101.00), lawful money of the United States, the property of Captain Ronald L. Redfield, Detachment Medical Department, Daniel Field, Augusta, Georgia.

Specification 2: In that Second Lieutenant Troy W. Sparks, Army Air Forces Replacement Pool, Daniel Field, Augusta, Georgia, did, at Daniel Field, Augusta, Georgia, on or about 25 October 1943, feloniously take, steal, and carry away about Six Dollars ($6.00), lawful money of the United States, the property of First Lieutenant Louis R. Hanemann, 1997th Quartermaster Truck Company (Aviation), Daniel Field, Augusta, Georgia.

He pleaded guilty to and was found guilty of the Charge and its 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 ten (10) years. The reviewing authority approved the sentence, but reduced the period of confinement to five (5) years, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution, supplementing the accused's plea of guilty, shows that on the afternoon of 25 October 1943 Lieutenant Louis R. Hanemann left his quarters, known as B.O.Q. No. 405, for an hour's exercise, leaving six or seven one dollar bills in the top drawer of his bureau. During his absence the charge of quarters observed the accused enter the room where he remained for a few minutes and its occupant, returning shortly thereafter, missed the money and reported its loss or theft (R. 6-7, 8-9).

The next afternoon about the same time the accused was observed entering B.O.Q. No. 407, occupied by Captain Ronald L. Redfield who was also taking exercise and who had left about $103.00 in bills, several of which bore unique identifying marks, in his zipper type wallet in the pocket of his trousers. The accused, who was under suspicion because of the previous theft, was being "shadowed" by two investigators from the Provost Marshal's office who, after the accused's short stay in Captain Redfield's quarters, followed him to the nearby city of Augusta, Georgia, where he made several telephone calls, took several drinks at a bar with another officer and then entered a restaurant to secure his evening meal. In the meantime, Captain Redfield had discovered that the currency had been taken from his wallet and reported its theft. The investigators, pursuant to instructions, then arrested the accused at the restaurant and returned him to the office of the Provost Marshal where a search revealed $98.00 in currency in his possession. Thereafter, in the presence of several officers, he voluntarily admitted that such sum was the unspent remainder of the money he had taken from B.O.Q. Nos. 405 and 407, stating that the first theft was to secure funds for taxi fare and the second to secure funds to repay a debt to a friend who had furnished a bail bond for a female acquaintance. He had been properly warned of his right to speak or remain silent and subsequently executed a written sworn statement which likewise contained such admissions. The offer into evidence of the written statement was withdrawn upon objection but several witnesses who heard the admissions testified about the substance thereof without objection. The $98.00 in currency, found

on his person, were admitted into evidence and Captain Redfield identified several of the bills as having been in his wallet (R. 9-11, 11-13, 13-17, 17-19, 19-22, 22-24, Ex. 1-8).

4. The accused, after explanation of his rights as a witness, elected to remain silent. The defense counsel stated to the court that the accused had declined to give testimony or make any statement and had requested that no statement or plea be made for him by counsel (R. 24-25).

5. Specifications 1 and 2 respectively allege that the accused on 26 and 25 October 1943 at Daniel Field, Augusta, Georgia, feloniously took, stole and carried away about $101.00 in money which was the property of Captain Redfield and about $6.00 in money which was the property of Lieutenant Hanemann. 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 either generally or specially to another, with intent to deprive such owner permanently of his property therein (Clark)" (M.C.M., 1928, par. 149g).

The evidence for the prosecution conclusively supplements the accused's plea of guilty and shows that he committed the two larcenies as alleged. He was observed entering and leaving the officers' quarters from whence the money was taken and shortly after the second larceny he was apprehended with a large part of the stolen money in his possession of which several bills were identified by the owner thereof. The recovery of such money was contemporaniously attended by voluntary admissions by the accused of his guilt concerning which persons, who heard such admissions, were properly permitted to testify (M.C.M., 1928, par. 114b). Although, the subsequent sworn written statement of the accused probably amounted to a confession, its offer into evidence was withdrawn but testimony of the substance thereof was admitted without objection and was properly received because, even if it constituted a confession, it was secured under circumstances permitting its lawful use and the guilt of the accused had been otherwise satisfactorily established which made its admission by secondary evidence harmless error, if at all. The evidence, therefore, beyond a reasonable doubt, supplements the accused's plea of guilty and supports the findings of guilty of the Charge and its Specifications.

6. The accused is about 21 years old. The War Department records show that he enlisted on 15 May 1941 having enlisted service from such date until 12 April 1942 when he was commissioned a second lieutenant

upon completion of Officer's Candidate School and that he has had active duty as an officer since the latter date.

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

Benjamin R. Sleeper, Judge Advocate

Gabriel H. Golden, Judge Advocate

SPJGN
CM 246092

1st Ind.

War Department, J.A.G.O., 7 - 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 Second Lieutenant Troy W. Sparks (0-741945), Army Air Forces Replacement Pool.

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 legally sufficient to warrant confirmation thereof. I recommend that the sentence be confirmed but that three years of the confinement approved by the reviewing authority 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,
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 three years of confinement approved by reviewing authority remitted. G.C.M.O. 130, 20 Mar 1944)

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

SPJGH
CM 246101

24 MAR 1944

UNITED STATES	)	FOURTH AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at Santa Maria Army Air Field, California, 10-12 November 1943. Death.
Private First Class EDDIE W. NICKLES (34401589), 391st Aviation Squadron.	)	

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

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1. The Board of Review has examined the record of trial in the case of the soldier named above 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 92nd Article of War.

Specification: In that Private First Class Eddie W. Nickles, 391st Aviation Squadron, did, at Santa Maria, California, on or about 31 October 1943, with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation kill one Bennie Jules, a human being, by shooting him with a rifle.

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

Specification 1: In that Private First Class Eddie W. Nickles, 391st Aviation Squadron, did, at Army Air Field, Santa Maria, California, on or about 31 October 1943, knowingly and wilfully apply to his own use a motor vehicle, to-wit: a truck, one-quarter ton, four by four, Ford, U.S.A. registration number 20131457, motor serial number 47295, of a value in excess of Five Hundred ($500.00) Dollars, property of the United States, furnished and intended for the military service thereof.

Specification 2: In that Private First Class Eddie W. Nickles, 391st Aviation Squadron, did, at Army Air Field, Santa Maria, California, on or about 31 October 1943, knowingly and wilfully apply to his own use one Rifle, U.S., Caliber .30 M1903A3, Serial Number 3512587-Remington, of a value in excess of Fifty ($50.00) Dollars, property of the United States, furnished and intended for the military service thereof.

He pleaded guilty to the Specification, Charge I, except the words "with malice aforethought, wilfully, deliberately, feloniously" and "and with premeditation"; not guilty to Charge I, but guilty of a violation of the 93rd Article of War; and guilty to Charge II and to both Specifications thereunder. He was found guilty of all Specifications and Charges and was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence. The record of trial has been forwarded for action under the 48th Article of War.

3. The evidence for the prosecution shows that at about 3:00 p.m. on Sunday, 31 October 1943, accused entered the shop of the supply sergeant of the 391st Aviation Squadron at Santa Maria Army Air Field, California. Accused made a temporary exchange of his trousers, which were too small, for another pair. He was to return later (at no specified time or date) and bring back the borrowed trousers. At about 4:30 or 5:00 p.m. Sergeant Booker T. Cole saw accused on Main Street in Santa Maria, going in the direction of the Bomber Cafe. Accused was accompanied by three other colored soldiers. Later in the afternoon, about 6:00 or 6:30 p.m., accused, who had been in the Bomber Cafe earlier, returned there. Both times when accused was in the cafe he was accompanied by Privates James R. Mitchell and Woodrow Jemison. On the second visit three military policemen from the organization of accused, Master Sergeant Ralph Hobson and Corporals Roy Brown and James C. Washington, were in the Bomber Cafe (R. 31-33, 50-51, 64-66, 88-89, 138-139, 141-142).

Mitchell was "pretty drunk". Accused and Jemison were not drunk. Accused and the two soldiers with him ordered sandwiches. The military policemen were finishing their sandwiches at the time. Mitchell was "cussing" and Corporal Washington told him to "cut this cussing out" or he would return Mitchell to the base. Accused was not in the argument. When Mitchell did not stop, Corporal Brown got up to remove him from the cafe, and accused was "taking it up". The military policemen decided to remove both of them from the cafe. Accused objected and wanted to wait until they finished their sandwiches. Brown told him that he would have to leave without his sandwich. Sergeant Hobson and Corporal Brown removed accused from the cafe. Corporal Washington, assisted by Jemison, removed Mitchell. In the process of taking accused out, Brown hit him with his club when accused said he would not go. Accused then "grabbed" Brown by the tie, and the latter hit him several more times with the club. When they reached the sidewalk, Brown hit accused on the knuckles and on the head with the club to make him release his tie. Brown slapped Mitchell. Washington and Brown took the three soldiers to the base in their jeep. On the way, Mitchell cursed some more, and Brown slapped him. Brown testified that while they were driving to the base, accused said "I will get you tomorrow if I have to spend the rest of my life in the guardhouse". The two military policemen left the three soldiers at the base, and returned to town (R. 33-35, 42-49, 51-52, 55-58, 66-68, 72-78).

At about 7:30 p.m. accused entered the supply room and asked the supply sergeant if he wanted accused to return the trousers he had borrowed. The supply sergeant informed him that there was no need to bring them back until the next day. The supply sergeant had charge of the rifles, which were

in racks about 20 feet away from where he talked to accused. He remarked that he was going to take a shower, and after accused left he locked the supply room and went to take his shower. The rifle racks were locked. The supply sergeant identified a rifle (Ex. A) which had been in the rack, but was discovered to be missing at about 8:30 or 8:45 p.m. When accused was in the supply room he had a "wild, frantic look in his face - trouble or something in his face" (R. 139-145).

At about 8:00 p.m. Technical Sergeant Hazel T. Morris, who was in charge of a jeep which she used in performance of her duties, parked it near the post exchange. When she returned about 10 minutes later the jeep was gone (R. 136-137).

At about 7:50 p.m. Sergeant Cole, who had just come from a show, saw accused get out of a jeep opposite the Bomber Cafe. Accused, who was alone, had an Army rifle in his hand. He passed within a foot of Sergeant Cole, with the rifle at port arms, and asked "Whereabouts are the M.P.'s?" Sergeant Cole saw there was something wrong, and asked accused to calm down and give him the rifle. When accused stepped back and said "Don't try to stop me", Sergeant Cole told him the "M.P.'s" were in the Gardenia Cafe, west of the Bomber Cafe. When accused started in that direction, Sergeant Cole entered the Bomber Cafe "at a double time". Accused was "very excited", "blowing from the nose", "cross-eyed", "light-footed", "perspiring to a great extent", his eyes were "going from one corner to the other", and he spoke very slowly with a pause between words (R. 90-91, 93-95).

The Bomber Cafe was a long building, like a hallway, with the entrance at the south end. On the west side was a food counter, on the east side was a bar, and at the north end was the kitchen. There were stools along the bar and the food counter, with a passage way, about two or four feet wide, between the rows of stools. It was well lighted. When Sergeant Cole entered the Bomber Cafe, it was filled with people, on the stools and in the passage way. Sergeant Hobson was sitting at the end of the food counter at the northwest corner of the room, and Corporal Washington was in the northeast corner near the telephone. Corporal Brown was not present. Bennie Jules, a civilian, was standing beside Sergeant Hobson, facing the door, with his hand resting on Hobson's knee and talking to him. When Sergeant Cole came in, he went to Sergeant Hobson and was bent over talking to him, and partially between Hobson and the door (R. 36, 38-40, 60-63, 68, 78, 84, 95-96).

About a minute after Sergeant Cole saw accused outside, the latter entered the Bomber Cafe. Hobson and Washington testified that it was about 35 or 45 minutes after accused had been taken to the base. Accused came through the crowd and fired a shot from his side. The bullet struck and killed Bennie Jules. People crowded around accused, who appeared to be trying to reload and who backed up. He had "frowns" on his face, his eyes were bloodshot, and he looked "sort of wild", but also appeared "kind of cool". When Corporal Washington pulled out his gun, accused left the place and drove away in the jeep (R. 37, 52-54, 59-61, 68-70, 78-86, 92-93).

A search was made for accused in the surrounding area, in the course of which a wrecked jeep was found on a highway, and also the rifle which was missing from the supply room. At about 1:00 a.m. on 1 November, accused was arrested by police officers in Santa Maria. Accused was examined by a medical doctor at the police station and found to be sober, with no apparent injuries, stoical, indifferent and calm (R. 28-29, 99-107).

Another doctor performed an autopsy on the body of Bennie Jules and found that death had been caused by hemorrhage resulting from a bullet wound through the heart and right lung (R. 23-24).

It was stipulated that the jeep "in question" was furnished and intended for the military service and of a value in excess of $500, and that the rifle "in question", furnished for the military service, was of a value in excess of $50 (R. 146).

4. Accused testified that he attended school for six months, when he was about seven years old, started to work on the farm when he was 11 years of age, began work as a truck driver, hauling logs from the swamp, when he was 14, and continued at that work until he was drafted. He cannot read or write, but can write his name. Since he had been at Santa Maria Army Air Field, he had done common labor, worked in the mess halls and in the post exchange. About two weeks prior to the trial he was on the rifle range, and made a score of 127. Prior to 31 October he had been to Santa Maria about twice. On the afternoon of 31 October he exchanged a pair of trousers at the supply room, and the supply sergeant told him to bring the loaned trousers back when he returned from Santa Maria. He then went to town with Mitchell, Jemison and Private Lonnie Hinds. The other three men bought some gin, but accused did not drink any. He bought a bottle of beer. Accused played pool while Corporal Washington, Mitchell and Jemison took Hinds to the bus station where he was going to take a bus for Los Angeles. When they returned, accused met Jemison and Mitchell in the Bomber Cafe. Mitchell appeared to be drunk. Accused asked them whether they wanted a sandwich, and ordered three. The persons involved were then in the following positions: Corporal Brown was seated on the first stool at the food counter, at the back of the room, then Sergeant Hobson, Corporal Washington, accused and Mitchell, with Jemison standing behind Mitchell (R. 199-207).

Washington told Jemison to talk to Mitchell and quiet him so he would not get into trouble. Both Jemison and accused tried to quiet Mitchell. When Mitchell snatched Washington's "billy", the latter got up to put Mitchell out. Accused asked Washington to wait till he got his sandwich and he would take Mitchell back to camp. Accused stood up. Brown then came up and told accused not to interfere and said "Beings you got so smart you are going too". Brown started pushing accused out, and accused said he was not going out without his sandwich. Brown replied that he did not "need it". Accused pushed Brown aside to get his sandwich. Brown then grabbed him and struck him on the head with his club. The blow knocked off the cap of accused, who reached down for it. When he looked up he saw Brown "fixing" to hit him again, so threw up his left hand. Brown hit him four times on the wrist with the club. Accused then gave up and went out of the cafe. When they were outside getting in the jeep, Brown slapped Mitchell several

times. On the way to the base Mitchell was still "cussing" and Brown slapped him twice, and wanted Washington to stop the jeep so he could beat Mitchell. At the base, accused and Jemison put Mitchell to bed (R. 207-212).

Accused then went to the supply room to return the trousers he had borrowed. While there he observed that the rifle rack was not locked. When the supply sergeant went out to take a shower, accused returned to the supply room, opened a window, went in and obtained a rifle. He could not find any ammunition and then remembered that he had some in his cartridge belt. He went to his hut and obtained this ammunition. In passing the post exchange, he saw a jeep, got in it, and drove off. He did these things because he was "mad at " Corporal Brown for the way he had treated accused, in not permitting him to wait for his sandwich after he asked in a "nice" way, and in hitting him several times with the club, when accused was not "cussing" or "raising any scene". Accused drove the jeep through the fence and toward town. Accused parked the jeep and saw Sergeant Cole. After the conversation with him, accused saw Sergeant Cole go into the Bomber Cafe "at a double time", concluded that the "M.P.'s" were in there and that Cole was going to warn them, so entered the cafe behind Cole. He was holding the gun down as he approached the crowd, and saw Sergeant Hobson and Corporal Brown. He was positive he saw Brown. Accused shot to hit Brown's leg. As he was "squeezing off" the trigger, the crowd "broke" to go out the door, ran into him, and he did not know what happened. He went back to the jeep and started to the base. Accused did not intend to hit the civilian. He was excited at the time and was thinking about the way Brown had mistreated him without cause when he had not done anything (R. 212-217).

On cross-examination he stated that he decided to shoot Brown in the leg, when he was in the supply room and saw the rifle rack unlocked. At the time of the shooting Brown was seated three stools away from Hobson. Accused did not aim at Brown's leg. He was holding the gun low when he fired. When he was squeezing the trigger the gun was pointed at the floor and he expected to hit Brown's leg. He denied that he told anyone he wanted to kill Brown. Accused denied that he attempted to reload the rifle in the cafe, but he reloaded it after he got in the jeep. The only thing he said as he entered the cafe with the rifle was "Okay" or "Okay, Brown". He and Brown were good friends and this was the first trouble he ever had with Brown. Accused was sober and knew what he was doing, but was mad. The jeep was turned over a "good ways" down the road, and the rifle was probably lost at that time. His head and arm were sore that night from the blows Brown gave him (R. 217-237).

Private Mitchell testified that on the night of 31 October he had been drinking, and had no memory of anything that happened after he went to the bus station. Private Jemison testified that when he and Mitchell returned to the Bomber Cafe from the bus station, accused invited them to have a sandwich and ordered three. Mitchell was "cussing", Jemison tried to stop him and then told Corporal Washington to take him out. The next thing he noticed, Sergeant Hobson and Brown were trying to take accused out. Accused wanted to wait for his sandwich, and Brown pushed him. When accused tried to push Brown, the latter grabbed him by the collar and hit

him on the head with his club. Accused then went out. Outside and in the jeep, Brown slapped Mitchell. At the base, Jemison and accused took Mitchell to the hut, Jemison undressed him and accused left. Two other witnesses who were present in the cafe observed no particular details but only the general course of events. One of them noted that when accused entered the cafe at the time of the shooting he seemed nervous and unsteady and his eyes were "very staring" (R. 178-198).

First Sergeant Arthur F. Smith stated that for a time accused was assigned to duty as a "permanent K.P.", that accused was one of the "hardest workers" in the organization and that he always performed the work assigned in a "very efficient" manner and very willingly. The manager of the post exchange, under whom accused worked for about six weeks, observed that he was "always very happy" at his work and did it "very well" and quickly. The mess sergeant stated that accused was one of the "best K.P.'s" he ever had and performed his duties willingly (R. 150-151, 156, 170-174).

5. Major Otto L. Gericke, Medical Corps, a psychiatrist, testified in rebuttal, over objection, that he examined accused on 8 November and found that he has "average emotional stability for an individual of his age, race, and education". Accused suffers from no mental diseases and knows the difference between right and wrong. Accused "may have to exercise a little more control over his emotions than a man of higher education" (R. 239-246).

6. The evidence shows that on the afternoon of Sunday, 31 October 1943, accused went into town (Santa Maria, California) with three other colored soldiers. At about 6:00 or 6:30 p.m. accused and two of these soldiers, Privates James R. Mitchell and Woodrow Jemison, entered the Bomber Cafe. At this time Mitchell was drunk. Accused and Jemison were sober. Among others in the cafe were three military policemen from the organization of accused, Master Sergeant Ralph Hobson and Corporals Roy Brown and James C. Washington. After entering the cafe, accused ordered sandwiches for his two companions and himself. While they were waiting for the sandwiches, Mitchell was cursing and refused to quiet down. When one of the military policemen started to put Mitchell out of the cafe accused objected, and stated that if they would wait until the sandwiches were served, he would take Mitchell back to the base.

Corporal Brown objected to interference by accused and told accused he would have to get out also. Accused objected to going before getting his sandwich. Brown then struck accused on the head with his club, and when accused grasped Brown's tie, the latter struck him several times on the head and arm with the club. Accused was then taken out of the cafe by Hobson and Brown. Brown and Washington then returned the three soldiers to the base in a jeep. On the way Brown slapped Mitchell several times, as Mitchell continued to curse.

After returning to the base, accused went to the supply room to return some trousers that he had borrowed. While there he observed that the rifle rack was not locked, and conceived the idea of obtaining a rifle and shooting Brown on account of the way the latter had treated him. Accused

claimed that it was his intention to shoot Brown in the leg. When the supply sergeant locked the supply room and left to take a shower, accused opened a window, entered, and took a rifle. He then obtained some ammunition which he remembered was in his cartridge belt, took a jeep which he saw parked in front of the post exchange, and drove to town. He reentered the Bomber Cafe approximately 45 minutes after he had left there the first time.

The Bomber Cafe consisted of a long, narrow room with a food counter on one side and a bar on the other. There was a row of stools on each side with an aisle about two to four feet wide between. When accused entered with the rifle the place was crowded and people were standing in the aisle. Hobson was seated on a stool near the back of the room and a civilian, Bennie Jules, was standing behind him. Washington was in the rear corner of the room on the side opposite to Hobson. Brown was not present, but accused testified definitely that he saw Brown on one of the stools. Accused came through the crowd and fired a shot from his side. Bennie Jules was killed by the shot. Accused was in a highly excited condition at the time. He testified that it was his intention to shoot Brown in the leg, but as he was squeezing the trigger the crowd pushed against him and he did not know what happened. After the shot, accused left the cafe, entered the jeep, and departed.

Murder is the unlawful killing of a human being with malice aforethought. Malice does not necessarily mean hatred or personal ill-will toward the person killed. The use of the word "aforethought" does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed. Malice aforethought may mean an intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, except when death is inflicted in the heat of a sudden passion, caused by adequate provocation (MCM, 1928, par. 148a).

The evidence conclusively shows all elements of the offense of murder, in that accused killed Jules in an effort to shoot Corporal Brown (according to the claim of accused) with a rifle. He intended, at least, by his own admission, to inflict grievous bodily harm. The defense was that the homicide occurred in the heat of passion and upon adequate provocation, and hence that accused was guilty only of the lesser included offense of manslaughter. The contention cannot be sustained, however, even if it be assumed that adequate provocation existed at the time when Hobson and Brown ejected accused from the cafe. Where sufficient cooling time elapses between the provocation and the blow the killing is murder, even if the passion persists (MCM, 1928, par. 149a). Accused went back to the base, talked to the supply sergeant, entered the supply room through the window, took a rifle, went to his hut and obtained ammunition, then took a jeep and returned to town. It was about 45 minutes after the first encounter with the military police when he reached the Bomber Cafe. During this time he clearly had adequate opportunity to cool off and to desist from his intention to seek violent revenge.

In the opinion of the Board of Review the evidence shows beyond reasonable doubt that the homicide was committed by accused with malice aforethought, willfully, deliberately, feloniously, and with premeditation, in violation of the 92nd Article of War.

As to Specifications 1 and 2, Charge II, the evidence shows and the pleas of guilty admit that accused willfully applied to his own use a jeep and a rifle, property of the United States, furnished and intended for the military service thereof, in violation of the 94th Article of War, as alleged.

7. The Charge Sheet shows that the accused is 21 years of age, and that he was inducted on 11 September 1942, with no prior service.

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. The death penalty is authorized upon conviction of murder, in violation of the 92nd Article of War.

Samuel M. Drewes, Judge Advocate.

Robert J. Clemen, Judge Advocate.

F. J. Lotterhos, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 6 APR 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 First Class Eddie W. Nickles (34401589), 391st Aviation Squadron.

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 wrongfully applied to his own use an Army motor vehicle (Spec. 1, Chg. II) and rifle (Spec. 2, Chg. II), and murdered a civilian by shooting him with the rifle (Spec., Chg. I). The accused, an illiterate colored soldier, who was highly excited and angry at the time as a result of an altercation with military police of his organization about 45 minutes earlier in which he was struck several times with a club, fired at one of the military policemen. The bullet struck and killed a civilian standing nearby. I recommend that the sentence to be hanged by the neck until dead 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,
Major General,
The Judge Advocate General.

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

(Sentence confirmed but commuted to dishonorable discharge, total forfeitures, and confinement for life. G.C.M.O. 442, 18 Aug 1944)

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

SPJGQ
CM 246125

5 JAN 1944

UNITED STATES	)	WARNER ROBINS AIR SERVICE COMMAND
	)	
v.	)	Trial by G.C.M., convened at
	)	Lawson Field, Fort Benning,
Second Lieutenant JOHN A.	)	Georgia, 25 November 1943.
KANGISER (0-806852), 308th	)	Dismissal, total forfeitures
Troop Carrier Squadron.	)	and three years confinement.

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 93rd Article of War.

Specification 1: In that 2nd Lieutenant John A. Kangiser, 308th Troop Carrier Squadron, Lawson Field, Fort Benning, Georgia, did, at Barracks 2188, Bachelor Officer's Quarters, Lawson Field, Fort Benning, Georgia, on or about 7 October 1943, feloniously take, steal, and carry away currency, legal tender of the United States, value about $75.00, the property of 2nd Lieutenant John Y. Harris.

Specification 2: In that 2nd Lieutenant John A. Kangiser, 308th Troop Carrier Squadron, Lawson Field, Fort Benning, Georgia, did, at Barracks 2188, Bachelor Officer's Quarters, Lawson Field, Fort Benning, Georgia, on or about 7 October 1943, feloniously take, steal, and carry away currency, legal tender of the United States, value about $85.00, the property of 2nd Lieutenant John H. Hicks.

Specification 3: In that 2nd Lieutenant John A. Kangiser, 308th Troop Carrier Squadron, Lawson Field, Fort Benning, Georgia, did, at Barracks 2188, Bachelor

Officer's Quarters, Lawson Field, Fort Benning, Georgia, on or about 29 October 1943, feloniously take, steal, and carry away currency, legal tender of the United States, value about $15.00, the property of 1st Lieutenant James P. Champion, Jr.

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

Specification 1: In that 2nd Lieutenant John A. Kangiser, 308th Troop Carrier Squadron, Lawson Field, Fort Benning, Georgia, did, at Barracks 2188, Bachelor Officer's Quarters, Lawson Field, Fort Benning, Georgia, on or about 7 October 1943, feloniously take, steal, and carry away currency, legal tender of the United States, value about $75.00, the property of 2nd Lieutenant John Y. Harris.

Specification 2: In that 2nd Lieutenant John A. Kangiser, 308th Troop Carrier Squadron, Lawson Field, Fort Benning, Georgia, did, at Barracks 2188, Bachelor Officer's Quarters, Lawson Field, Fort Benning, Georgia, on or about 7 October 1943, feloniously take, steal, and carry away currency, legal tender of the United States, value about $85.00, the property of 2nd Lieutenant John H. Hicks.

Specification 3: In that 2nd Lieutenant John A. Kangiser, 308th Troop Carrier Squadron, Lawson Field, Fort Benning, Georgia, did, at Barracks 2188, Bachelor Officer's Quarters, Lawson Field, Fort Benning, Georgia, on or about 29 October 1943, feloniously take, steal, and carry away currency, legal tender of the United States, value about $15.00, the property of 1st Lieutenant James P. Champion, Jr.

Upon arraignment and before pleading, counsel for accused contended that Specifications 1 and 2 were the same under each Charge. The law member suggested that the question could be more intelligently passed on after the evidence had been heard, and accused thereupon pleaded guilty to all Charges and Specifications. After the evidence had been introduced, and before the findings, defense counsel made a formal motion that Specifications 1 and 2, respectively, be combined into one specification under Charge I and Charge II. The law member, ruled, subject to objection by any member of the court, that the motion was sustained and

that the specifications would be combined to read as follows, the law member himself having drafted the consolidation,

> "In that 2nd Lieutenant John A. Kangiser, 308th Troop Carrier Squadron, Lawson Field, Fort Benning, Georgia, did, at Barracks 2188, BOQ, Lawson Field, Fort Benning, Georgia, on or about 7 October 1943, feloniously take, steal, and carry away currency, legal tender of the United States, value about $160, the property of 2nd Lieutenant John Y. Harris, and 2nd Lieutenant John H. Hicks" (R6DD).

Accused was found guilty of a violation of Specifications 1, as thus amended, and 3 of Charges I and II, and of Charge I and II. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for three years. The reviewing authority approved only so much of the findings of guilty of the amended Specification 1, of Charge I, and Specification 1, as amended, of Charge II as finds that accused did "feloniously take, steal, and carry away currency, legal tender of the United States, value about $155 ($75.00 the property of 2nd Lieutenant John Y. Harris, and $80.00 the property of 2nd Lieutenant John H. Hicks) the property of 2nd Lieutenant John Y. Harris and 2nd Lieutenant John H. Hicks". He approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 48.

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

On 7 October 1943 Second Lieutenants John Y. Harris and John H. Hicks were quartered in the Bay of barracks 2188, BOQ, at Lawson Field, Fort Benning, Georgia. Their beds were parallel and approximately three feet apart. Second Lieutenant Jesse B. Hepler occupied the same Bay with them (R. 6, 6B, 6S).

At approximately 4:30 in the afternoon of the above mentioned date, Lieutenants Harris and Hicks changed clothes and went out to physical training. Each left his wallet in a trousers' pocket of the clothes he removed, and each left his trousers on his bunk. Lieutenant Harris' wallet contained approximately seventy-five dollars (R. 6A) and that of Hicks approximately eighty dollars (R. 6C). Each had observed the money in his wallet shortly before leaving it. Shortly after returning from physical training at about 5:40 p.m., Lieutenant Harris discovered that his money was missing from his wallet and likewise Lieutenant Hicks

discovered that his wallet and money were also gone. They immediately reported their losses to Major Aronsohn, Base Legal Officer (R. 6B, 6C).

A police sergeant returned Lieutenant Hicks' wallet to him at Police Headquarters in Columbus, Georgia, the following afternoon (R. 6C). It had been delivered to Police Headquarters by Homer Laster, who had found it near the road that was ordinarily travelled in going from Fort Benning to Columbus, Georgia, (R. 6D) All money had been removed from the wallet before it was found by Mr. Laster, but it contained papers and a picture from which it was easy to identify the rightful owner.

Second Lieutenant Hepler, who, as above mentioned, slept in the same Bay with Harris and Hicks, went to his quarters at approximately 4:45 p.m., 7 October 1943 and discovered accused, whom he had not previously known, but whom he definitely identified at the trial; in the Bay between the beds of Hicks and Harris. Accused at the time made some remark about a radio program and left two or three minutes later (R. 6R).

On 29 October 1943 Major Nat H. Aronsohn had the serial numbers of a five and ten dollar bill recorded and delivered the bills to First Lieutenant James P. Champion, Jr. The latter placed the two bills in his wallet, went to the physical training room of barracks 2188, dressed for calisthenics, and when he went to physical training at approximately four o'clock, left his trousers, with the wallet showing in a conspicuous position, hanging inside the physical training room on the door knob. Upon his return at approximately five o'clock, he discovered that the money was missing from his wallet and immediately reported the loss to Major Aronsohn (R. 6F).

During Lieutenant Champion's absence from barracks 2188, First Lieutenant Robert F. VanVoorhis, who was on watch, saw accused enter and some five minutes later leave the barracks (R. 6K, 6L). Lieutenant Frederic A. Channer also witnessed accused's departure from the building (R. 6N).

Shortly after Lieutenant Champion had discovered and reported that the two bills were missing, Major Aronsohn and Lieutenant Channer went in search of accused. Upon finding him, they explained that they were investigating the losses of money that had been occurring and, after warning him of his rights, asked if he would voluntarily cooperate with them. Accused, having expressed his willingness to cooperate, was asked to detail his activities since two o'clock that afternoon. In purporting

to do this, he not only failed to mention that he had been to barracks 2188, but specifically denied that he had been there. Upon request, accused produced his wallet, which was found to contain a ten dollar bill bearing a serial number which was recognized by Major Aronsohn to be the same as had been noted on, and previously recorded by him, the bill he had delivered to Lieutenant Champion (R. 6T).

Accused was then requested to accompany the officers to Headquarters, which he did. He there, in the presence of a number of officers, identified his own wallet, and himself read the serial number of the ten dollar bill. It was checked against the record that had been kept of the bill delivered to Lieutenant Champion and found to be the same (R. 6"O"). Accused at first claimed the bill had been delivered to him, as part of change for a twenty dollar bill, but later, after talking to his executive officer and after having had Article of War 24 read to him, he made a voluntary written confession to having taken the fifteen dollars from Lieutenant Champion's trousers while the latter was at physical training (R. 6T, Ex. D).

The following morning, after Article of War 24 had been again read to him, accused made an additional confession in writing, whereby he admitted a series of perhaps ten thefts, most of which had been perpetrated in barracks 2188, and particularly confessed to taking one wallet and the money it contained and the money from another wallet from "the two cots in the corner of the bay in BOQ 2188". One wallet, according to the confession, contained approximately $60 and the other about $80. He threw the wallet on the side of the road in Columbus on his way home (Ex. E). After he was apprehended, accused sent Major Aronsohn a check for $171 with the request that it be prorated among those who had lost money (R. 6AA, 6BB).

4. The defense offered no witnesses, but the accused, having been advised of his rights, elected to make an unsworn statement. It was in substance as follows:

He had led a more or less sheltered life before entering the Army and had always been accustomed to having money and most of the things he desired. Around graduation time he married and was resolved to stay married. He purchased a car and had to make other purchases and became rather heavily indebted. He did not want to let his wife know of his troubles and resorted to the thefts to keep going. His conscience had bothered him, and after he was apprehended he had done what he could to make restitution (R. 6CC).

5. The same acts are charged, in identical Specifications, as violations of both Article of War 93 and Article of War 95. To this there can be no valid objection. The Manual for Courts-Martial, 1928,

p. 186, in discussing Article of War 95, provides:

> "This article includes acts made punishable by any other Article of War, provided such acts amount to conduct unbecoming an officer and a gentleman; thus, an officer who embezzles military property violates both this (A.W. 95) and the preceding article (A.W. 94)".

So also an officer who steals from his fellow officers violates both Article of War 95 and Article of War 93.

The accused pleaded guilty to all Charges and Specifications. A plea of guilty is a judicial confession made in open court and is the highest form of confession known to the law. It admits all the facts set forth as to each and every allegation in the Specifications of the Charges to which it is offered. After a plea of guilty it is not necessary for the prosecution to make out a case (CM 118766; CM 134185; sec. 378 (3), p. 189, Dig. Ops. JAG, 1912-40).

The prosecution did, however, in the subject case, adduce the strongest kind of circumstantial evidence in addition to two extra-judicial confessions made by accused, showing beyond reasonable doubt that he is guilty of having committed the theft charged in each Specification.

In taking the action whereby Specifications 1 and 2 of both Charges were consolidated, the court was doubtless actuated by the provisions of Par. 27 and 149g, MCM, 1928. Par. 27 provides that:

> "One transaction, or what is substantially one transaction, should not be made the basis for an unreasonable multiplication of charges against one person. * * * So also the larceny of several articles should not be alleged in several specifications, one for each article, when the larceny of all of them can properly be alleged in one specification (see 149g, Larceny); * * * However, there are times when sufficient doubt as to the facts or law exists to warrant making one transaction the basis for charging two or more offenses."

Par. 149g, among other things, provides:

> "* * * Where the larceny of several articles is substantially one transaction, it is a single larceny even though the articles belong to different persons. Thus, where a thief steals a suitcase containing the property of several

individuals, or goes into a room and takes property belonging to various persons, there is but one larceny, which should be alleged in but one specification."

Whether or not sufficient doubt, as to the law and facts, existed in the minds of those responsible for drafting the specifications upon which accused was arraigned in this case to warrant separate specifications is not a matter of essential inquiry. The convening authority directed that he be tried upon the specifications as submitted; he was arraigned upon them as they appeared upon the Charge Sheet; he pleaded guilty to each; competent evidence was introduced at the trial to prove the guilt so confessed beyond any reasonable doubt, notwithstanding the pleas. That the court, at request of counsel for accused, irregularly combined the specifications at the end of the trial and just prior to the findings cannot possibly have resulted in the violation of any substantial rights of accused. In fact, this procedure resulted in a distinct benefit to the accused by reducing the number of the larcenies originally alleged. The irregularities of alleging the amounts stolen as a single sum and the ownership thereof as joint when the law member announced the amendment of the specification as well as any error in the findings thereon, were cured by the action of the reviewing authority and constituted no harm to accused.

6. War Department records disclose that the accused was born on 8 December 1921 and was 21 years of age at the time of the commission of the offenses here alleged. He is a high school graduate. He is married but has no children. He entered pre-flight training at Maxwell Field, Alabama, in November 1942 and was commissioned a second lieutenant, Army of the United States, at Marianna Army Air Field, Marianna, Florida, on 30 June 1943. He reported for active duty 30 June 1943.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings of guilty and the sentence. A sentence of dismissal is authorized upon conviction of violation of Article of War 93 and is mandatory upon conviction of violation of Article of War 95.

William A. Pounds, Judge Advocate

Parke Hepburn, Judge Advocate

Herbert R. Frederick, Judge Advocate

1st Ind.

War Department, J.A.G.O. 18 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 John A. Kangiser (0-806852), 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, Greenhaven, New York, be designated as the place of confinement.

3. Consideration has been given to the attached communication from accused, dated 5 December 1943, urging clemency in his behalf.

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.
1 - Record of trial.
2 - Dft. ltr. for sig. S/W
3 - Form of action
4 - Ltr. dated 5 Dec. 43 from accused.

(Sentence confirmed. G.C.M.O. 124, 11 Mar 1944)

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