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

(1)

SPJGV
CM 247725

15 FEB 1944

UNITED STATES v. First Lieutenant ALBERT H. HATCHETT (0-258569), Air Corps.	ARMY AIR FORCES TACTICAL CENTER Trial by G.C.M., convened at Army Air Forces Tactical Center, Orange County, Florida, 24 November 1943. Dismissal and total forfeitures.

OPINION of the BOARD OF REVIEW
TAPPY, KIDNER and RIVES, 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 93rd Article of War.

Specification 1: In that First Lieutenant Albert H. Hatchett, 348th Night Fighter Squadron, 481st Night Fighter Operational Training Group, formerly Commanding Officer, 12th Aviation Squadron and formerly Commanding Officer, 380th Aviation Squadron, did, at or near Orlando, Florida, on or about 1 June 1943, feloniously embezzle by fraudulently converting to his own use $100.00, lawful money of the United States of America, the property of Technical Sergeant John L. Brooks, 382nd Aviation Squadron, formerly a member 12th Aviation Squadron, entrusted to him for safekeeping by the said Technical Sergeant John L. Brooks.

Specification 2: In that First Lieutenant Albert H. Hatchett, 348th Night Fighter Squadron, 481st Night Fighter Operational Training Group, formerly Commanding Officer, 12th Aviation Squadron and formerly Commanding Officer, 380th Aviation Squadron, did, at or near Orlando, Florida, on or about 6 October 1943, feloniously embezzle by fraudulently converting to his own use $200.00, lawful money of the United States of America, the property of Private Edward Hughey, 380th Aviation Squadron, entrusted to him for safekeeping by the said Private Edward Hughey.

Specification 3: In that First Lieutenant Albert H. Hatchett, 348th Night Fighter Squadron, 481st Night Fighter Operational

(2)

Training Group, formerly Commanding Officer, 12th Aviation Squadron and formerly Commanding Officer, 380th Aviation Squadron, did, at or near Orlando, Florida, on or about 6 October 1943, feloniously embezzle by fraudulently converting to his own use $30.00, lawful money of the United States of America, the property of Private Elbert Bradham, 380th Aviation Squadron, entrusted to him for safekeeping by the said Private Elbert Bradham.

Specification 4: In that First Lieutenant Albert H. Hatchett, 348th Night Fighter Squadron, 481st Night Fighter Operational Training Group, formerly Commanding Officer, 12th Aviation Squadron and formerly Commanding Officer, 380th Aviation Squadron, did, at or near Orlando, Florida, on or about 9 October 1943, feloniously embezzle by fraudulently converting to his own use about $65.00, lawful money of the United States of America, the property of Corporal James A. Booth, 380th Aviation Squadron, entrusted to him for safekeeping by the said Corporal James A. Booth.

He pleaded not guilty to and was found guilty of the Charge and all Specifications thereunder. 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. The evidence for the prosecution in support of Specification 1 of the Charge shows that on or about 2 April 1943, Technical Sergeant John L. Brooks, 12th Aviation Squadron, having $350 in his possession, deposited it with accused, who was then adjutant of the 12th Aviation Squadron, for safekeeping until the following day (R. 10-13, 71). Accused accepted the money and placed it in an envelope which he marked and sealed (R. 13, 25). About 3 April, Sergeant Brooks asked accused for the entire $350. Accused said he had put the money in his safe at home and would keep it (R. 13). Sergeant Brooks then agreed to let accused keep the money as he had no need for it and would simply have placed it in the bank (R. 13, 14). In May, prior to leaving camp on furlough, Sergeant Brooks requested the entire $350 from accused, whereupon accused gave him $170 stating that he (accused) had used a portion of the money. Upon return from his furlough (date not specified) Sergeant Brooks asked for the balance of $180 which accused agreed to deliver the following morning but failed to do so. Later in June and July accused made additional payments totaling $80, leaving a balance due of $100 (R. 14-16). About 1 October, Sergeant Brooks asked accused for the balance of $100. Accused promised to give it to him the following day but failed to do so (R. 17-18). On 18 November Captain Thomas L. Coleman, who had been given the money by accused, returned the $100 to Sergeant Brooks (R. 24, 68). Accused admitted converting this money to his own use without the consent of Sergeant Brooks (R. 84).

In support of Specification 2 of the Charge the evidence shows that on or about 6 August 1943, Private Edward Hughey, now 381st Aviation Squadron, but on 6 August a member of accused's organization, gave to accused two $100 bills or a total of $200 for safekeeping until needed (R. 27-30). About 6 September, prior to going on furlough, Private Hughey asked accused for his money. Accused promised to give it to him but failed to do so (R. 30). Thereafter, on different occasions Private Hughey demanded return of his money from accused without result (R. 31-34). Private Hughey finally received his money from Captain Coleman on 19 November. Accused admitted converting this money to his own use without the consent of Private Hughey (R. 84).

In support of Specification 3 of the Charge the evidence shows that on or about 1 August 1943 Private Elbert Bradham, a member of accused's organization, gave to Staff Sergeant Raymond W. Jenkins, same organization, the sum of $40 for delivery to the accused for safekeeping until such time as Private Bradham would call for it. Sergeant Jenkins put the $40 in an envelope which was marked on the outside thereof "$40.00, Private Elbert Bradham" and gave the envelope with the money therein to the accused at his home (R. 49, 50). On 6 October Private Bradham asked accused for the return of his $40, whereupon accused gave Private Bradham $10, stating that the balance was at his home and that he would send the money to Bradham at his home in Detroit, Michigan, where Private Bradham was going on furlough. Private Bradham received a postcard at Detroit, Michigan, stating that accused had been sick and that Private Bradham would receive his $30 within a few days. Private Bradham never received his money until 15 November when it was paid to him by Captain Coleman for and on behalf of accused (R. 49). Accused admitted that he converted the $30 to his own use without Private Bradham's consent (R. 84).

In support of Specification 4 of the Charge the evidence shows that in June 1943, Corporal James A. Booth, 12th Aviation Squadron, a former member of accused's organization, gave to accused the sum of $285 to keep for him until needed (R. 52-53). Thereafter, on 20 June Corporal Booth asked accused for $50 and received it. On 7 July he asked accused for $50 and received it. These and other partial payments made at various times, totaled in all $220, leaving a balance due of $65 (R. 54, 55). About 8 October Corporal Booth left the organization to attend school and requested Captain Charles T. Munn, then commanding officer of the 380th Aviation Squadron, to obtain for him the balance of the money due Booth from the accused (R. 55-56, 62). Accused promised Captain Munn that he would bring the money the following day but did not do so (R. 63). On 18 November accused paid the money to Captain Coleman who gave it to Corporal Booth (R. 60, 68). Accused admitted that he converted the $65 to his own use without Corporal Booth's consent (R. 85).

4. The defense called Lieutenant Colonel Harold F. Robertson, Medical Corps, Orlando Station Hospital, who testified that he had recently examined accused (R. 74) and described him as a "psychoneurotic of the reactive

depression type", such individuals being subject to depression, sometimes "to the point of attempting various situations with regard to their lives", and stated that the accused suffered from a duodenal ulcer which could have caused him to "react abnormally to certain situations" (R. 75). However, Colonel Robertson stated that he could find nothing in accused's condition to affect his realization of right and wrong (R. 77).

Accused, after being advised of his rights, elected to take the stand and testified under oath substantially as follows: He was a reserve officer and came on active duty 1 March 1942. He received the monies in the amounts and from the persons set forth in the Specifications of the Charge for safekeeping (R. 80-82). There was no date set for the return of the monies. He intended to return the monies (R. 80-84). On cross-examination accused admitted that he had converted the monies received from the parties as set forth in the Specifications of the Charge to his own personal use without the consent of the owners; that part of the monies had been used to buy a car in April 1943 (R. 84-87, 89). He stated that he intended to repay the monies by selling his car but admitted that he had not tried to sell the car prior to 2 November 1943. The accused sold his car prior to 16 November and raised the money to pay back all parties in full (R. 88, 89).

5. The evidence fully supports the findings of guilty as to all Specifications and the Charge. The testimony clearly shows that the accused received the monies from the parties thereto as set forth in the Specifications of the Charge for safekeeping; that he spent and appropriated the monies to his own use without their consent for the payment of various personal obligations. In spite of repeated promises to repay the monies to the parties entitled thereto the accused failed to make complete restitution until 18 November 1943, two days after the service of the court-martial charges upon him. Accused testified that he intended at all times to return the monies and had no intention "of any fraud--of any embezzlement whatsoever" (R. 86). Nevertheless, the requisite elements of the offense of embezzlement are present as defined in paragraph 149h, Manual for Courts-Martial, 1928, to wit:

> a. That the accused was entrusted with certain money by and for a certain other person.
>
> b. That he fraudulently converted or appropriated such money.
>
> c. That such conversion or appropriation was with fraudulent intent.

The only issue in this case is whether the conversion or appropriation was with fraudulent intent. The fraudulent appropriation is to be inferred from the facts. Proof that accused appropriated the money to his own personal use

and that he failed to account for and pay over the money on proper and lawful demand constitute circumstances from which the intent to embezzle will be inferred (9 R.C.L., sec. 20, p. 1279; Wharton's Criminal Law, Vol. II, sec. 1308, 1311 (Note 18)). After the embezzlement an offer or intent to restore the money and the return of the money does not purge the accused of his guilt or prevent his punishment (Clark's Criminal Law, 2d Ed., p. 313).

6. Accused is about 37 years of age and married. He attended Auburn College, Auburn, Alabama, where he majored in science but did not obtain a degree. He was commissioned second lieutenant in the Field Artillery, Reserve Corps, 15 May 1929, and appointed first lieutenant on 16 June 1932. He entered on active duty 1 March 1942 and has been serving continuously until this time.

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. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 93.

Thomas N. Jappy, Judge Advocate.

Herbert M. Kiedner, Judge Advocate.

Edwin E. Finer, Judge Advocate.

SPJGV
CM 247725

1st Ind.

War Department, J.A.G.O., 22 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 First Lieutenant Albert H. Hatchett (0-258669), 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, to support 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 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 action.

(Sentence confirmed but forfeitures remitted. G.C.M.O. 193, 25 May 1944)

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

SPJGQ
CM 247753

2 FEB 1944

UNITED STATES	)	FIELD ARTILLERY REPLACEMENT TRAINING CENTER
v.	)	Trial by G. C. M., convened at Fort Sill, Oklahoma, 4 January 1944. Dismissal and total forfeitures.
Second Lieutenant JAMES O. DAVIS (O-1550355), Ordnance.	)	

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 O. Davis, Five Ninety-ninth Ordnance Ammunition Company; alias James Batista Davis, Five Ninety-ninth Ordnance Ammunition Company, alias First Lieutenant James B. Davis, Five Ninety-ninth Ordnance Ammunition Company, did, at Washington, District of Columbia, on or about 10 December 1943, willfully, wrongfully, and unlawfully appear in improper uniform by wearing unauthorized insignia of a First Lieutenant, Army of the United States, in a public place, thereby falsely representing himself to have an official status which he did not have, he the said James O. Davis being at said time, a Second Lieutenant, Army of the United States.

Specification 2: In that Second Lieutenant James O. Davis, Five Ninety-ninth Ordnance Ammunition Company; alias James Batista Davis, Five Ninety-ninth Ordnance Ammunition Company, alias First Lieutenant James B. Davis, Five Ninety-ninth Ordnance Ammunition Company, did, at Washington,

District of Columbia, on or about 6 August 1943, willfully, wrongfully, and unlawfully appear in improper uniform by wearing unauthorized insignia of a First Lieutenant, Army of the United States, in a public place, thereby falsely representing himself to have an official status which he did not have, he the said James O. Davis, being at said time, a Second Lieutenant, Army of the United States.

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

Specification 1: In that Second Lieutenant James O. Davis, Five Ninety-ninth Ordnance Ammunition Company; alias James Batista Davis, Five Ninety-ninth Ordnance Ammunition Company, alias First Lieutenant James B. Davis, Five Ninety-ninth Ordnance Ammunition Company, did, at Fort Sill, Oklahoma, on or about 15 November 1943, wilfully make a false official statement to Brigadier General Charles R. Doran, Commanding General, Seventeenth Field Artillery Brigade, in his application for leave using the following words, "Address while on leave: 1010 E. Blancke St., Linden, New Jersey.", which statement was false and made with the intent to deceive the said Brigadier General Charles R. Doran.

Specification 2: In that Second Lieutenant James O. Davis, Five Ninety-ninth Ordnance Ammunition Company; alias James Batista Davis, Five Ninety-ninth Ordnance Ammunition Company, alias First Lieutenant James B. Davis, Five Ninety-ninth Ordnance Ammunition Company, did, at Washington, District of Columbia, on or about 9 December 1943, willfully make a false statement to Reverend George L. Gingras, Assistant Pastor of St. Francis De Sales Catholic Church, Washington, District of Columbia, by answering "No" to the following question: "Have you ever attempted or contracted marriage?", which answer was known to the said James O. Davis to be false, the said James O. Davis being at that time a

> married man, and which statement was made with the intent to deceive the said Reverend George L. Gingras and to cause the said George L. Gingras to perform a bigamous marriage between James O. Davis and Dorothy Ellen O'quest, this to the scandal and disgrace of the military service.

He pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence of any 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 two years. The reviewing authority approved only so much of the sentence as provides for dismissal and total forfeitures and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution consisted entirely of stipulations and written statements of witnesses admitted by the court with the consent of the defense counsel. It was stipulated that the accused is, and has been since 24 October 1942, a second lieutenant in the Army of the United States (R. 6). It was stipulated that if one Dorothy E. O'Quest (at present 22 years of age) were present in court she would testify that in 1938, through the personal column of a magazine, she commenced corresponding with the accused, who then used the name of James Batista, and gave his address as 1010 E. Blancke Street, Linden, New Jersey. This mutual correspondence continued for two years. During that time they averaged two letters per week. At that time Miss O'Quest was living in Missouri. She graduated from a Catholic secretarial school in May 1940 and was given, upon her application, a Civil Service clerical position in Washington, D. C., and moved to that city in July 1940. In June of 1941 she sent a birthday card to the accused, giving her Washington address and received a letter from him six weeks later in which he stated he was in the Army and signed his name as James B. Davis. Correspondence continued intermittently until January or February 1942 when, by arrangements made through correspondence, the accused called upon her in Washington. He was dressed in the uniform of a master sergeant. They spent the evening together. He called several Saturday nights thereafter until May 1942. In his letters the accused told her he was of Latin American extraction and she thought he had corresponding characteristics.

In May 1942 she received a letter from him signed "First Lieutenant James Batista" and stating that because of his military duties he would not be able to write to her any more. In December 1942 she received both a letter and a personal telephone call from accused and as a result he personally called on her in Washington dressed in the uniform of a second lieutenant in the Army of the United States. He told her he had been overseas and was then stationed in Aberdeen, Maryland. He called upon her about two Sundays per month during the winter and spring of 1942-43. His letters became affectionate and her replies took on the same tone. About June 1943 he asked her to marry him. They agreed to be married after the war but he soon insisted upon an earlier wedding. Accused spent a fourteen day leave in Washington in August and gave her an engagement ring. Accused had told her he was a Roman Catholic so she decided that it would be to their best interests if she would turn Catholic before their marriage. For that reason she did not marry him during his leave in August (1943). She thereupon started taking instructions in the Catholic faith and was admitted to that faith on 8 December 1943. In the meantime accused, after several transfers, was stationed at Fort Sill, Oklahoma. By letter he informed her that he expected another leave in early December (1943) when he would come to Washington and marry her. He requested her to make the necessary arrangements. On 1 December 1943 she applied for a marriage license which was issued on 7 December 1943 in accordance with her application (Pros. Ex. 4). It was directed to Reverend George L. Gingras, a Catholic priest, and authorized him to celebrate the rites of marriage between James Batista Davis of Linden, New Jersey, and Dorothy Ellen O'Quest of Marshall, Missouri. She procured a bridal gown and veil. She informed accused of her wedding plans. He wired her that he would have to postpone his leave as he would not have time to go through with all the plans she had made. She wired him that her planned wedding would not take any more time than any other kind and that all arrangements had been made.

More telegrams and telephone calls followed but she could not get him to set a definite date for the wedding. Accused arrived in Washington about noon of 8 December 1943. She had arranged for a room for him in her neighborhood. He came to the office where she was employed and she introduced him to her employer and others in the office as her fiance. She took him to her church where he witnessed her baptism in the church and her first confession that followed. Arrangements were made with Father Gingras to marry them Friday morning, 10 December 1943, at 9:30. On 9 December they both took Holy Communion from Father Gingras. That evening they held a

wedding rehearsal in the church in the presence of Father Gingras. A Mr. W. L. Hauser, his two daughters and other friends of Miss O'Quest attended and took part in the rehearsal. About eleven o'clock that night she received a telephone call from Father Gingras that he had just ascertained from the War Department that the accused was a married man and had a child nine years of age. As a result the wedding was "called off". She learned that the accused was placed under arrest on 10 December 1943. Miss O'Quest turned over to her employer the engagement ring to deliver to the accused.

During his leave in August 1943 and also upon his arrival in Washington on 8 December 1943 the accused was wearing silver bars upon his uniform denoting the rank of a first lieutenant (Pros. Ex. 1).

It was further stipulated that if Reverend George L. Gingras were present in court he would testify (R. 8) that he is the assistant pastor of St. Francis DeSales Catholic Church, Washington, D. C., and a duly ordained priest of the Roman Catholic Church. He met Miss Dorothy O'Quest in July 1943 and instructed her, and finally baptized her, in the Catholic faith. On 8 December 1943 she introduced the accused to him. After the baptism the three returned to the rectory to get

> "information for our Pre-Nuptial Investigation for which we use a printed form ***. I hereby attach to this my statement, a true and correct copy of the answers I made on this Pre-Nuptial Investigation Form in my own handwriting in accordance with the information, or failure of information, given by Lt. Davis to me on said afternoon in our Rectory in the presence of Miss O'Quest, and in my own handwriting I have marked said true copy as Exhibit 1 hereto, initialing same."

Attached to the typewritten statement of Reverend Gingras was a printed form on one side of which was printed at the top "Pre-Nuptial Investigation - Bridegroom". The answers to the various printed questions were typed. Question No. 15 was, "Have you ever attempted or contracted marriage before?". Immediately following the question was typed "No". At the bottom of the form

was a line for the signature of the bridegroom and one for the priest. "James B. Davis" and "George L. Gingras" were typed on these two lines respectively. At the very bottom of the form was a signature in ink reading: "Exhibit #1 Rev. George L. Gingras" (Pros. Ex. 3).

It was further stipulated (R. 9) that if Detective Sergeant Harold H. Hodge were present in court he would testify (Pros. Ex. 5) that he was present when accused was arrested on 10 December 1943. Accused was at that time wearing on his trench coat the silver bars indicative of a first lieutenant. Subsequently accused removed the bars and delivered them to the witness who turned them over to a Sergeant F. R. Niles.

Thereupon accused freely and voluntarily made and signed a written statement (Pros. Ex. 6) wherein the accused, after tracing his life from the date of his birth, 11 June 1910, to June 1932, admitted that during the month of June 1932, while living at 1024 East Blancke Street, Linden, New Jersey, he married one Dorothy Williams and their child was born in December of 1932. He and his wife separated a short time after the child was born. He subsequently moved to 1010 East Blancke Street, Linden, New Jersey. He told of corresponding with Miss O'Quest during and following 1939. He was drafted into the Army on 9 May 1941 and after numerous transfers he was promoted to master sergeant on 28 March 1942. He entered OCS on 15 July 1942 and was commissioned a second lieutenant 24 October 1942, which rank he still holds. In September 1943 his organization moved to Fort Sill, Oklahoma. He visited Miss O'Quest a few times in Washington and continually corresponded with her while he was in the service. On or about 5 November 1943 he received a letter from her in which she told him that all arrangements had been made for them to be married. He replied by letter in which he "raised Cain with her about making the arrangements without saying anything about it". She replied that she had just started to make arrangements and had not actually done anything. In the telephone calls and telegrams that followed he tried to prepare her for the fact that he was not going to Washington, but the more he talked the deeper he became enmeshed. He tried to postpone his leave but he had to take it in order to give the other officers a chance to take their leave in time. He arrived in Washington on a Tuesday without letting her know about it until he telephoned her in that city. He intended to dissuade her from her plans. He met her at her office. She insisted upon introducing him to her friends and showed him all

of the preparations which she had made for the wedding. He could not figure any way out and "stalled off" until the last minute, when he was picked up by the police. He was relieved when they picked him up. On 9 December 1943 he went over to see Father Gingras four times trying to get up courage enough to tell him that he was married and could not go through the ceremony, but he "didn't know how to tell the girl because she had made all preparations".

It was also stipulated (R. 10) that the statement made by the accused and summarized above was voluntary and made with full knowledge of his rights regarding the making of statements. The statement was admitted in evidence with the consent of defense counsel (R. 11).

It was further stipulated that if Detective Sergeant H. H. Carper, Metropolitan Police Force, Washington, D. C., and First Lieutenant William V. McDermott, Corps of Military Police, were present in court they would testify that they saw the accused in Washington on 10 December 1943, at which time he had upon the shoulders of his trench coat silver bars indicative of a first lieutenant and when asked, "When did you promote yourself", replied, "two days ago", "December 8, 1943" (Pros. Exs. 7, 8; R. 11-12).

There was admitted in evidence without objection the accused's written request for leave (Pros. Ex. 9a). It was dated 15 November 1943 and addressed to "COMMANDING GENERAL, Headquarters 17th Field Artillery Brigade, Fort Sill, Oklahoma". Paragraph 6 thereof read: "Address while on leave: 1010 E. Blancke St., Linden, New Jersey". It requested 14 days leave on or about 7 December 1943. The leave was approved through military channels up to and including Brigadier General Charles R. Doran, the Commanding General, who wrote thereon "Approved C.R.D."

It was stipulated that the accused is and was married to Dorothy M. Davis, 1010 E. Blancke Street, Linden, New Jersey, and that they have one child by the marriage (Pros. Ex. 10).

4. The accused, having been fully advised of his rights, elected to remain silent but through his counsel stated that he never intended to go through with the ceremony but tried up until

the last minute to find a way out, that when he applied for leave he fully intended to go to Linden, New Jersey, where his home is and where his mother lives. He had no address in Washington but his mother could reach him in Washington. He was only on his third day of leave when he was apprehended. He had no intention of deceiving General Doran in his application for leave (R. 14-15).

5. The Specifications under Charge I allege that accused did on or about 10 December 1943 and 6 August 1943, at Washington, D. C., willfully, wrongfully and unlawfully appear in improper uniform by wearing the unauthorized insignia of a first lieutenant when in fact he was at the time a second lieutenant. It was shown by three or more witnesses and admitted by the accused that he did knowingly wear upon his uniform on 10 December 1943, at Washington, the silver bars indicating his rank as that of a first lieutenant when in fact he held the rank of a second lieutenant. The evidence was ample and uncontradicted. The only evidence of the commission of the same offense in August was contained in the sworn statement of Miss O'Quest admitted without objection and not denied by the accused other than by his plea of not guilty.

She swore under oath that accused, during his leave in August, while visiting in Washington, wore the silver bars and not the gold. She saw and was with him frequently during that period of time and had the opportunity and the interest to observe. There appears to be no good reason for doubting her word. In the opinion of the Board the evidence is therefore legally sufficient to support the findings of guilty of Charge I and both of its Specifications. Appearing in public in a uniform other than the one prescribed for the wearer is a violation of Article of War 96 (MCM, par. 104c, p. 100).

Specification 1 of Charge II alleges that the accused willfully made a false official statement to his commanding general in his application for a leave on 15 November 1943 when he set forth that his "address while on leave" would be 1010 E. Blancke St., Linden, New Jersey, and that he thereby intended to deceive the general. It appears in several places in the record that the accused's home address or legal residence on 15 November 1943 and for many years prior thereto was 1010 E. Blancke Street, Linden, New Jersey. There was no evidence that this residence was ever changed. By some railroads Washington is on a direct line of travel from Fort Sill to

Linden, New Jersey. When accused applied for leave he had no address in Washington and therefore could give none. The real purpose of requiring the address of an officer about to go on leave is to enable his commanding officer to communicate with the officer concerned in case of necessity. The only evidence of the only method of communication with this accused was produced by the prosecution in the accused's sworn statement. It there appears that he could be contacted through 1010 East Blancke Street, Linden, New Jersey, where his mother or other members of his family live. It would be unjust to hold that his giving of this home address as his address during his leave was a false official statement made with intent to deceive. In the first place, as stated, it is debatable whether the address is false or correct, and secondly, it was never shown beyond a reasonable doubt that the accused intended to deceive anyone in supplying his home address as his address during his leave. To hold otherwise would mean that an officer may not stray away during his leave from the address supplied in his application for leave without the risk of being charged as in the subject case. The finding of guilty of this Specification should not therefore be sustained.

With reference to Specification 2 of Charge II, the bizarre tale given by Miss O'Quest and Reverend Gingras of the accused's perfidy and deceit, substantially admitted by the accused, and denied by him in only a few minor details, clearly proves beyond any doubt that the accused conducted himself in a manner disgraceful and scandalous to the service and unbecoming an officer and gentleman. This Specification condemns only a part of his nefarious scheme, namely, the deceit practiced upon the Reverend Gingras, a clergyman authorized by civil law to perform marriages, in representing himself to be an unmarried man in order to induce him to perform a bigamous marriage in a case involving miscegenation. It was only the sagacity of the priest that prevented the ceremony and saved the accused from committing bigamy. The evidence is legally sufficient to support the finding of guilty of this Specification.

6. The records of The Adjutant General show the accused to be 33½ years of age. He graduated from Linden (New Jersey) High School in 1928, attended Newark Technical School for three years and graduated from a six month course in radio engineering in 1932 at "R.C.A." Institute. From 1929 to 1941 he owned and operated "General Electric Supply Co.", engaged in the business of radio repairs and service. In making application for appointment as an officer he described himself as colored. He gave 1010 E. Blancke Street, Linden, New Jersey,

as his permanent address and also as the address of his wife, his mother and his father. He is the father of one child. He served as an enlisted man from 5 September 1941 to 24 October 1942 and reached the grade of master sergeant. He was commissioned a second lieutenant of Ordnance on 24 October 1942.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is not legally sufficient to support the finding of guilty of Specification 1, Charge II, legally sufficient to support the findings of guilty of the remaining Specifications and of the Charges, legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is mandatory upon conviction of violation of Article of War 95 and is authorized upon conviction of violation of Article of War 96.

William A. Rounds, Judge Advocate.

Carl Eckstein, Judge Advocate.

Herbert A. Fredman, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 9 - 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 James O. Davis (0-1550355), Ordnance.

2. I concur in the opinion of the Board of Review that the record of trial is not legally sufficient to support the finding of guilty of Specification 1, Charge II, legally sufficient to support the findings of guilty of the remaining Specifications and of the Charges, legally sufficient to support the sentence as approved by the reviewing authority 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 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 Executive action

(Finding of guilty of Specification 1 of Charge II disapproved. Sentence as approved by reviewing authority confirmed but forfeitures remitted. G.C.M.O. 148, 30 Mar 1944)

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

(19)

SPJGV
CM 247755

24 FEB 1944

UNITED STATES	5TH ARMORED DIVISION
v.	Trial by G.C.M., convened at Indiantown Gap Military Reservation, Pennsylvania, 4 January 1944. Dismissal.
Second Lieutenant ALBERT J. SAUERER (0-1014874), Army of the United States.	

OPINION of the BOARD OF REVIEW
TAPPY, KIDNER and RIVES, 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 Albert J. Sauerer, Headquarters Company, 5th Armored Division, did, at the Indiantown Gap Military Reservation, Pennsylvania, on or about 26 December 1943, with intent to deceive Captain Henry K. Staub, Headquarters Commandant, 5th Armored Division, officially state to the said Captain Henry K. Staub, that he had personally checked the fire in the furnace of building T 6-102 and that there was a good fire in said furnace and the building was heated, which statement was known by the said Second Lieutenant Albert J. Sauerer to be false and untrue.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence, but recommended that the sentence of dismissal be suspended, and forwarded the record of trial for action under the 48th Article of War.

3. The evidence shows that Henry K. Staub, Captain, Infantry, Headquarters Company, 5th Armored Division, and stationed at Indiantown Gap Military Reservation, Pennsylvania, was Headquarters Commandant of the 5th Armored Division and among other things was charged with the duty of taking

care of visiting officers and officials visiting the division. Accused was a member of his Headquarters Company. On the afternoon of 26 December 1943 Captain Staub telephoned accused and informed him that General Shugg was expected to arrive and instructed accused to see that the cottage (Bldg. T 6-102), which the general was to occupy, was put in readiness. This conversation took place about 2:30 in the afternoon of 26 December 1943. About 5:30 or 6:00 p.m. or maybe later, he again telephoned accused and asked him if the cottage was in readiness. Accused said it was, and that he had personally checked the fire; that there was a good fire in the furnace and that everything was in readiness for the general (R. 7-8). Sometime after 7:00 p.m. Captain Staub had a call from Major Blasdel, the Division Duty Officer, who informed him that General Shugg had arrived and was going to his cottage. Several minutes later Major Blasdel again called him, stating that the general had found the cottage to be cold, and had accordingly moved to the 81st Armored Tank Battalion Officers' Quarters where he could get a room and stay for the night. Whereupon, Captain Staub again telephoned accused, who told him that "the cottage had been warm and reaffirmed that there was a good fire" in the furnace in Building T 6-102, and that he had checked the fire personally (R. 8). Captain Staub then went to the cottage (Bldg. T 6-102) and found there was no fire in the furnace. He reached into the fire pit and found no live coals, only gray coals. There was some indication that a fire had been built, but the coals were burned out and there was no heat whatever. There was no fresh coal in the furnace. All the coals were burned-out ashes or dead coals. The grates were cold. After that and about 8:10 p.m., he went to accused's quarters and accompanied accused back to the cottage (Bldg. T 6-102) where they found no fire whatever (R. 12). Again accused told him there had been a fire there in the afternoon. He then took accused to the orderly room of Headquarters Company, where he left him, with instructions to get some enlisted men and make a fire. The witness then called the Chief of Staff, 5th Armored Division, and was instructed to go and see General Shugg and then bring the accused to see the Chief of Staff. He found accused at the cottage (Bldg. T 6-102) and brought him back to the quarters of the Chief of Staff. It was now between 8:30 and 9:00 o'clock p.m. (R. 8-12).

The Chief of Staff asked accused if he had told Captain Staub that there was a fire in the furnace that afternoon, and accused admitted he had. He then asked accused if he had checked on the fire and accused said he had not (R. 9).

4. For the defense:

Larry H. Greenwood, Captain, Infantry, Commanding Officer, Headquarters Company, 5th Armored Division, same station, was sworn as a witness for the defense, and testified that accused had been a member of his command since 18 April 1943 and that his principal duties had been platoon leader and supply officer. Accused's character and the performance of his duties had been excellent. He was a very dependable officer and his honesty was

unimpeachable. Notwithstanding the charges against accused he would believe the word of accused "in the future, or in combat" (R.12-13).

Accused testified that he had been a commissioned officer approximately one year. Prior to 26 December 1943 (time not stated) Captain Staub had informed him that he was to prepare two buildings for occupancy which belonged to XIII Corps. He also told him to get a detail to take care of the fires, which he did. On Saturday (25 Dec. 1943) after Captain Staub informed him that some officers would arrive Sunday morning and to see that the buildings were prepared and heated, he contacted the custodian officers in the areas where these buildings were located and arranged for cots, bedding, etc. He then instructed his staff sergeant to contact the post stockade and get a prisoner detail to prepare the designated buildings by turning on the water and heating them. He was in the office at the time his staff sergeant made the call and was then assured by the sergeant that he had made the necessary arrangements to accomplish these acts.

The next day (Sunday, 26 Dec.) Captain Staub telephoned him about 3:30 in the afternoon and inquired if there was heat in the buildings and he replied that he did not know, but would check on it. He then called the prison officer, who was not in, but the charge of quarters assured him the fires would be made if they had not already been built. Thus, when Captain Staub telephoned him the second time about 5:00 or 5:30 p.m., and relying upon the assurances given him by the charge of quarters of the prison stockade, accused told Captain Staub that he had personally checked the fires. He did not intend to deceive him, although his statement was so worded as to give Captain Staub the impression that he had personally visited the building and checked the fires. He did not intend to convey that meaning, but was positive that it had been taken care of, and was merely reassuring Captain Staub. Captain Staub telephoned him a third time about 8:00 p.m. and said the general had gone to the building and found it cold. He again told the captain that he had checked the fire and found the building warm. This he had not done. Shortly afterward, Captain Staub and accused drove down to the cottage (Bldg. T 6-102) and they examined the furnace and found there was no fire - only ashes. It was then that he told Captain Staub that he had made arrangements to have the fire built, but had not taken care of it or checked it personally. Because of the definite arrangements he had made, accused was positive he would find a fire in the furnace (R. 15-19).

5. The evidence thus shows that accused received a lawful order from Captain Henry K. Staub in the afternoon of 26 December 1943 to put in readiness and heat a cottage (Bldg. T 6-102) for use and occupancy of a general officer, who was expected to arrive that evening at Indiantown Gap Military Reservation. This order was given to accused by Captain Staub about 2:30 or 3:00 o'clock in the afternoon of 26 December 1943, and about 5:00 or 5:30 o'clock in the afternoon Captain Staub again telephoned accused and inquired if the building was in readiness to which inquiry accused told Captain Staub that he had personally checked the fire, that there was a good fire in the furnace and that everything was in readiness for the visiting officer. When the officer who was to occupy the building arrived, he found the building unheated and unfit for occupancy. Upon learning these facts Captain Staub again telephoned accused and was told

by accused that the building had been warm and reaffirmed his previous statement that there was a good fire in the furnace and that he had checked the fire personally. Shortly thereafter accused accompanied Captain Staub to the building in question and found that there was no fire in the furnace. It was then that accused told Captain Staub that he had made arrangements to have the fire built but had not in fact checked it personally.

The evidence also shows that accused undertook to carry out the order of Captain Staub by delegating the work to his staff sergeant, whom he believed had made the necessary arrangements to heat the building, but he had no personal knowledge that the fire had in fact been made and was not justified in making the false statement to his superior that he had such personal knowledge, or that he had inspected the building and found it to be warm, when in fact, he had not done so. The offense was aggravated by his successive repetition of the false statement and clearly constituted a violation of the 95th Article of War.

6. Accused is 24 years of age and married. He graduated from Cathedral High School, St. Cloud, Minnesota and for 3½ years attended St. John's University at Collegeville, Minnesota. He served as an enlisted man from 28 January 1942 to 1 January 1943, when upon graduation from the Armored Force Officer Candidate School, Fort Knox, Kentucky, he was appointed second lieutenant, Army of the United States. In recommending accused for the Officer Candidate School, his commanding officer stated that accused was of excellent character, had demonstrated outstanding qualities of leadership and possessed educational qualifications or practical experience which would enable him to complete satisfactorily the course of instruction.

7. Seven of the eleven members of the court recommended that the sentence of dismissal be suspended, and the action of the reviewing authority contains the same recommendation.

8. 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 mandatory upon conviction of a violation of the 95th Article of War.

Thomas N. Tappy, Judge Advocate.

Thorkor W. Kuder, Judge Advocate.

Edwin E. Rives, Judge Advocate.

SPJGV
CM 247755

1st Ind.

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

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Albert J. Sauerer (0-1014874), Army of the United States.

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, to support the sentence, and to warrant confirmation of the sentence. With intent to deceive, accused made a false official statement to his superior officer. In view of the previous good record of accused, the recommendation of seven of the eleven members of the court, and the recommendation of the reviewing authority that the sentence of dismissal be suspended, I recommend that the sentence be confirmed, but commuted to a reprimand 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 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 action.

(Sentence confirmed but commuted to reprimand. G.C.M.O. 162, 7 Apr 1944)

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

(25)

SPJGV
CM 247763

7 MAR 1944

UNITED STATES v. Second Lieutenant ROBERT A. DUNAWAY (0-683631), Air Corps.	ARMY AIR FORCES CENTRAL FLYING TRAINING COMMAND Trial by G.C.M., convened at Fort Worth Army Air Field, Fort Worth, Texas, 4 January 1944. Dismissal, total forfeitures and confinement for five (5) years.

OPINION of the BOARD OF REVIEW
TAPPY, KIDNER and SLEEPER, Judge Advocates

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

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

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

Specification: In that Second Lieutenant Robert A. Dunaway, Air Corps, did, without proper leave, absent himself from the Station Hospital, San Antonio Aviation Cadet Center, San Antonio, Texas, from about 4 October 1943 to about 23 November 1943.

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

Specification 1: In that Second Lieutenant Robert A. Dunaway, Air Corps, did, at Fort Worth, Texas, on or about 9 September 1943, with intent to defraud, wrongfully and unlawfully, make and utter to Hotel Texas a certain check, in words and figures as follows, to wit:

THE FIRST NATIONAL BANK 37-1

of Fort Worth, Texas Sept. 9 1943

Pay
to the
order of Hotel Texas $ 30.00

Thirty and no/100 ---------- Dollars

No. _____

/s/ Robert A. Dunaway
0683631 Tarrant Field B.O.Q. 7

and by means thereof, did fraudulently obtain from Hotel Texas $30.00, lawful money of the United States, he the said Second Lieutenant Robert A. Dunaway, then well knowing that he did not have, and not intending that he should have, sufficient funds in The First National Bank of Fort Worth, Texas, for the payment of said check.

Specification 2: Same form as Specification 1, but alleging check dated 21 September 1943, payable to the order of cash, made and uttered to the Fort Sam Houston Exchange, and fraudulently obtaining thereby $20.

Specification 3: Same form as Specification 1, but alleging check dated 12 October 1943, payable to the order of the Jefferson Hotel, made and uttered to the Jefferson Hotel, St. Louis, Missouri, and fraudulently obtaining thereby $30.

Specification 4: Same form as Specification 1, but alleging check dated 13 October 1943, payable to the order of cash, made and uttered to The Boatmen's National Bank of St. Louis, St. Louis, Missouri, and fraudulently obtaining thereby $50.

Specification 5: Same form as Specification 1, but alleging check dated 15 October 1943, payable to the order of cash, made and uttered to The Boatmen's National Bank of St. Louis, St. Louis, Missouri, and fraudulently obtaining thereby $80.

Specification 6: Same form as Specification 1, but alleging check dated 12 October 1943, payable to the order of the Scott Field Exchange, made and uttered to the Scott Field Exchange, and fraudulently obtaining thereby $20.

Specification 7: Same form as Specification 1, but alleging check dated 18 October 1943, payable to the order of the Scott Field Exchange, made and uttered to the Scott Field Exchange, and fraudulently obtaining thereby $25.

Specification 8: Same form as Specification 1, but alleging check dated 20 October 1943, payable to the order of the Scott Field Exchange, made and uttered to the Scott Field Exchange, and fraudulently obtaining thereby $25.

Specification 9: Same form as Specification 1, but alleging check dated 25 October 1943, payable to the order of John S. Flint, made and uttered to John S. Flint, of Chicago, Illinois, and fraudulently obtaining thereby $35.

Specification 10: Same form as Specification 1, but alleging check dated 4 November 1943, payable to the order of the First National Bank, made and uttered to the First National Bank, Enid, Oklahoma, and fraudulently obtaining thereby $34.85.

Specification 11: Same form as Specification 1, but alleging check dated 5 November 1943, payable to the order of the Oxford Hotel, made and uttered to the Oxford Hotel, Enid, Oklahoma, and fraudulently obtaining thereby $25.

Specification 12: Same form as Specification 1, but alleging check dated 8 November 1943, payable to the order of the Oxford Hotel, made and uttered to the Oxford Hotel, Enid, Oklahoma, and fraudulently obtaining thereby $35.

Specification 13: Same form as Specification 1, but alleging check dated 8 November 1943, payable to the order of the Oxford Hotel, made and uttered to the Oxford Hotel, Enid, Oklahoma, and fraudulently obtaining thereby $35.

Specification 14: Same form as Specification 1, but alleging check dated 18 November 1943, payable to the order of Lowenhaupts, made and uttered to Lowenhaupts, Inc., Enid, Oklahoma, and fraudulently obtaining thereby one Army exchange officer's blouse of the value of about $33.15.

Specification 15: Same form as Specification 1, but alleging check dated 9 November 1943, payable to the order of Lowenhaupts, made and uttered to Lowenhaupts, Inc., Enid, Oklahoma, and fraudulently obtaining thereby $15.

Specification 16: Same form as Specification 1, but alleging check dated 12 November 1943, payable to the order of the Enid Army Air Field Exchange, made and uttered to the Enid Army Air Field Exchange, and fraudulently obtaining thereby $30.

Specification 17: Same form as Specification 1, but alleging check dated 15 November 1943, payable to the order of cash, made and uttered to the Enid Army Air Field Exchange, and fraudulently obtaining thereby $40.

Specification 18: Same form as Specification 1, but alleging check dated 15 November 1943, payable to the order of cash, made and uttered to the Enid Army Air Field Exchange, and fraudulently obtaining thereby $40.

Specification 19: Same form as Specification 1, but alleging check dated 18 November 1943, payable to the order of cash, made and uttered to the Enid Army Air Field Exchange, and fraudulently obtaining thereby $50.

Specification 20: Same form as Specification 1, but alleging check dated 21 November 1943, payable to the order of cash, made and uttered to the Enid Army Air Field Exchange, and fraudulently obtaining thereby $50.

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

Specification: In that Second Lieutenant Robert A. Dunaway, Air Corps, being indebted to Hotel Oxford in the amount of $15.00 for hotel services from 5 November 1943 to 11 November 1943, which amount became due and payable on or about 11 November 1943, did, at Enid, Oklahoma, from 11 November 1943 to 28 November 1943, dishonorably fail and neglect to pay said debt.

He pleaded guilty to and was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to "be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for 5 years." The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that on 4 October 1943 the accused went absent without leave from the Station Hospital, San Antonio Aviation Cadet Center, where he had been assigned for treatment, and that he remained absent without leave until apprehended by military police in Enid, Oklahoma, 23 November 1943 (R. 14, 15, 26, 28; Exs. 1, 2).

On 9 September 1943, prior to his unauthorized departure from the Station Hospital, the accused had cashed, at the Hotel Texas in Fort Worth, Texas the check for $30 drawn on the First National Bank, Fort Worth described in Specification 1, Charge II. He had, on 2 August 1943, opened an account in the drawee bank with an initial - and final - deposit of $287. On 27 August 1943, his balance there had been reduced to twenty cents, at which figure it continuously remained until the date of the trial. The payee twice presented this check for payment; both times it was returned unpaid. Similarly dishonored was the check for $20 described in Specification 2, Charge II, drawn on the same bank by the accused, and cashed by the Fort Sam Houston Exchange, 21 September 1943 (R. 16-19; Exs. 3, 4).

On 4 October 1943, the day on which he went absent without leave, the accused's account with the National Bank of Fort Sam Houston contained $86.50. It was reduced to $26.50 on 14 October 1943, and finally exhausted

on 20 October 1943. Commencing 12 October 1943, with a $30 check cashed by the Jefferson Hotel, St. Louis, Missouri, terminating 21 November 1943, with a $50 check cashed by Enid Army Air Field Exchange, Enid, Oklahoma, the accused drew on the National Bank of Fort Sam Houston a series of 18 checks - described in Specifications3 through 20 (both inclusive), Charge II - obtaining for each, in cash or its equivalent, the amount for which it was drawn. Upon presentation, payment of each of these 18 checks was refused because of the insufficiency - in earlier instances - and total absence - in later - of funds in the accused's account (R. 20-22, 24; Exs. 5-16).

On 5 November 1943, the accused registered at the Oxford Hotel, Enid, Oklahoma, obtaining a room which he occupied until 11 November 1943, leaving without paying - arranging or even promising to pay - his hotel bill, which amounted to $15, and which, on the date of the trial, was still unpaid (R. 22; Ex. 17).

There was also admitted in evidence a full written confession, made after due warning, and reiterated - in all its essential particulars - in the accused's subsequent testimony on the trial (R. 23; Ex. 18).

4. The only evidence for the defense was the accused's testimony, elicited after his rights as a witness had been explained to him and he had elected to take the stand under oath. He testified to approximately three and one-half years of college training at the University of South Carolina at Aurora College, Illinois, and at the South Carolina College of Music. He had worked in the Accounting Department for the Gerogia-Florida Railroad and had been employed by the Delta Airlines and by the National Airlines during his civilian life. He then entered the ministry and occupied the pulpit of a small church in Florida for about a year. Thereafter he was employed from time to time by the Augusta Coca-Cola Bottling Company and by Sears, Roebuck & Company. He enlisted in the Army 16 December 1941 and, after a course of training, qualified as a radio operator and mechanic. He entered navigation training and, of his own volition, was later transferred to pilot training. He attended primary school at Sweetwater, Texas, receiving basic training at Enid, Oklahoma, and advanced training at Pampa, Texas. In each of these three schools he was an outstanding cadet and a cadet officer. During his basic training he was cadet wing commander and, on graduating from basic, was awarded a certificate reciting that he was the outstanding cadet of his class in military conduct and deportment. After receiving his commission upon graduation from advanced flying school, he was ordered to Fort Worth for training in four-engine flying. It was there that he suffered an attack of bronchial asthma, was confined to the hospital for some time, then granted sick leave. As the condition had not improved, upon his return he was sent to the Station Hospital, San Antonio Aviation Cadet Center, where a complete allergy clinic was available, for observation and treatment. At this time he had learned that it was highly probable that he would be grounded for at least six months and possibly would not do any more flying for the

Army as a result of his physical condition. After remaining in the hospital at the Cadet Center, he grew more discouraged and finally went absent without leave from that station (R. 24-27).

He suggested that his unhappy marriage and a prior moderate use of intoxicants perhaps contributed to his reaching the state of mind from which he was suffering immediately prior to going absent without leave, without however attributing very much of the blame to these two causes. He was under the influence of liquor when he went absent without leave and for almost the entire duration of his unauthorized absence. He had only very vague recollections of having been at Scott Field and at Jefferson Barracks, Missouri. While in Chicago, his physical condition became so bad that he could drink no more for a while. There, on returning to his senses, he determined to go back to his station and "turn in". En route, he stopped at Enid and met some old friends. This led to further drinking, and he remained in Enid for several days, imbibing heavily throughout his stay there. It was in Enid that he was apprehended by the Military Police. He has been in confinement since that time (R. 28).

With reference to writing the series of worthless checks described in the Specifications under Charge II, he can remember only vaguely having written a few of them, although he realizes from the handwriting and the signature that they were written and cashed by him. The fact that each was drawn on one or the other of the two banks with which he carried accounts demonstrated his intention not to defraud the payee and not to hide his identity. Referring to the testimony of the prosecution's witnesses that he appeared sober when they cashed these worthless checks, the accused explained that he had always been able to consume large quantities of liquor without manifesting - by outward and visible sign - the extent of his inebriation (R. 28-29).

"As for my bill at the Oxford Hotel, I remember staying there but I don't remember leaving without paying the bill", he testified. He had had the funds to pay it long before, but, in confinement, was not allowed access to them (R. 28).

5. The Specification, Charge I alleges absence without leave from 4 October 1943 to 23 November 1943. The accused's plea of guilty is amply corroborated by the evidence adduced.

6. Specifications 1 through 20, Charge II, allege that the accused wrongfully and unlawfully made and uttered, with intent to defraud, checks respectively described therein, well knowing that he did not have and not intending that he should have funds in the drawee bank for the payment of said checks. Not only did the accused plead guilty to each of these Specifications and the Charge, but the prosecution established, by competent testimony, in each instance, every element of the offense alleged, in violation of Article of War 96 (Dig. Op. JAG, 1912-40, sec. 453 (22), p. 346). The accused's testimony of drunkenness and of amnesia induced by alcoholic indulgence at the time some of the checks were written, is not of a character

to exonerate him of the guilt involved, implicit in the circumstances clearly shown by the prosecution's uncontradicted evidence, and appropriately admitted by his plea. The most that the accused's testimony, accepted at its face value, could avail to establish is some measure of extenuation, on the basis of disappointment, weakness and protracted intoxication. Making due allowance for these factors, as affecting motivation, the sentence is not inordinate.

7. The Specification, Charge III, alleges dishonorable failure and neglect, at Enid, Oklahoma, to pay the Hotel Oxford the bill incurred by the accused during his residence there from 5 November to 11 November 1943. The time of the alleged offense is limited by the language of the Specification to the period "from 11 November 1943 to 28 November 1943", the date of his departure from Enid. The record, however, discloses that, upon the date of the trial, the bill was still unpaid. The evidence that, while he remained in Enid after leaving the Oxford, the accused made no effort either to pay this bill or to arrange for its payment, particularly when considered in connection with attendant circumstances, properly shown, supports the inference that his neglect and failure were dishonorable, in violation of Article of War 95 (Dig. Op. JAG, 1912-40, sec. 453 (14), p. 344).

8. The accused is about 26 years of age. War Department records show enlisted service from 16 December 1941 terminated by appointment as second lieutenant, Air Corps Reserve, 26 June 1943.

9. The court was legally constituted and had jurisdiction of the person and the subject matter. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 61 or 96, and mandatory upon conviction of a violation of Article of War 95.

Thomas N. Jaffy, Judge Advocate.

Arthur M. Kidner, Judge Advocate.

Benjamin R. Campbell, Judge Advocate.

SPJGV
CM 247763

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 Second Lieutenant Robert A. Dunaway (0-683631), 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, to support the sentence, and to warrant confirmation of the sentence. I recommend that the sentence be confirmed and carried into execution but that three years of the confinement adjudged be remitted, and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas be designated as the place of confinement.

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

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 action.

(Sentence confirmed but four years of confinement remitted. G.C.M.O. 203, 26 May 1944)

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

SPJGV
CM 247766

26 APR 1944

UNITED STATES	ALASKA DEFENSE COMMAND
v.	Trial by G.C.M., convened at Adak, Alaska, 9, 12 and 22 October, and 8 December 1943. Dismissal
Major FREAR BURK (0-191773), Coast Artillery.	

OPINION of the BOARD OF REVIEW
TAPPY, KIDNER and HARWOOD, Judge Advocates

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

2. The accused was tried upon the following Charge and a single Specification which was amended at the trial (R. 8):

CHARGE: Violation of the 96th Article of War.

Specification: In that Major FREAR (NMI) BURK, Two-hundred sixty seventh Coast Artillery, on temporary duty with Two-hundred fiftieth Coast Artillery, having been ordered by a court of competent jurisdiction, by duly entered judgment of said court, to pay medical expenses, money for the support of his children and alimony to his divorced wife, Francis O. Burk, did, from on or about 20 June 1942 to 21 July 1943, at San Rafael, California, dishonorably fail and neglect to pay the same in compliance with said judgment, to the disgrace of the military service.

He pleaded not guilty to and was found guilty of the Charge and its Specification as amended. 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. In support of the Specification and Charge the prosecution introduced,

without objection (a) Interlocutory Decree of Divorce rendered on 21 December 1938 by the Superior Court of California for the County of Marin in the case of Frances Burk vs. Frear Burk, No. 12832, (Ex. 1); (b) Order modifying Interlocutory Decree of Divorce rendered on 2 June 1939 (Ex. 2); (c) Final Decree of Divorce rendered on 29 March 1940 (Ex. 4); and (d) Order modifying Final Decree of Divorce rendered on 3 May 1940 (Ex. 5). The final decree incorporated so much of the terms of the interlocutory decree as "makes any provision for alimony or the custody and support and maintenance of the children" (Ex. 4). The interlocutory decree ordered, among other things, that the accused pay to Frances Burk "the sum of ($125.00) One Hundred Twenty-five Dollars per month as and for alimony, support and maintenance of plaintiff and the minor children of said parties * * *" (Ex. 1). The order modifying final decree of divorce amended the final decree as follows:

> "* * * to include, among other things, the following order, to-wit: 'It is hereby ordered, adjudged and decreed that defendant, Frear Burk, pay to plaintiff, Frances Burk, in addition to the other amounts provided herein, an amount equal to all reasonable doctor's, dentist's, optician's, orthodontist's, medical and hospital bills that may be necessarily incurred by said plaintiff for herself or the minor children of the parties hereto'". (Ex. 5).

The prosecution also introduced in evidence the deposition of Frances Burk, the accused's former wife (R. 11; Ex. 7). She stated she married the accused on 6 July 1926 and was granted a final decree of divorce from him on 29 March 1940. She further stated that the decree of divorce provided for alimony of $125 monthly and reasonable doctor, dental and hospital bills incurred for care of two minor children"; that the alimony payments for the periods from 20 June 1942 to 21 July 1942 and from 21 July 1942 to 21 August 1942 were not paid until 8 October 1943; that the alimony payment for the period from 20 September 1942 to 21 October 1942 has never been made; that the alimony payment for the period from 20 June 1943 to 21 July 1943 was not paid until 22 September 1943 (Ex. 7).

She also stated that payments other than alimony that were to be made by the accused during the period from 20 June 1942 to 21 July 1943 were delinquent in their entirety. In response to the twenty-fifth interrogatory as to the amounts and dates of these delinquent payments, she listed under the headings "Doctor", "Dentistry", "Orthodontic", "Drugs" and "Optical", a series of dates with particular amounts set opposite each such date.

4. The only witness for the defense was the accused. After having his rights fully explained to him, he elected to take the stand and was

duly sworn. He identified various checks (Exs. A-D, J, K) as alimony checks sent by him to Frances Burk, and also identified various receipts (Exs. E-I) as receipts from Frances Burk for alimony received (R. 13-16). These checks and receipts cover a series of fourteen alimony payments due from 21 June 1942 to 21 July 1943 inclusive. The accused also testified as to the dates on which he made the various alimony payments due during that period of time (R. 13-16). It is believed that this statistical testimony can best be exemplified by a chart. Such a chart has been prepared and is attached hereto and marked Schedule A. For purposes of comparison there is also shown on the chart the testimony of the prosecution, as set forth in paragraph 3 supra, relative to the dates certain of the payments were made.

The accused testified that in addition to the aforementioned exhibits, he mailed another alimony check for $125 to Frances Burk in August 1943 (R. 15, 20). Exhibit J, a check for $166.10 dated 30 September 1943 and payable to Frances Burk, covered a period of time subsequent to that alleged in the Specification (R. 20). Two other checks (Exs. A, B) were for alimony payments due prior to the period of time alleged in the Specification (R. 18).

On numerous occasions accused had requested receipts for alimony payments from Frances Burk, but they were not forthcoming and he needed such receipts to submit with his pay vouchers in order to be able to draw an allowance for quarters (R. 16). He further testified that he had other obligations to meet; that "the interlocutory decree had caused certain obligations and it was necessary to borrow money to meet these payments and also to pay the fees of the defense counsel", and that since these receipts were not forthcoming he was unable to meet his obligations up to the early part of 1943 (R. 17).

The accused went on foreign duty in Alaska in June 1941 holding the rank of captain. He was promoted to major 1 March 1943. He had no other dependents than his divorced wife and two minor children. Before going to Alaska he made certain arrangements with the Letterman General Hospital. He filled out a form "to show that the children were my dependents and they could get medical attention at the hospital". The hospital was nine or ten miles from where Frances Burk and the accused's children lived (R. 18, 19). Since accused left the States Frances Burk had not forwarded any doctor bills to the accused (R. 19). When accused first went to Alaska his pay was delayed and no payments were made for three or four months (R. 20). He never made application for an allotment to cover alimony payments (R. 20).

5. The relevant testimony of both the prosecution and the defense has been charted on Schedule A attached hereto to afford a composite picture of the history of the alimony payments involved in this case.

Although the prosecution offered evidence only on Items 1, 2, 4 and 13 (Ex. 7) the accused introduced various checks and receipts into evidence which completed the picture of his alimony payments for the period stated in the Specification from 20 June 1942 to 21 July 1943. The prosecution's evidence showed that the accused was delinquent approximately 15½ and 14½ months respectively, in making the alimony payments due 21 June 1942 and 21 July 1942; that the payment due 21 September 1942 was never made; and that he was delinquent approximately three months in making the payment due 21 June 1943 (See 5th column of Schedule A). The testimony of the accused did not show that the payment due 21 September 1942 had ever been made unless it be assumed that the alimony check (not offered in evidence) which the accused testified he sent in August 1943 (R. 15, 20) was intended to pay that installment. Even taking such a view, the accused would have been delinquent eleven months in making that payment. The testimony of the accused was almost identical with the evidence of the prosecution as to the length of the delinquency on the other three items (See 3rd column of Schedule A). On the remainder of the alimony payments, the testimony of the accused showed that he had been delinquent in paying every one and that the delinquencies ranged from 1 1/3 months to 9 1/3 months in duration (See 3rd column of Schedule A).

The accused had a legal obligation to pay the sum of $125 monthly for the support and maintenance of his divorced wife and two minor children. It is a violation of the Articles of War for an officer to evade his legal obligation toward his dependents and to fail to make provision for their support (Dig. Op. JAG, 1912-40, sec. 454 (48), p. 356, 357). Continuous failure to make alimony and support payments on time and to remain delinquent therein for such periods of time as is evidenced by this record is tantamount to a failure to provide support and, in the opinion of the Board of Review, is conduct of a nature to bring discredit upon the military service and constitutes an offense in violation of Article of War 96.

The evidence fails to sustain that part of the Specification alleging failure to pay medical expenses. The deposition of Frances Burk merely stated that payments other than alimony that were to be made by the accused during the period alleged in the Specification as amended were delinquent "in their entirety" (Ex. 7). Thereafter in the deposition there is listed a series of dates and amounts under the following headings: Doctor, Dentistry, Orthodontic, Drugs and Optical. It is impossible to determine from this list whether the dates are the dates the bills were incurred, the dates they were paid or to what the dates do have reference. Most conclusive, however, there is no showing by the prosecution that the accused was ever informed of these bills or requested to pay them. The accused, apparently quite accurate in his other testimony, testified that Frances Burk had not forwarded any doctor bills to him since he left the States (R. 19). The accused cannot be convicted of dishonorably failing and neglecting to pay these medical bills in the absence of proof that he had knowledge of their existence and refrained from making payment thereof.

6. The accused is 43 years of age. He graduated from an accredited high school and pursued a course in civil engineering for two years at the University of California. He served as private and corporal in the California National Guard during the first World War from 27 May 1918 to 26 July 1919. He enlisted in the California National Guard 20 January 1921 and was discharged 6 July 1922 in the grade of first sergeant to accept appointment as second lieutenant in the same organization. He was promoted to first lieutenant, California National Guard 7 June 1923 and to captain in the same organization, 7 October 1925. He entered upon extended active duty 16 September 1940, pursuant to Executive Order No. 8530, dated 31 August 1940, and was given temporary promotion to the grade of major, Army of the United States, 1 March 1943. He completed 23 years service 19 November 1942.

7. All members of the court who sat in trial of accused signed a letter, which is attached to the record, recommending clemency. Their recommendation is predicated upon accused's 23 years of continuous honorable service in the National Guard and Army of the United States; his excellent reputation and professional record during that period; his overseas military service during the first World War, followed by an honorable discharge, and his present need and usefulness because of his professional qualifications. Attached to the record also, is a letter requesting clemency signed by Lieutenant Colonel Carl F. Lyons and Lieutenant Colonel Luther Meyer, defense counsel and assistant defense counsel respectively. They attest to accused's usefulness because of his professional qualifications and opine that the sentence imposed is most severe. Colonel John L. Farley, Coast Defense Officer, Alaskan Department, also recommends clemency in his letter attached to the record. He states that accused's battery was specifically selected for its difficult assignment because of accused's demonstrated ability and high state of training of his unit; that because of his ability accused was selected to command and take charge of important seacoast developments in the Alaskan Department, and that he had accomplished his tasks with distinction, and in an excellent manner. He considered accused to be one of the outstanding Seacoast Artillery Officers in the Alaskan Department, and well qualified for further advancement. The Commanding General of the Alaskan Department, by letter accompanying the record of trial states that accused has shown on the one hand, competence in the performance of his duties, and on the other, a disregard for the advice of his superior officers to comply with the order of the court requiring him to pay his wife alimony; that since the inception of court-martial charges, accused has made efforts to rectify his former attitude toward supporting his dependents; that a suspended sentence would have the salutary effect of putting accused on probation, and for such reasons, recommends that the sentence be confirmed but that the execution thereof be suspended during the pleasure of the confirming authority.

8. 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 only so much of the findings of guilty of the Specification and the Charge as involves a finding of guilty of failing and neglecting to pay money for the support of his children and alimony to his divorced wife, at the time and place and in the manner alleged in violation of the 96th Article of War, 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.

Thomas H. Lappy, Judge Advocate.

Herbert M. Kidner, Judge Advocate.

Robert B. Harwood, Judge Advocate.

SPJGV
CM 247766

1st Ind. (39)

War Department, J.A.G.O., 9 MAY 1944 To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Major Frear Burk (0-191773), Coast Artillery.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty of the Specification and the Charge as involves findings of guilty of failing and neglecting to pay money for the support of his children and alimony to his divorced wife, at the time and place and in the manner alleged, in violation of the 96th Article of War, legally sufficient to support the sentence and to warrant confirmation of the sentence.

3. It appears from papers accompanying the record that the accused has had a long and enviable record as an officer. All members of the court have recommended that the sentence be commuted to reduction of accused to his permanent grade of captain. Lieutenant General S. B. Buckner, Jr., the Commanding General of the Alaskan Department, reviewing authority, in recommending suspension of the sentence, states:

> "This officer has shown on the one hand, competence in the performance of his duties; and on the other, a disregard for the advice of his superior officers to comply with the order of the court requiring him to pay alimony. It appears that since the inception of court-martial charges, he has made efforts to rectify his former attitude as to payments to his dependents. However, it is believed without the threat of immediate dismissal he will suffer a relapse in meeting his obligations and again become a nuisance".

I recommend that the sentence to dismissal be confirmed but, in view of all the circumstances and recommendations for clemency, that the execution thereof be suspended during accused's good behavior.

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

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

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

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but execution suspended. G.C.M.O. 335, 27 Jun 1944)

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

(41)

SPJGV
CM 247839

8 FEB 1944

UNITED STATES v. Second Lieutenant WINSTON T. BURNLEY (0-1322886), Infantry.	INFANTRY REPLACEMENT TRAINING CENTER Trial by G.C.M., convened at Camp Fannin, Texas, 13, 24, 27 December 1943. Dismissal.

OPINION of the BOARD OF REVIEW
TAPPY, KIDNER and RIVES, 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: (Finding of not guilty).

Specification: (Finding of not guilty).

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

Specification 1: In that Second Lieutenant Winston T Burnley, Infantry, was, at St Louis, Missouri, on or about 16 October 1943, in a public place, to wit: Harvey's Restaurant, drunk while in uniform.

Specification 2: In that Second Lieutenant Winston T Burnley, Infantry, was at St Louis, Missouri, on or about 18 October 1943, in a public place, to wit: Union Station, drunk while in uniform.

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

Specification: In that Second Lieutenant Winston T Burnley, Infantry, did, without proper leave, absent himself from his organization at Camp Fannin, Texas, from about 15 November 1943, to about 17 November 1943.

He pleaded not guilty to Charge I and its Specification; guilty to Specification 1, Charge II; not guilty to Specification 2, Charge II; not guilty to Charge II but guilty of a violation of the 96th Article of War; guilty to the Additional Charge and its Specification. He was found not guilty of

Charge I and its Specification and guilty of all remaining Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution in support of Charge II and the Specifications thereunder shows that on 16 October 1943 accused was found drunk in Harvey's Restaurant, Union Station, St. Louis, Missouri, a public place. He was in uniform. He was so drunk that he could not stand and a "naval officer was trying to get him on his feet". Accused had to be aided when taken to the station master's office (R. 12; Pros. Ex. 7).

Second Lieutenant Edward G. Luce who was then in the station on patrol duty, was notified and found accused "unconscious, obviously from over-indulgence in intoxicating liquors". Efforts to awaken accused were without results and two military police carried him to a staff car and he was taken to Military Police Headquarters (R. 10; Pros. Ex. 3).

Major Arne Stenslie, the Provost Marshal, placed accused under arrest in quarters (R. 10, 11; Pros. Ex. 4). Accused left his quarters (Pros. Ex. 4) and on 18 October 1943, Sergeant Charles W. Bradford, who had been instructed by Major Stenslie to be on the "alert" for accused, found accused in the waiting room of the Union Station, St. Louis, a public place. Accused was "in a very slouched position; as that of a man under the influence of liquor". Accused identified himself and was taken to the sick room in the station where he lay down and immediately went to sleep. Accused was in uniform (R. 11; Pros. Ex. 5). Corporal Richard V. Bauer, who was with Sergeant Bradford at this time, stated that he saw accused was "intoxicated, due to the odor of liquor, incoherent mumbling, and unsteadiness of limbs" (R. 11; Pros. Ex. 6).

In support of the Additional Charge and its Specification, the morning report of accused's organization for 15 and 17 November was introduced in evidence without objection by the defense and showed accused duty to AWOL on 15 November 1943 and AWOL to duty 17 November 1943 (R. 5; Pros. Ex. 2). Also, the Voco register of accused's organization was admitted by stipulation showing permission was granted accused to be absent from 1300 13 November 1943 to 1615 15 November 1943, and that he returned to his organization at 0600 17 November 1943 (R. 5; Pros. Ex. 1).

4. The evidence for the defense consisted of an unsworn statement by the accused to the effect that he had been divorced from his wife on 31 December 1941 (R. 15). On 28 July 1943, after graduation from the Infantry Officer Candidate School, Fort Benning, Georgia, he went to St. Louis to see his former wife. Here he suffered a fall from the tenth story of his hotel and was hospitalized for 67 days. Upon his release from the hospital accused was given a 7-day sick leave, during which time he again

saw his former wife in the hope of effecting a reconciliation. On 16 October he went to Union Station to get his ticket for Camp Fannin, Texas, and had several drinks in Harvey's Cocktail Lounge. Due to his run-down condition, the taking of sulfathiazole and other medicines, the drinks took effect very quickly and he went to sleep sitting in the station. On 18 October he again went to the Union Station, St. Louis, to catch the train for Camp Fannin, Texas. He stated that he was feeling so badly that he had a few drinks, hoping they would make him feel better (R. 16).

Accused reported to Camp Fannin, Texas, on 20 October 1943 and on 13 November went to Dallas, Texas in company with Second Lieutenants Kenneth W. Hatcher and Eugene R. Bruce. The accused went to the Barker Hotel to meet a lady with whom he went to a restaurant, where they had some wine. Following this meeting and the departure of the lady, accused went to sleep and failed to catch the bus to Camp Fannin, Texas the following morning. Due to sickness he did not arrive at Camp Fannin until 17 November. His wife arrived at Camp Fannin 22 November with their 4½ year old son and she and accused were remarried in the chaplain's office at Camp Fannin, Texas (R. 15-17).

Second Lieutenants Kenneth W. Hatcher and Eugene R. Bruce, officers from accused's organization, testified as character witnesses in accused's behalf. Lieutenant Hatcher stated that accused's work in the company was very good, that he never knew accused to be drunk, and that accused tried to be "on the ball" although he (Hatcher) admitted on cross-examination that, in his opinion, an officer who absented himself from his organization without leave was not "on the ball". Lieutenant Bruce stated that he knew accused at the OCS class at Fort Benning and Camp Fannin and believed accused "one of the highest in characteristics of leadership and integrity and ability in the military service" (R. 13, 14, 15).

First Lieutenant John H. Fox testified by deposition that he was company commander of accused's organization, that he knew accused since 20 October 1943, and during the time accused was with the organization his work was satisfactory and he was diligent in his attention to duty (R. 15; Def. Ex. A).

Captain Howard V. Turner, Medical Corps, Station Hospital, Chief of the Neuropsychiatric Department, testified that he interviewed the accused on 23 December 1943, at which time he received the history of accused's fall from the tenth floor of his hotel, which rendered accused unconscious for a period of time; that when any human body falls a great distance there is a certain amount of damage that takes place in the brain and a change is frequently noticed in the patient after recovery. This change is manifested by symptoms such as vertigo, dizziness, nausea and vomiting; that a person who has had a brain injury is more susceptible to alcohol than formerly, and that the only way accused "could have known it was to drink it". On cross-examination Captain Turner stated

that he had no personal knowledge of how alcohol affected the accused before or since the accident and that he based his diagnosis largely on the subjective symptoms given him by the accused (R. 19-24; Def. Ex. B).

5. Accused pleaded guilty to Specification 1 of Charge II, not guilty to Charge II, but guilty of a violation of the 96th Article of War. Evidence adduced in proof of Specification 1 showed that accused, dressed in military uniform, was so drunk in Union Station, St. Louis, Missouri, on 16 October 1943, that he could not stand up and had to be aided when taken to the station master's office. Lieutenant Luce, an officer on patrol duty, called to take care of accused stated that he was unconscious from overindulgence in intoxicating liquors (R. 10; Pros. Ex. 3).

Evidence adduced in support of Specification 2 shows that accused, two days after the offense alleged in Specification 1, was again drunk in uniform at Union Station, St. Louis, Missouri. He was "slouched down" in the seat, smelled of liquor, was mumbling and was unsteady on his feet. When taken to the sick room in the station, he lay down and immediately went to sleep (R. 11; Pros. Ex. 5).

Charge II and the Specifications thereunder are laid under Article of War 95. Therefore, it is necessary to consider whether the conduct of accused is that of "being grossly drunk and conspicuously disorderly in a public place" in violation of Article of War 95 (par. 151, MCM, 1928). It has been held that 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, Williamson; Dig. Op. JAG, 1912-40, sec. 453 (12)). The evidence shows that the accused was drunk in a public place while in uniform. However, the words "grossly drunk" used as descriptive of a violation of Article of War 95 in the Manual for Courts-Martial have been construed to mean vulgar or obscene drunkenness (the act of drunkenness itself plus some aggravating circumstances) (CM 114900, Williamson; CM 228894, Peterson; CM 238792 Kuennen). While the accused was so drunk that his mental and physical faculties were seriously impaired, there is no indication that his clothing was disarranged, that he presented a vulgar appearance, or that the attention of the public was directed to the accused because of his condition. No medical testimony of accused's condition was introduced. While the behavior of the accused does reflect a lack of appreciation of the standard of conduct required of an officer, an addiction to drink and a weakness of character, the evidence establishes "drunkenness" in violation of Article of War 96 (par. 152, MCM, 1928) rather than that degree of drunkenness deemed a violation of Article of War 95.

The Additional Charge and its Specification to which accused pleaded guilty alleges that accused was absent without leave from 15 November to 17 November 1943. Notwithstanding the plea of guilty, the prosecution, by the morning report of accused's organization and other competent evidence, clearly proved the offense. Accused, in his explanation of this unauthorized

absence, stated that he had had some wine (R. 4), that he later went to sleep and failed to catch the bus, that he then became sick from something he ate, and failed to catch other busses, resulting in a two-day delay in returning to camp. There is no competent evidence to show that accused was drunk during this two-day absence but the fact that he admits drinking wine and later oversleeping indicates that he may again have been indulging in intoxicating liquors.

6. The accused is about 31 years of age. He attended a pre-medical course at Emory University, Atlanta, Georgia, for three years. He is married and has one child. He had enlisted service from 2 May 1942 to 28 July 1943 when he graduated from the Officer Candidate School, Fort Benning, Georgia, and was commissioned second lieutenant. Since the latter date he has been on active duty as an officer.

7. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of Charge II and the Specifications thereunder as involves findings of guilty of the Specifications in violation of Article of War 96, legally sufficient to support the findings of guilty of the Additional Charge and its Specification, and legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of either Article of War 61 or 96.

Thomas N Jaffee, Judge Advocate.

Norton M Kedner, Judge Advocate.

(On Leave), Judge Advocate.

SPJGV
CM 247839

1st Ind.

War Department, J.A.G.O., 26 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 Winston T. Burnley (0-1322886), Infantry.

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 II and the Specifications thereunder as involves findings of guilty of the Specifications in violation of Article of War 96, legally sufficient to support the findings of guilty of the Additional Charge and its Specification, and legally sufficient to support the sentence and to warrant confirmation thereof. I recommend that the sentence of dismissal 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 carrying into effect the recommendation made above, 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 action.

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but execution suspended. G.C.M.O. 157, 4 Apr 1944)

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

SPJGN
CM 247840

29 JAN 1944

UNITED STATES	26TH INFANTRY DIVISION
v.	Trial by G.C.M., convened at Camp Campbell, Kentucky, 7 January 1944. Dismissal, total forfeitures, and confinement for one (1) year.
Second Lieutenant GEORGE T. TYBERG (0-1182731), 180th Field Artillery Battalion.	

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

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

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

CHARGE: Violation of the 61st Article of War.

Specification: In that Second Lieutenant George T Tyberg, Battery B, 180th Field Artillery Battalion, did, without proper leave, absent himself from his post and duties at Battery B, 180th Field Artillery Battalion, Camp Campbell, Kentucky, from about 14 December 1943 to about 27 December 1943.

He pleaded guilty to and was found guilty of the Charge and its Specifi-

cation. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority might direct, for two years. The reviewing authority approved the sentence but reduced the period of confinement to one year, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution, supplementing the accused's plea of guilty, shows that the accused was carried on his organization's morning report as "AWOL" from 1900 o'clock on 14 December 1943 until 1330 o'clock on 27 December 1943. The morning report was identified and admitted into evidence without objection (R. 6-8; Ex. I).

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 in the early part of November 1943 he had applied for and had been granted leave commencing on or about 7 December 1943 and extending beyond 12 December 1943, when his brother, whom the accused had not seen for two years and who was shortly being sent overseas, was getting married. The accused had been asked to be best man at the wedding and had secured leave for such purpose. On 5 December 1943 his leave had been verbally rescinded and he had been unable to interview his battalion commander concerning its cancellation. His brother's wedding occurred on the date originally scheduled but the accused was not present. However, he thereafter absented himself without authorization on 14 December 1943, went home to see his brother and family and returned on 27 December 1943. He had subsequently ascertained that his reclassification papers had been received about the time his leave had been canceled (R. 8-11).

5. In rebuttal the prosecution presented the testimony of the battalion's executive officer who had notified the accused that his leave had been rescinded by order of the battalion commander about 3 December 1943, and to whom the accused had returned his leave papers without requesting an interview with the battalion commander. Other changes had been made in authorized leaves of other officers and the accused had been advised that he would probably be granted leave at a shortly later date (R. 11-13).

6. The Specification alleges that the accused, without proper leave, absented himself from his post and duties at Battery B, 180th Field Artillery Battalion, Camp Campbell, Kentucky, from about 14 December 1943 to about 27 December 1943. The elements of the offense alleged 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 was without authority from anyone competent to give him leave" (M.C.M., 1928, par. 132).

The evidence adduced by the introduction of the organization's morning report shows the accused's unauthorized absence as alleged. The accused likewise by his testimony admits his commission of the offense. The rebuttal testimony shows that the accused was fully aware of the cancellation of his leave. All of the evidence, therefore, supplements the accused's plea of guilty and beyond a reasonable doubt establishes his guilt and supports the findings of guilty of the Charge and its Specification.

7. The accused is about 27 years old. The War Department records show that the accused has had enlisted service from 25 October 1942 until 3 June 1943 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.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of the Charge and its Specification and the sentence, and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 61.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Slafer, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

(50)

SPJGN
CM 247840

1st Ind.

War Department, J.A.G.O., 9 - 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 George T. Tyberg (0-1182737), 180th Field Artillery Battalion.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the 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.
1 - Record of trial.
2 - Dft. ltr. for sig. S/W.
3 - Form of action.

(Sentence as approved by reviewing authority confirmed but forfeitures and confinement remitted. G.C.M.O. 142, 27 Mar 1944)

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

SPJGQ
CM 247841

-8 FEB 1944

UNITED STATES	83RD INFANTRY DIVISION
v.	Trial by G.C.M., convened at Camp Breckinridge, Kentucky, 6 January 1944. Dismissal.
First Lieutenant ROBERT H. GREEN (0-1166496), 323rd Field Artillery Battalion.	

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

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

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

CHARGE I: Violation of the 63rd Article of War.

Specification: In that 1st Lt. Robert H. Green, 323rd Field Artillery Battalion, did at Camp Breckinridge, Kentucky on or about 25 December 1943 behave himself with disrespect toward Lt. Col. James H. Skinner, his superior officer by saying; "You West Point sons of bitches are all alike. You fucker, you haven't guts enough to fight", or words to that effect.

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

Specification: In that 1st Lt Robert H. Green, 323rd Field Artillery Battalion, did at Camp Breckinridge, Kentucky on or about 25 December 1943 offer violence against Lt. Col. James H. Skinner, his superior officer, who was then in the execution of his office, in that he, the said 1st Lt Robert H. Green, did attempt to strike the said Lt Col. James H. Skinner.

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

Specification: In that 1st Lt Robert H. Green, 323rd Field Artillery Battalion, was at Camp Breckinridge, Kentucky on or about 25 December 1943, in a public place, to wit, the roof of building 847, drunk and disorderly while in uniform.

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

Specification 1: In that 1st Lt Robert H. Green, 323rd Field Artillery Battalion, having received a lawful order from Lt Col James H. Skinner to get off the roof of Building 847, the said Lt Col James H. Skinner being in the execution of his office, did, at Camp Breckinridge, Kentucky, on or about 25 December 1943, fail to obey the same.

Specification 2: In that 1st Lt Robert H. Green, 323rd Field Artillery Battalion, having received a lawful order from Lt Col James H. Skinner to go to his quarters, the said Lt Col James H. Skinner being in the execution of his office, did, at Camp Breckinridge, Kentucky, on or about 25 December 1943, fail to obey the same.

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

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

Accused was on and for sometime prior to 25 December 1943, a First Lieutenant of the 323rd Field Artillery Battalion stationed at Camp Breckinridge, Kentucky (R. 6, 10, 12, 14).

On 25 December 1943 at about 12:30 p.m. Lieutenant Colonel James H. Skinner, 322nd Field Artillery Battalion, was leaving the officers' mess hall at Camp Breckinridge in company with Lieutenant Colonel George W. Irvine, 324th Field Artillery Battalion when his attention was directed to accused who was, at that time, walking along the sloping roof (R. 11) of the adjoining building. The colonel, who had observed him through the window of the mess hall, left the mess hall and as he came outside accused had twice walked across the roof and sat down upon the cove, dangling his legs over the side. As the colonel approached he engaged accused in conversation and asked him what he was doing up there to which accused replied "I just happen to like it up here". Upon being asked his name accused refused to give it, and the colonel then told him if he had no business up there he should come down as he was making an ass of himself, to which accused replied, "If I am making an ass of myself up here you are making one of yourself down there".

Colonel Skinner then entered the building, going to the second floor, and inquired of other officers present who the man on the roof was but no one knew. Captain Shogren and another officer then climbed up on the roof and came back shortly followed by accused. The colonel asked accused whether he had understood him when he directed him to come down from the roof to which accused answered "you West Point sons-of-bitches are all alike". Colonel Skinner then "placed him in arrest" and ordered him to go to his quarters. This accused refused to do, placing his hands on the colonel's chest and shoving him.

Colonel Skinner called to Lieutenant Gardner and told him "I want you to witness this. I am placing this officer under arrest and ordering him to go to his quarters". Whereupon accused remarked "you may think you are placing me under arrest but I am not any different than I was". Lieutenant Davenport and another unidentified officer then approached as the colonel was telling accused he was becoming involved in serious trouble. They saw accused make an attempt to strike the colonel and, on being restrained by these other officers, he said to Colonel Skinner "you fucker, you ain't got guts enough to fight". As the officers were trying to take him away accused again attempted to get loose and made an effort to strike the colonel (R. 7). On one of these attempts accused swung his arm and knocked a cigar out of the colonel's mouth (R. 16) and, on the other, he knocked the cigar from the colonel's hand (R. 9, 10, 15). Colonel Skinner wore a field jacket with a garrison cap to which was attached the insignia of his rank (R. 9). Accused had on Army slacks, a shirt with the collar open, displaying the insignia of his rank and arm of service but wore neither a tie nor a cap (R. 8, 10).

Lieutenant Colonel Irvine testified that after lunching with Colonel Skinner on 25 December 1943 they had left the mess hall after their attention had been drawn to someone on the roof of the adjacent building. As they came outside he saw accused sitting on the edge of the roof dangling his feet over the side and smiling. He heard Colonel Skinner tell accused to come down but accused "sort of made light of the matter". The colonel then repeated the order, making it more emphatic by the tone of his voice, but accused only laughed at him. Whereupon Colonel Skinner again repeated the order saying "you are making an ass of yourself up on the roof". As the colonel then walked around the building accused said "With my wife as mad at me as she is neither Colonel Skinner and General Marshall could get me off this roof". At this point accused got to his feet and walked around the edge of the roof where Captain Philip Shogren (R. 17) had appeared and told accused to get off the roof (R. 10).

While these events were transpiring, a sergeant and about 15 or 20 enlisted men congregated in front of the orderly room of the headquarters battery, 322nd Field Artillery Battalion, across the street from the officers' mess, witnessed accused walk along the peak

of the roof on the adjacent building and then sit down on the edge of the roof, all the while whistling and calling to these soldiers to attract their attention (R. 18-20).

Captain Brice H. Hereford, 322nd Field Artillery Battalion, had also left the officers' mess shortly before Colonels Skinner and Irvine and was present at the time Colonel Skinner addressed accused. He testified that when Colonel Skinner told accused "he looked pretty silly up there" accused answered "you look pretty silly down there" and when then told "you are in a lot of trouble" accused said "you are telling I. When my wife is enigmatic I don't give a 'shit' for Col. Skinner or General Marshall." Later Captain Hereford went upstairs in the building where he heard Colonel Skinner direct one of the officers present "to get him (accused) in his room and lock him in". Accused, however, was not disposed to go with his captors and "there was a great deal of confusion in the course of which there was a lot of scuffling and name calling." At one time accused broke away from the men who were holding him and ran outside where he crawled underneath the building which, at that point, was but two feet from the ground (R. 12-14).

First Lieutenant Hubert C. Gardner, 322nd Field Artillery Battalion, was in his room in the building when accused came down from the roof thereof. He heard Colonel Skinner ask accused his name and heard accused ask Colonel Skinner's name. The colonel then called Lieutenant Gardner from his room to witness the proceedings and ordered accused to go to his room telling him he was under arrest. Accused refused to move telling Colonel Skinner "you West Point sons-of-bitches, are all alike" and asking him to fight, saying: "you 'fucker', you ain't got guts enough to fight". Accused then lunged at Colonel Skinner but was restrained by Lieutenant Gardner and another officer grabbed him. Accused broke loose, and knocked a cigar first, out of the colonel's mouth, and later, out of the colonel's hand (R. 14-16).

Captain Philip E. Shogren, 323rd Field Artillery Battalion was among those present who witnessed accused while he was on the roof and he and Lieutenant Davenport "crawled up to get him down". Later he saw accused crawl about under the same building and heard him "mumbling to himself" before he was brought out by Lieutenant McGuane (R. 17-18).

Warrant Officer (j.g.) Walter J. Matters, 323rd Field Artillery Battalion, testified that he was in the company of Lieutenants Davenport, Darling, McGuane and accused on the morning of 25 December 1943. They were drinking together and he saw accused take two drinks of "rum and coke" between 10 o'clock a.m. and 11:30 o'clock a.m. when he (Matters) left. He did not know whether accused had drunk any other liquor before that time. Some time after 12:20 p.m. Matters

was awakened from a nap by a "rumpus" out in the hall and he then saw Colonel Skinner leaving while Lieutenant McGuane was holding accused (R. 20-21).

With regard to accused's condition at the time of these events Colonel Skinner considered his actions those of a drunken person and, though he noticed no alcohol on his breath, believed accused was under the influence of alcohol, because, although he spoke distinctly and did not stagger, his words and actions were not those of a sober man (R. 8).

Colonel Irvine could not tell whether accused was drunk or not but thought he was not "acting normal" (R. 11). To Captain Hereford accused appeared to be drunk because of his "unsteady gait" and his actions "terrified" him (R. 13, 14). Lieutenant Gardner smelled no liquor on accused's breath but thought he "was definitely drunk to the extent that he didn't even know anybody around him or what he was doing" though "he was still able to walk and so forth" (R. 15, 16). Lieutenant Shogren also believed accused was drunk because he smelled liquor on his breath and he failed to recognize Shogren although they had known one another since October 1942 (R. 17, 18). Warrant Officer Matters stated that accused "was in good spirits. He wasn't drunk or intoxicated" at the time when Matters left the group of officers at 11:30 a.m. and accused was "happy. He wasn't drunk. He was in good spirits" when he saw him in the hall before Matters took a nap. When, forty-five minutes later, he saw accused after the "rumpus" in the hall outside of Matter's room "he seemed to be deranged" and acted "like a crazy man" (R. 22).

4. For the defense: Accused elected to be sworn as a witness in his own behalf and testified that he had returned to camp about midnight on Christmas eve after having "some domestic difficulty" with his wife. He arose at 8 o'clock a.m. on Christmas day and after visiting the enlisted men of the Battery he and a group of officers went to the room of one of the officers and began drinking rum and coca-cola. He became "a little merry" was "feeling good" and recalled "trying to light the hair on one of the men's chest". He then layed down on a cot and that is all he remembered except a vague recollection of a doctor. He could not understand how he could have been on a roof because he has "some fear of going up high" and for that reason had never been up in an airplane. On the next morning a friend told him he was "in some pretty serious trouble but that the Colonel had been laughing about it" and that if accused would call up and apologize "he thought it would be dismissed." Accused tried "to contact" the colonel unsuccessfully and when accused called again later the colonel refused to see him. He did acknowledge being "a poor drinker" because when drinking he becomes "quite hilarious", and that he had

become intoxicated on about eight or nine drinks on an occasion about two months before Christmas although he had been drinking prior to that time "perhaps once a week" without becoming drunk. On that occasion he did not remember how he got home from the Officers' Club and there was talk afterward that he "did not act right at home" (R. 23-25).

Second Lieutenant Harold B. McGuane, 323rd Field Artillery Battalion, stated that he was one of a group having a "drinking party" on Christmas Day in the room of one of the officers. Accused, with the rest of the officers "had a couple of drinks" while they sat and talked until about 11:30 a.m., when accused fell asleep and the others went to dinner.

At about 1 p.m., Lieutenant McGuane again saw accused who was in the hall of the building where the officers had their quarters. Colonel Skinner was present and accused was "flailing wildly" while Lieutenant Davenport attempted to hold him. The colonel asked Lieutenant McGuane, "Will you take care of him and take him to his quarters?" and he then took accused down the hall and into his (McGuane's) quarters, after which he sent for Lieutenant Royce, a medical officer.

Before the medical officer arrived accused broke away from Lieutenant McGuane, ran out of doors and crawled under the building where he was heard "hollering and growling". Lieutenant Davenport and Lieutenant McGuane, from opposite ends of the building finally induced accused to come out (R. 25, 26).

Second Lieutenant John D. Davenport, 323rd Field Artillery Battalion, was also present drinking with accused on the morning of 25 December 1943. He saw accused take "one or two drinks" and when Lieutenant Davenport left at noon accused was not drunk. He next saw accused at about 1 or 1:30 p.m., when Colonel Skinner asked him to get accused down from the roof of the building. Accused came down as soon as Lieutenant Davenport asked him to do so. As they came down the hall toward Colonel Skinner words passed between the colonel and accused but when the colonel asked accused his name he refused to give it. Lieutenant McGuane then came along and he and Lieutenant Davenport took charge of accused, intending to take him to his room. Accused meanwhile was wrestling with the officers trying to get away. Lieutenant Davenport did not see accused strike Colonel Skinner though accused "was more like a maniac" in his actions (R. 26, 27).

When the medical officer, First Lieutenant Robert K. Royce, 57th Medical Battalion, arrived at Lieutenant McGuane's room "between Christmas dinner and about 1:30", he found accused lying on a bed with his face down and "acting peculiar". When asked whether he had been drinking anything, accused looked at Lieutenant Royce "sort of silly like" and answered, "a couple of quarts of grain alcohol". When again asked what he had been drinking, accused said "arsenic". He

could not say that accused was intoxicated but "he was not normal" and though he recognized the doctor accused told him he did not like him and ordered him to get out. Lieutenant Royce thought he was temporarily deranged and stated that the derangement "could have been precipitated by drinking liquor". Accused was, in the doctor's opinion, "well oriented but didn't have his judgment" and although he believed accused was not responsible for his actions he knew what he was doing. This was evident because when Lieutenant Royce would ask simple questions accused would make absurd answers, but when told that he was lying in making such answers he would then give correct answers.

After an examination the doctor was unable to determine whether accused had used drugs and he then administered 10 grains of Benzedrine to him (R. 28-30).

Concerning accused's conduct as an officer, Captain Fred B. Hartman, 323rd Field Artillery Battalion, who was commanding officer of the battery in which accused was, for four months, the motor officer, testified that he was efficient in his work and that he would have given him "a very high rating" if he had made an efficiency report on him at that time (R. 31, 32).

Captain Walter R. Hoblitzell, 323rd Field Artillery Battalion, knew accused as an officer of the battalion in October 1943 and during that time he was very efficient and courteous to officers (R. 32, 33).

Major Robert W. Pegg, Executive Officer of the 323rd Field Artillery Battalion, testified that during the three months in which accused was battalion motor officer accused was efficient and courteous (R. 33).

Captain Ralph W. Morgan, 323rd Field Artillery Battalion, had known accused for 18 months, during 5 of which he was accused's battery commander. During the first four months of this period he had rated accused "superior" and though he was not required to rate him for the last month he would have given him a rating of "excellent". In his opinion accused was one of the most courteous of officers and well liked by the men (R. 34).

Captains Hartman and Hoblitzell and Major Pegg had never seen accused drunk (R. 32, 33, 34), but Captain Morgan had seen him drunk on one occasion at the officers' club (R. 35).

5. Although it is difficult to reconcile the fantastic and precarious conduct of accused, as portrayed by the evidence, with a state of drunkenness, either from the use of liquor or drugs, there can be no other conclusion as accused's sanity is nowhere questioned or in issue.

While there is no proof in the record of the use of an excessive amount of liquor by accused on the day in question and no proof of the use by him of any drug, prior to the commission of the offenses with which he stands charged, there can be little doubt that he did, by the voluntary use of some stimulant, produce a condition of temporary derangement during which he publicly misbehaved himself in an absurd, rude and obscene manner.

There is a conflict of opinion as to whether he was or was not drunk but all witnesses to the acts charged agree that he committed them. That he was rational is obvious from several incidents. Only a person able to reason would have been able to both recognize Colonel Skinner and associate his rank with that of a much higher and more important official as accused did when he said, "Even Colonel Skinner and General Marshall could not get me off this roof." But even more significant is the testimony of the medical officer who saw accused soon after he was confined to quarters and who testified that accused knew what he was doing notwithstanding he was under the influence of alcohol or drugs. Indeed, this witness stated that, although accused would first give absurd answers to simple questions he did, when told he was lying, promptly give correct answers.

Voluntary drunkenness, whether caused by liquor or drugs, is not an excuse for crime committed while in that condition (M.C.M., 1928, par. 126a). Since no other rational explanation of accused's conduct appears in the record it must be attributed to the alcoholic liquor which he admits he voluntarily consumed. The conclusion is inescapable that his weird conduct was the result of this voluntary indulgence and he is legally responsible therefor.

Each specification is fully and amply supported by the evidence. The nature of the language used by accused toward Colonel Skinner, his superior officer (Charge I and Specification) requires no comment. It was not only disrespectful but indecent and obscene.

Accused not only offered violence to Colonel Skinner (Charge II and Specification) by offering to fight him, but twice assaulted him to the extent of striking his cigar from his mouth and his hand. Colonel Skinner was in the execution of his office, since it was a fundamental duty of his to maintain discipline at the time and place in question insofar as accused was concerned.

Nor is there any doubt about the drunken and disorderly conduct of accused in a public place (Charge III and Specification). His ludicrous behavior on the peak of a roof in full view of 15 or 20 enlisted men who were in the battery street and whose attention accused invited by whistling and shouting is conclusive proof of this offense when viewed in connection with the testimony of a number of officers who said he smelled of liquor and was drunk, as well as

accused's own admission, under oath at the trial, that he had been drinking rum and coca cola that morning to such an extent that he suffered a complete lapse of memory until the next day.

That accused committed the offenses charged in the Specifications of Charge IV is likewise sufficiently shown. He was able to and did recognize Colonel Skinner as his superior officer; the colonel was then in the execution of his office; and accused on two separate occasions refused to obey lawful commands. On the first occasion the refusal was accompanied by derisive remarks and on the second by a defiant attitude and opprobrious words indicating, in each instance, a full comprehension of the commands and a determination to disobey them.

6. Records of the War Department disclose that accused was born in Los Angeles, California and is twenty-six years of age. He was graduated from high school in 1938 and attended the University of Chicago for three and a half years thereafter, specializing in law and business administration. From 1940 to 1941 he was head bellman in the Morrison Hotel. He also did clerical work for a hotel and a varnish company and at one time operated truck gardens. He was inducted on 25 November 1941 and became a member of Battery "D", 11th Battalion, 4th Field Artillery Training Regiment at Fort Bragg, North Carolina. He attended the Field Artillery School at Fort Sill, Oklahoma and upon completion of the course was commissioned a second lieutenant, Army of the United States, on 14 July 1942 and on the same day ordered to active duty and assigned to the 83rd Infantry Division at Camp Atterbury, Indiana. He was promoted to First Lieutenant on 23 January 1943.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence. A sentence of dismissal is mandatory upon conviction of a violation of Article of War 95 and is authorized upon conviction of a violation of Articles of War 63, 64 and 96.

William A. Pounds, Judge Advocate.

Carl A. Hoblum, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 18 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 First Lieutenant Robert H. Green (0-1166496), 323rd Field Artillery Battalion.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and 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.
1 - Record of trial
2 - Dft. ltr. for sig. S/W
3 - Form of Executive action

(Sentence confirmed but execution suspended. G.C.M.O. 185, 20 May 1944)

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

SPJGN
CM 247878

(61)

19 Feb 1944

UNITED STATES	)	THIRD SERVICE COMMAND ARMY SERVICE FORCES
v.	)	
Captain JOHN F. HOUCK (0-236032), Corps of Military Police.	)	Trial by G.C.M., convened at Indiantown Gap Military Reservation, Pennsylvania, 23, 30 and 31 December 1943. Dismissal.

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 Charge and Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Captain John F. Houck, CMP, Commanding Officer of the 3300th Service Unit, did, on or about 3 September 1943, knowingly and wrongfully take four (4) prisoners of war confined in the stockade at the Pine Grove Internment Camp, Pine Grove Furnace, Pennsylvania, to a tavern known as the Deer Lodge Inn, Mt. Holy Springs, Pennsylvania.

Specification 2: In that Captain John F. Houck, CMP, Commanding Officer of the 3300th Service Unit, did, on or about 3 September 1943, at a tavern known as the Deer Lodge Inn, Mt. Holy Springs, Pennsylvania, drink intoxicating liquor with four (4) prisoners of war under his charge.

Specification 3: (Finding of not guilty).

Specification 4: (Finding of not guilty).

Specification 5: In that Captain John F. Houck, CMP, Commanding Officer of the 3300th Service Unit, did, on or about 3 September 1943, wrongfully and in derogation of his duties as Commanding Officer of Pine Grove Internment Camp, Pine Grove Furnace, Pennsylvania, absent himself from said camp during duty hours on a mission other than that for the government.

Specification 6: (Finding of not guilty).

Specification 7: In that Captain John F. Houck, CMP, Commanding Officer of the 3300th Service Unit, having received a lawful order from Lt. Colonel Crawford C. Madeira, Cavalry, not to leave the Pine Grove Internment Camp, Pine Grove Furnace, Pennsylvania, unless Captain Edgar F. Gallagher, the Executive Officer at said camp, remained on duty and in command of said camp during the absence of Captain John F. Houck, the said Lt. Colonel Crawford C. Madeira being in the execution of his office, did at the said Pine Grove Internment Camp, on or about 15 October 1943, fail to obey the same.

The accused pleaded not guilty to the Charge and all Specifications thereunder. He was found not guilty of Specifications 3, 4 and 6, and guilty of all other Specifications and of the Charge. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved only so much of the sentence as provides for dismissal from the service, and forwarded the record of trial for action under the 48th Article of War.

3. With respect to Specification 1, the evidence for the prosecution shows that the accused was the Commanding Officer of the 3300th Service Unit and the Pine Grove Internment Camp, situated at Pine Grove Furnace, Pennsylvania, from 20 May 1943 until 20 October 1943, when he was relieved. At about 2:30 p.m. on 3 September 1943, the accused, leaving the camp in charge of Captain Marinello, the camp's medical officer and the only other commissioned officer then on the post (although six commissioned officers were then assigned to the post), secured four German prisoners of war confined at the camp and conveyed them in his private automobile to Deer Lodge Inn, a tavern or cabaret situated about ten miles from the camp. The group of four prisoners included a leader, described as a "positive and aggressive" person, an interpreter, and two prisoners described as artists. The accused was armed with a .45 caliber pistol strapped to his right side. The leader sat in the car beside the accused, and the other three prisoners sat in the rear seat (R. 22, 24, 64-69, 75-76).

The accused and the four prisoners arrived at the tavern at about 3:00 p.m., remained there until about 5:45 p.m. and returned together in the accused's private automobile, after the arrival at the tavern of Lieutenant Simpson and an armed guard of three enlisted men who had been sent there to obtain the return of the accused and the prisoners. The tavern was closed to the general public while the accused and the prisoners were there, although two enlisted men from the camp were admitted during that time (R. 11-13, 18, 25, 51-52, 59, 64, 67-69, 75-76).

Lieutenant Colonel Madeira, Chief, Provost Marshal Branch, Internal Security Division, Third Service Command, testified that War Department policy prohibited the movement of prisoners of war except (1) upon the direct order of the Provost Marshal General, or (2) if the movement is within the Service Command, upon the order of the Service Commander himself, through one of his Staff Officers, or (3) if on working parties, by order of the Camp Commander and "under suitable guard".

He further testified that the Commanding General of the Service Command is responsible for the security of prisoners of war entrusted to him; that their security depends upon the exercise of good judgment by the Camp Commander; that for general prisoners "a guard must accompany not more than two prisoners"; and that for prisoners of war "there is nothing written in the book" as to the required ratio of guards to prisoners. He further testified that Italian prisoners of war could be made trusties and worked without guards but that, in his opinion, German prisoners could not (R. 7-10).

Private Culp, a defense witness, who was First Sergeant on 3 September 1943, testified, on cross-examination, that trusties were first appointed at this camp about 30 November 1943, and that they are not allowed to leave the camp (R. 57).

4. With respect to Specification 2, the evidence for the prosecution shows that the accused and two of the prisoners sat at the bar in the tavern more than two hours, during which time several rounds of drinks were served them. Private Lowry testified that, in company with Sergeant Torpey, he went to Deer Lodge Inn on the afternoon of 3 September 1943, arriving there about 3:00 p.m. The door, "a double door, half wood and half window frame", was locked. He looked in through the glass section and saw the accused and two prisoners of war sitting at the bar. The owner of the tavern, Mr. Parks, recognized Lowry and Torpey and let them in. Upon entering, Lowry saw two more prisoners of war. They were "sketching two women". The accused was seated at the right of the two prisoners at the bar, and Lowry and Torpey took seats at the bar to the right of the accused, Lowry being seated beside the accused. The accused asked them what they were doing out of camp, to which Torpey gave a seemingly satisfactory explanation. Lowry saw on the bar in front of the prisoners "several glasses" which looked like "old fashioneds" and "there was liquid in the glasses". Lowry, when asked whether he meant by "old fashioned" a "whiskey glass", answered "Yes". On the bar in front of the accused was a "beer glass", at least "it looked like beer", but Lowry did not see any foam on it. Lowry and Torpey while at the bar were served two or three whiskeys and two or three beers. The accused paid for at least one round of whiskies for Lowry and Torpey. The two prisoners seated at the bar were served "several times"; likewise the accused was served "several times". Lowry also testified that the chief drinks sold at the tavern were "beer and whiskey", and further as follows: "Q. When they were served, everybody had a drink?" "A. Those at the bar". "Q. They were all served together?" "A. Yes, sir". Lowry and Torpey remained at the tavern two and one-half hours, and the accused and the prisoners were there during all of that time (R. 17-22).

Private Woltemate testified that upon the arrival of Lieutenant Simpson and the armed guard at the tavern, the accused asked Sergeant Culp if he thought that he (the accused) was drunk, to which Culp did not answer. The accused then made similar inquiry of one of the ladies and she said "she thought it would be better if he left". Woltemate saw some

glasses in front of the prisoners, containing liquid which was "amber or dark amber" of color. There was an empty glass in front of the accused. The accused's eyes "were sort of heavy" and "his speech was rather thick, slurred" and "rather like a man that has false teeth that don't fit him. You couldn't understand him" (R. 13-15).

Captain Marinello, the medical officer, testified that he called the accused three times on the telephone while the accused was at the tavern. The first time he called, about 3:00 p.m., the accused's voice "sounded normal"; the second time he called the accused "began to have some slurring in his voice"; and at the time of the third call, about 5:15 p.m., the accused's voice was "decidedly impaired". He further testified that when the accused returned to the camp he looked "tight" and "his eyes shown" and "he made an effort to maintain himself, and his speech was not as usual" and "his mind was not any too active" (R. 25-26).

The accused testified that he drank two glasses of port wine in the presence of the prisoners in the tavern, and added "I am not fond of wine". Mr. Parks, the owner of the tavern, testified that he served the accused several glasses of wine "three as close as I can fix it" (R. 60-68).

Staff Sergeant Ryan, a witness for the defense, when asked whether the prisoners were "drunk" when they were returned to the stockade late in the afternoon of 3 September 1943, evaded the question by replying "They were excited" (R. 43).

5. A summary of the evidence for the prosecution with respect to Specification 5 is included in the above summaries of the evidence with respect to Specifications 1 and 2.

6. With respect to Specification 7, the evidence for the prosecution shows that Lieutenant Colonel Madeira, as a Staff Officer of the Third Service Command, had supervision over the accused. The accused together with Captain Edgar F. Gallagher, the Executive Officer at the camp, paid a visit to the office of the Internal Security Division, in Baltimore, in August 1943. As they were leaving that office, Colonel Madeira stopped the accused in the hallway and "explained to him that he and Captain Gallagher should never both be away from the camp at the same time as they were the only two officers familiar with the camp, and as such one officer must remain at all times, one of the two must remain". In answer to the question "was your comment intended as an order or was your remark intended as a Staff Officer's comment as to Captain Houck's conduct of his post?" Colonel Madeira replied: "I would say it was one and the same thing". The evidence further shows that Colonel Madeira was representing the Third Service Command and was carrying out the policy of that Command when he instructed the accused that both he and Captain Gallagher should never be away from the camp at the same time (R. 7, 8, 9).

Both the accused and Captain Gallagher were absent from the camp for several hours on the afternoon of 15 October 1943 (R. 27, 31, 33, 37, 39, 43).

The accused admitted, in his testimony, that both he and Captain Gallagher were away from the camp on 15 October 1943, from 2:15 p.m. until after 5:00 p.m., they having left the camp and returned thereto by the back gate, which was unguarded (R. 34, 71-73).

7. The evidence for the defense includes testimony of the accused that Pine Grove Internment Camp "is run primarily for the use of internment, for the internment of prisoners of war". The average prisoner remains two to three weeks. Certain equipment has been installed at the camp to facilitate the procurement, from the prisoners, of military information for the use of the Military Intelligence Service. Such equipment includes "one building with microphones, reproducing machines, three sound proof rooms, also living quarters for various interrogators". For assistance in obtaining military information from the prisoners, there is also maintained at the camp "a permanent cadre of ten prisoners of war. These prisoners of war are certified by military intelligence and are sent in for that purpose. They are assigned as cooks, interpreters and so forth. These ten men remain in the camp and they are what is commonly known as stool pigeons". The members of the cadre obtain information, and also "leads" to other information. It was considered important to keep the morale of the cadre "at the highest pitch". They received no extra pay or rations. Any special privileges shown them within the compound "would give them away as to what their mission was". All four of the prisoners who were taken to Deer Lodge Inn on 3 September 1943, were members of the permanent cadre. One was a leader, one an interpreter, and the other two had been working on art work. The purpose in taking the two artists to the Inn was to permit them to make sketches of the "exterior and interior" of the Inn for use in painting reproductions on the walls of the day room at the camp. The other prisoners were taken to the Inn for "the purpose of morale". The accused also testified that at the Inn he drank two glasses of wine and the prisoners drank soft drinks; that on 15 October 1943, the accused and Captain Gallagher were away from the camp on official business; that he did not receive an order from Colonel Madeira prohibiting him from leaving the camp unless Captain Gallagher, the Executive Officer, remained on duty at the camp; and that neither he nor Colonel Madeira regarded the latter's statement as an order. The accused's version of what Colonel Madeira said to him was as follows: "Colonel Madeira said, 'Houck, you and Gallagher shouldn't be down here together in Baltimore'. That was the only thing he ever said" (R. 65-68, 70-71, 73).

Sergeant Michaelis, a defense witness, testified that he saw the accused upon the latter's return to the camp after 5:00 p.m. on 3 September 1943, and that, in his opinion, the accused "was not drunk" (R. 47).

Lieutenant Simpson, who was originally called by the prosecution to testify as to events which occurred on 15 October 1943, was recalled by the defense and asked whether the accused was drunk or sober when Lieutenant Simpson arrived with an armed guard at Deer Lodge Inn on 3 September 1943. The witness replied that, in his opinion, the accused "was sober" (R. 51).

Private Culp, a witness for the defense and one of the three enlisted men who constituted the armed guard that accompanied Lieutenant Simpson to the Inn on 3 September 1943, testified that he saw the accused at the Inn and that, in his opinion, the accused and the prisoners were sober. On cross-examination, however, he admitted that the lights in the Inn "were very dim", and testified further as follows: "Q. Weren't the lights out?" "A. I believe the one behind the bar was lit". "Q. Could you see in all right?" "A. After we entered". He further testified that he did not notice that the prisoners took anything with them when they left the tavern, but he did state that he saw nothing in their hands - evidently referring to the sketches (R. 54-56).

William M. Parks, a witness for the defense, testified that he owns and operates the Deer Lodge Inn. It is a tavern or roadhouse "we serve wines, beers, and liquors and we operate as a restaurant more or less, night club". The place has a juke box. The accused was "a frequent customer" and a "good customer". On the afternoon the accused brought the prisoners to the Inn the place was closed to the general public, but there were present Mr. Parks' wife and a woman employee, and, of course, Mr. Parks himself. Also, Private Lowry and Sergeant Torpey arrived and were admitted. All drinks were served by Mr. Parks himself. He served three glasses of "dark red" wine to the accused and soft drinks only to the prisoners. The wine was served in a 2-ounce glass and the soft drinks were served in 9-ounce glasses. Two of the prisoners made sketches of Mrs. Parks and of various parts of the "interior" of the Inn. Mr. Parks could not say whether any sketches of the "exterior" of the Inn were made, but he did state, on cross-examination, that the accused and the prisoners came into the Inn "when they got there". This part of his testimony contradicts the accused's testimony that upon arriving at the Inn "we sat outside for five to six minutes, while they made a rough sketch of the exterior of the Lodge" (R. 58-64, 68).

8. Specification 1 alleges that the accused "did, on or about 3 September 1943, knowingly and wrongfully take four (4) prisoners of war confined in the stockade at the Pine Grove Internment Camp * * * to a tavern known as the Deer Lodge Inn". It is undisputed that the accused did in fact, on the date specified, remove four German prisoners of war from their place of confinement in the stockade at the camp, and drive them in his private automobile to Deer Lodge Inn, where they remained for a considerable period of time in the company of the proprietor, the proprietor's wife, two enlisted men and a woman employee of the tavern. It is also undisputed that, while the accused was himself armed with a .45 calibre pistol strapped to his right side, no other guard of any kind accompanied the accused and the prisoners. The only defense asserted by the accused to the offense charged in Specification 1 is that, as the Commanding Officer of the camp, he was "authorized" to effect the movement of the prisoners complained of. He points to no written authority to support his assertion. On the contrary, the evidence clearly shows that War Department policy prohibits the movement of prisoners of war except (1) upon the direct order of the Provost Marshal General, or (2), if

within the Service Command, upon the order of the Service Commander himself, through one of his Staff Officers, or (3), if on working parties, by order of the Camp Commander and "under suitable guard".

In an effort to give support to his assertion that he was "authorised" to take the prisoners to the tavern, the accused emphasized that all four of the prisoners were members of a permanent cadre of ten men maintained at the camp by the Military Intelligence Service to assist in obtaining military information from prisoners of war; that it was important to maintain the morale of the cadre "at the highest pitch"; that he, as Camp Commander, had an obligation to assist in morale building and a considerable latitude within which to do it; and that the object of taking two of the prisoners (the "leader" and the "interpreter") to the tavern was "the purpose of morale". The other two were taken, he asserted, to make sketches for use at the camp.

The evidence touching upon the alleged purposes of the trip to the tavern is contradictory and unsatisfactory, and the court was entitled to conclude that the accused's attempted explanation of the trip was a mere subterfuge. Even if it be assumed that the two prisoner-artists were engaged on a work detail authorizing their movement from the camp, the inclusion of the leader and the interpreter for "morale building" was clearly unwarranted.

The shocking action of the accused in making this trip, and in exposing the prisoners and himself to the risks that were incident thereto, was clearly prejudicial to good order and military discipline and conduct of a nature to bring discredit upon the military service. The Board is of the opinion, therefore, that the evidence is clearly sufficient to sustain the finding of guilty of Specification 1, in violation of the 96th Article of War.

9. Specification 2 alleges that the accused "did, on or about 3 September 1943, at a tavern known as Deer Lodge Inn * * * drink intoxicating liquor with four (4) prisoners of war under his charge". The accused himself testified that, while at the tavern with the four prisoners, he drank two glasses of port wine. Mr. Parks, a defense witness, testified that the accused drank three glasses of port wine. No further evidence as to the drinking of intoxicating liquor by the accused was necessary. There was in fact, however, considerable evidence from which the inference might have been drawn that the accused was drinking a much stronger beverage than port wine.

With respect to the drinks consumed by the prisoners, the evidence is conflicting. There is evidence that at least two of the prisoners were served "several times"; that they were drinking out of "old fashioned glasses", it being explained that by that term was meant "whiskey glasses"; that the prisoners and the others at the bar were all served at the same time when new rounds of drinks were ordered; and that when the prisoners were returned to the stockade they were "excited", this being the answer given by a defense witness when asked, on cross-examination, whether the prisoners were "drunk". On the other

hand, there was evidence for the defense that the prisoners were served only soft drinks. The court was entitled to believe only such witnesses as it chose, it might have found either way on the question as to whether the prisoners drank intoxicating liquors. There is evidence sufficient to support a finding by the court that, beyond a reasonable doubt, the prisoners as well as the accused were drinking intoxicating liquor on the occasion in question.

The Board is of the opinion, therefore, that the evidence is sufficient to sustain the finding of guilty of Specification 2, in violation of the 96th Article of War.

10. Specification 5 alleges that the accused "did, on or about 3 September 1943, wrongfully and in derogation of his duties as Commanding Officer of Pine Grove Internment Camp * * * absent himself from said camp during duty hours on a mission other than for the government." The circumstances under which the accused was absent from the camp on the afternoon of 3 September 1943, have been already reviewed in this opinion. It has not been contended by the accused that the hours he spent at the tavern during the afternoon in question were not "duty hours" or that he was "off duty" during those hours. On the contrary the nature of the defense asserted by him under Specification 1 required him to represent that he was on duty during those hours. On the evidence presented it must, therefore, be inferred that the accused was absent from the camp during duty hours. This leaves for determination only the issue as to whether the accused was "on a mission other than for the government". As indicated above, the Board is of the opinion that the court was entitled to conclude that the trip was in no sense bona fide, but that the accused's attempted explanation was a mere subterfuge. That the court did so conclude is indicated by its finding the accused guilty of Specification 5. The evidence consequently is clearly sufficient to sustain the finding of guilty of Specification 5, in violation of the 96th Article of War.

11. Specification 7 alleges that the accused "having received a lawful order from Lt. Colonel Crawford C. Madeira * ** did * * * on or about 15 October 1943, fail to obey the same". The accused does not deny that Colonel Madeira spoke to him in Baltimore on the occasion mentioned in Colonel Madeira's testimony, but he disagrees with Colonel Madeira on two points, namely (1) the exact words which were spoken, and (2) whether such words were intended as an order. On both of these points the court was entitled to accept, and apparently did accept, the version given by Colonel Maderia. The authority of Colonel Madeira to give the order has not been questioned. On the contrary, the accused, when asked whether he recognized Colonel Madeira's authority, replied: "I would accept it as coming from Internal Security". Accepting Colonel Madeira's account of the statement made by him to the accused, as quoted in paragraph 6 of this opinion, there can be no doubt that such statement amounted to an order. It was mandatory in its terms. It must have been so understood by the accused, who, it is to be observed, had had several years of service, both as an enlisted man and as an officer. Moreover, the evidence shows that the order was given in furtherance of the policy

of the Service Command and was one which could easily have been obeyed. It is undisputed that the order was disobeyed. The Board is of the opinion, therefore, that the evidence is clearly sufficient to sustain the finding of guilty of Specification 7, in violation of the 96th Article of War.

12. The records of the Office of The Adjutant General show that the accused was born 27 November 1894; that he was a member of the Maryland National Guard from 23 August 1911, until 12 April 1917, and from 5 March 1920 until 2 January 1929, rising in that service from the rank of private to the rank of captain; that he served as a member of the 115th Infantry from 12 April 1917 until 10 March 1919, and was commissioned a second lieutenant 26 August 1918; that he held a commission (rank not stated) in the Officers Reserve Corps from 1 February 1927 until that appointment terminated 2 January 1929; that he was a captain in the National Guard Reserve from 2 January 1929 until 1 May 1934; and that he was commissioned a captain in the Army of the United States 15 September 1942, entering upon active duty 8 October 1942. No previous convictions are shown.

13. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty of the Charge and of Specifications 1, 2, 5 and 7 thereunder, and legally sufficient to support the sentence and to warrant confirmation thereof. A sentence of dismissal is authorized upon conviction of a violation of Article of War 96.

Abner E. Lifsconb, Judge Advocate.

Benjamin R. Cooper, Judge Advocate.

Gabriel H. Goldin, Judge Advocate.

SPJGN
CM 247878

1st Ind.

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

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Captain John F. Houck (0-236032), Corps of Military Police.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and 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 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 ofExecutive action.

(Sentence as approved by reviewing authority confirmed. G.C.M.O. 206, 26 May 1944)

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

SPJGQ
CM 247915

9 FEB 1944

UNITED STATES v. Second Lieutenant J. RUSSELL SAGE (O-1175302), Field Artillery.	CAMP ROBERTS, CALIFORNIA Trial by G.C.M., convened at Camp Roberts, California, 3 January 1944. 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 95th Article of War.

Specification: In that Second Lieutenant J. Russell Sage, Headquarters & Headquarters Battery, 11th Field Artillery Training Regiment, Camp Roberts, California, did, at Martinez, California, on or about 13 September 1943, with intent to defraud wrongfully and unlawfully make and utter to Bank of Martinez, Martinez, California, a certain check, in words and figures as follows, to-wit:

Martinez, California, 9-13 1943

Cash _____ Pay to the order of

Customer's Draft

BANK OF MARTINEZ
MARTINEZ, CALIFORNIA

Twenty - - - - - - - - - - - - - - - and - no/100 - $20.00 Dollars

Value received, and charge to account of

To 1st Natl of Portland
Medford Oregon
Camp White Branch

/s/ J. RUSSELL SAGE
2nd Lt., FA O-1175302

and by means thereof, did fraudulently obtain from Bank of Martinez, Martinez, California, twenty dollars and no cents ($20.00), he the said Second Lieutenant J. RUSSELL SAGE, then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank of Portland, Oregon for the payment of said check.

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

Specifications 1, 2, 3 and 4 are identical with the Specification under Charge I appearing above, with the exception of the time, place, amount of the check drawn and the payee or person alleged to have been defrauded, which details are as follows:

	Date	Place	Amount	Payee (Person Defrauded)
Spec.1:	October 23, 1943	San Luis Obispo, Cal.	$25.00	Anderson Hotel (J.L. Anderson)
Spec.2:	October 24, 1943	San Luis Obispo, Cal.	25.00	Anderson Hotel (J.L. Anderson)
Spec.3:	November 8, 1943	San Luis Obispo, Cal.	46.20	Anderson Hotel (J.L. Anderson)
Spec.4:	November 8, 1943	San Luis Obispo, Cal.	5.00	Anderson Hotel (J.L. Anderson)

He pleaded not guilty to and was found guilty of all the Charges and Specifications, No evidence of any previous conviction was submitted. 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 competent evidence for the prosecution in support of Charge I and its Specification shows that on 13 September 1943 accused identified himself at the Bank of Martinez, Martinez, California, and asked that bank to cash a check or draft in the sum of $20. He was supplied with a blank form of customer's draft which the accused filled out in the sum of $20 naming as drawee the First National Bank of Portland, Medford, Oregon, presented it for payment to the Bank of Martinez who cashed it. When the check was presented at the First National Bank of Portland, Medford, Oregon, payment was refused for the reason noted upon the draft, viz, "Account Closed". When the check was returned the vice president of the Bank of Martinez was unable to contact the accused even as late as 20 October 1943. On 4 November 1943, the Bank of Martinez was reimbursed in full by the accused in the sum of $20 (Pros. Exs. A, B, C).

With reference to Charge II and its Specifications, Harold D. Spillers, the acting manager of the Anderson Hotel, San Luis Obispo, testified by deposition (Ex.D) that J. L. Anderson was the owner of the Anderson Hotel. On 23 October 1943 and 24 October 1943 the accused personally presented to a clerk of the hotel his checks in the sums of $25 each, drawn upon the First National Bank of Portland, Medford, Oregon, payable to the Anderson Hotel, who, upon accused's request cashed them. On 8 November the accused, in a similar manner, had this hotel cash an additional check drawn on the same bank in the amount of $5. On the same date, 8 November 1943, the accused "owed the hotel $40 to cover bad checks he had previously cashed, and $6.20 for the hotel room of a friend". Accordingly, on that date he

made payment of this indebtedness to the hotel by means of a check in the sum of $46.20, payable to Anderson Hotel, signed by the accused and drawn on the same drawee bank. On or about the 6th or 7th of November 1943, the accused had paid $50 in cash to the hotel "to cover bad checks owed the hotel" (p.1, Pros. Exs. D, E, F, H, J).

The four checks described above were presented for payment and payment was refused. The checks were returned marked "Account Closed".

By stipulation accused admitted that he made and signed the four checks described; that he received value in exchange for the checks from the Anderson Hotel; and that all checks were returned by the First National Bank of Portland marked "Account Closed" (Pros. Exs. E, F, G, H, I, J, K).

Mr. Phelan Benford, an official representing the First National Bank of Portland, Medford, Oregon, and having custody of the books of account for that bank, testified by deposition (Pros. Ex. L) that the records of that bank, concerning the accused's checking account, showed that the accused opened his account on 8 January 1943 and because of the fact that he had withdrawn all of his funds in that account on 2 August 1943, the bank closed the account. The balance on deposit in the accused's account upon the following dates were as follows:

25 February 1943	$ 1.52
25 March	5.30
25 April	1.33
25 May	15.43
25 June	12.25
25 July	12.25
2 August	0.00

The accused was not notified of the closing of the account other than by the mailing of the monthly statement. The witness was unable to say whether the statement was mailed or not after 2 August 1943 (p. 4, Pros. Ex. L). At no time did the accused request that the account be closed (p. 5).

Charles L. Newland, the assistant manager of the same bank also testified by deposition (Pros. Ex. N) that the accused made no request to close his account with that bank and that he knew of no notice having been given to the accused that his account had been closed by the bank. The bank, however, closed the account (on August 2 1943) because there was a $.25 overdraft by reason of a service charge imposed by the bank. Upon numerous occasions after closing the account, accused's checks, or possibly the same check, were presented for payment and returned. On 2 July 1943, accused deposited $60 in the account by means of a telegraphic money order.

On 5 November 1943 the bank received a telegraphic money order for the sum of $60 to be credited to the account of accused. The bank, however, did not place this amount to the credit of accused, but returned $59.90 of that money by issuing its Cashier's Check to the order of the accused in that sum and mailing the check to the accused. The check has not been cashed by anyone and the accused claims that he never received it (p. 4-5; Pros. Ex. N).

It was stipulated on 29 December 1943 that the accused had made complete restitution to the Bank of Martinez, Martinez, California, and that restitution "will have been made on all the other checks involved on or before the date of trial of this action" (Pros. Ex. O).

4. The accused, after having been duly warned of his rights, elected to be sworn and testified (R. 25). He is 31 years of age. In civilian life he was a District Manager of Circulation of the Omaha World Herald for a period of 15 years. For the year prior to entering the Army, he was a route salesman for the Norwich Pharmical Company. He is married. He was inducted into the Army in April of 1942; was commissioned a second lieutenant on 24 December 1942; and was assigned to the 91st Division at Camp White, Oregon on 7 January 1943. On 8 June 1943 he was assigned to the Port of Embarkation at Fort Mason, California. On 12 October 1943 he was transferred to Camp Roberts, California. While at Camp White, in January 1943, he opened a checking account with the First National Bank of Portland, at Medford, Oregon, and arranged for his pay checks to be sent by the Finance Office direct to that bank (R. 27). He introduced in evidence his deposit book and duplicate vouchers showing the deposits made by the Finance Office (R. 28, Def. Ex. 1) indicating that this procedure was followed monthly until and including the deposit of his pay of 1 June 1943. The deposit book shows an additional deposit on 8 June 1943 of $50 upon which date he left Camp White. On 1 July 1943 he telegraphed $60 to the bank for deposit in that account (R. 30; Def. Ex. 2). He admitted that he had received his bank statements showing the status of his account each month until the month of June, but he had not received any statement since that time. The last one received was the May statement. He did not receive any notice that his account had been closed at any time (R. 31, 44).

He claimed that he had no intention of defrauding the Bank of Martinez; that at the time he gave the Bank of Martinez his check for $20 he thought he had money in the Medford, Oregon bank to cover it; and that immediately upon learning that the check had been dishonored he wired the Bank of Martinez in full reimbursement on 4 November 1943 (R. 31; Def. Ex. 3).

On the same day, 4 November 1943, knowing that he had also given the Anderson Hotel two checks on the same account, he wired $60 to the First National Bank of Portland to cover these checks (R. 32-33; Def. Ex. 4) together with a request that that bank send him a statement of his account

(R. 33). He never received the statement (R. 33). When he learned that his checks drawn on the First National Bank of Portland had been returned unpaid and marked "account closed" in spite of the $60 sent he sent numerous wires to the bank requesting advice on the disposition made of his money (R. 35; Def. Ex. 5 to 11). As yet he has never received his $60 which, he is informed, is now in the form of a cashier's check mailed to him by the bank on 10 November 1943, but which cannot be located (R. 43). The checks involved in the subject case have all been paid by him (R. 43). He stated that when he gave the checks forming the basis of the action he thought he had sufficient funds in the bank upon which they were drawn to cover them, otherwise he would not have issued the checks (R. 43). He had no intention to defraud the payees of the checks (R. 44).

On cross-examination he admitted that after June 1, 1943 his pay was paid directly to him and was not deposited in his bank by the Finance Department (R. 44); that the only deposits he made after that date were $50 on 8 June 1943, $40 later that month, $60 in July, and $60 on 4 November 1943. He could not explain his reason for wiring the $60 in July nor remember what checks, if any, were drawn on that $60 (R. 47, 56). He refused to answer whether he had drawn checks upon the $60 wired to his bank on 4 November 1943 in addition to those totaling $51.20 given to the Anderson Hotel on 8 November 1943 (basis of Specs. 3 and 4) giving as his reason that his answer might incriminate him (R. 50-51).

While he was at Camp White he received his bank statements monthly through the mail (R. 51) but received none after June (R. 53). He could not remember what transactions he had with his bank thereafter other than those related (R. 55, 57). He kept a record of his account until October but not thereafter (R. 54). At the time he gave the Anderson Hotel the two checks for $25 each (23, 24 October 1943) he thought he had sufficient funds in deposit with the drawee bank to cover them but didn't know that he was mistaken until November. He paid the hotel $50 in cash and the remainder by check to "cover all of the checks that I had given them there" (R. 61).

5. It was clearly shown by the evidence and admitted by the accused that on the five occasions specified he gave his check, drawn upon the First National Bank of Portland, Medford, Oregon, in exchange for cash or other consideration, which checks when presented in due course were returned by that bank unpaid and marked "account closed". The only issue in the case is whether or not the accused knew or should have known at the time of giving the checks in question that he did not have, or would not have, sufficient funds on deposit with that bank to meet the checks when presented. If he knew that such was the case, then the court may properly infer that he intended to defraud the Martinez Bank and J. L. Anderson, owner of the Anderson Hotel.

It was clearly shown that during the first six months of 1943 the accused received his bank statements. These statements showed that at the end of each month his account averaged a balance of $8.02. His balance on 25 June 1943, after he had discontinued having his pay check deposited in that account for him by the Finance Department, was $12.25. On 25 July his balance remained the same. This conclusively showed the deposit he made of $60 on 2 July 1943 was withdrawn by checks, even though the accused could not remember whether he had drawn on this $60 or not. His testimony in this regard is unbelievable - he could remember the deposit made by telegram but said he could not remember why he had to use such an unusual method of deposit nor if he had drawn on it. He admitted that he made no further deposits until he endeavored to make one by telegram on 4 November 1943. Notwithstanding these facts he issued his check for $20 in September (Charge I) and two additional checks of $25 each, on October 23rd and 24th (Spec. 1 and 2 of Charge II) - a total of $70 - on an account, the average "end-of-the-month balance" of which was $8.02. The conclusion is inescapable that he must have known that the checks given under such circumstances were worthless. The court was justified in its findings of guilty of these three Specifications and accordingly of the Charges.

As to Specification 3 and 4, however, there appears the additional fact that the accused attempted to deposit $60 on 4 November 1943 which was only a few days before he gave his two checks totalling $51.50 to the hotel. If this attempted deposit was intended by the accused to be used for the purpose of meeting these checks when presented and the bank refused to accept the deposit and thereafter for that reason refused payment of the checks, then there could not have been any intent on the part of the accused to defraud the hotel, unless, of course, he also knew that that would happen - which is extremely unlikely. This additional fact (the attempted deposit) is destroyed as a factor in favor of the accused if his attempted deposit was for some other purpose which if carried out would so deplete the $60 as to exhaust it or reduce it below the amount required to meet the checks in question. On direct examination (R. 32-33) the accused testified that he wired the $60 to the bank in order to meet the two $25 checks given to the hotel in October. If this were true then the $60 would have been reduced to $10 by the payment of these checks and there would not have been sufficient funds on hand with which to make payment of the checks of 8 November even if the bank had accepted the proferred deposit. It therefore follows that accused must have known the checks were worthless.

On cross-examination the accused claimed that when he paid the hotel $50 in cash on 6 or 7 November he did so in payment of previous bad checks (presumably the two checks forming the basis of Specifications 2 and 3 of Charge II) and that his payment on 8 November 1943 of $46.50 was in full

for all remaining bad checks in the hands of the hotel (including a bill for $6.50) and his check in that amount was, in his mind, good because of the attempted telegraphic deposit of November 4th. It was not clear from the evidence whether or not the $50 paid by the accused on November 6 or 7 was in payment of the two $25 checks involved in Specifications 1 and 2. An examination of their endorsements shows that they were still in transit on that date and therefore probably were not included in the attempted settlement with the hotel. The stipulation (Ex. O) dated 29 December 1943 to the effect that all of the checks other than the one given to the Bank of Martinez (already satisfied) would be made good prior to trial, clearly indicates that on that date these two checks of $25 each remained unpaid.

It therefore follows that the evidence was legally sufficient to support the findings of guilty of all of the Specifications and Charges.

As a matter of law accused is properly chargeable with knowledge of the status of his bank account and when he cashes a check he impliedly represents that there is or will be sufficient funds on deposit or on credit with the bank upon which the check is drawn with which to meet payment. As a defense he may endeavor to explain an error or mistake or show that he had good reason to believe such was the case when he gave the check. The court may or may not believe him depending upon the circumstances of each case. In the subject case, as shown above, the court could accept the accused's own story as told on direct examination and properly conclude that he knew he was issuing worthless checks at the time alleged. See CM 236070 Wanner; CM 202601, Sperti.

The giving of worthless checks for cash by an officer has been held to constitute a violation of either the 95th or the 96th Article of War or both CM 202601; (1935); CM 224286 (1942); CM 245507 (1943); CM 236069 (1943).

6. The records of the Adjutant General show the accused to be 34 years of age. After graduating from high school in 1930 he was employed for ten years as a district manager in the circulation department of the Omaha World Herald supervising 40 newspaper carriers. From November 1940 until he entered the service in April 1942 he was engaged in the advertising business for himself in Des Moines, Iowa. He was discharged from enlisted status 23 December 1942 and on the following day was appointed second lieutenant, Field Artillery. He was assigned to the 91st Infantry Division, Camp White, Oregon, 7 January 1943.

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

of Article of War 96 and mandatory upon conviction of a violation of Article of War 95.

William A. Lounds, Judge Advocate

Earle Hepburn, Judge Advocate

Herbert B. Fuderer, Judge Advocate

1st Ind.

War Department, J.A.G.O., 21 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 J. Russell Sage (0-1175302), Field Artillery.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty of all the Charges and Specifications 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.
1 - Record of trial
2 - Dft. ltr. for sig. S/W
3 - Form of Executive action

(Sentence confirmed. G.C.M.O. 166, 11 Apr 1944)

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

SPJGN
CM 248031

26 FEB 1944

UNITED STATES	)	ARMY AIR FORCES WESTERN TECHNICAL TRAINING COMMAND
v.	)	Trial by G.C.M., convened at Lowry Field, Colorado, 28 and 29 December 1943. Dismissal, total forfeitures and confinement for three (3) years.
Second Lieutenant JOHN H. RAQUET (0-564104), Air Corps.	)	

OPINION of the BOARD OF REVIEW
LIPSCOMB, SLEEPER and GOLDEN, 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 John H. Raquet, Army Air Forces Officer Replacement Pool, did, at Denver, Colorado on or about 19 October 1943, with intent to deceive, wrongfully and unlawfully, make and utter, to Hellesen Motors, 1278 Lincoln Street, Denver, Colorado, a certain check in words and figures as follows, to wit:

Southern Commercial Savings No. _____

St. Louis, Missouri October 19 1943

Pay to the
order of Hellesen Motors $339.90/100

Three Hundred Thirty Nine and 90/100 Dollars

By John H. Raquet

Address 1553 Clarkson St

and by means thereof, did fraudulently obtain from Hellesen Motors, one 1941 Desota Sedan Automobile of the value of about $1,395. He, the said Second Lieutenant John H. Raquet, then, well-knowing that he did not have and not intending that he should have sufficient funds in the Southern Commercial Savings Bank, St. Louis, Missouri, for the payment of said check.

Specification 2: (Finding of not guilty.)

Specification 3: Same form as Specification 1, but alleging check drawn on same bank, dated 12 November 1943, payable to order of and made and uttered to Cosmopolitan Hotel, Denver, Colorado, and fraudulently obtaining thereby $20.

Specification 4: Same form as Specification 1, but alleging check drawn on same bank, dated 13 November 1943, payable to order of and made and uttered to Cosmopolitan Hotel, Denver, Colorado, and fraudulently obtaining thereby $20.

Specification 5: Same form as Specification 1, but alleging check drawn on same bank, dated 13 November 1943, payable to order of and made and uttered to Cosmopolitan Hotel, Denver, Colorado, and fraudulently obtaining thereby $10.

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

Specification: In that Second Lieutenant John H. Raquet, Army Air Forces Officer Replacement Pool, with intent to defraud Commercial Credit Plan Industrial Bank, did, at Denver, Colorado, on or about 23 October 1943 unlawfully pretend

> to Commercial Credit Plan Industrial Bank that the only debt or liability he the said John H. Raquet had was one to the Gross Finance Company on his De Soto sedan for the sum of $820.00, well knowing that said pretences were false and by means thereof did fraudulently obtain from the Commercial Credit Plan Industrial Bank the sum of Four Hundred ($400.00) Dollars in money of the United States.

He pleaded not guilty to and was found guilty of all Charges and Specifications, except Specification 2, Charge I, of which he was found not 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 three years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Concerning Specification 1, Charge I, and the Specification, Charge II, the evidence for the prosecution shows that on 1 October 1943 the accused executed his note to the First Industrial Bank of Denver, Colorado, evidencing an indebtedness, incurred on that date, of $300, which he still owed, in its entirety, on 23 October 1943 (R. 37-39).

In the meantime, on 19 October 1943, he purchased an automobile from Hellesen Motors, Denver, Colorado, executing a mortgage thereon to secure his note for $820, payable to Gross Finance Company, which, to that extent, financed the purchase, in further consideration of which the accused gave to Hellesen Motors his personal check for $339.90, drawn on the Southern Commercial and Savings Bank, St. Louis, Missouri. When this check was presented to the drawee bank there were insufficient funds in the accused's account there to pay it so it was returned unpaid (R. 24-35; Exs. 7, 14, 15).

On 23 October 1943, while his $300 indebtedness to the First Industrial Bank of Denver, Colorado, was still outstanding, the accused applied to the Commercial Credit Plan Industrial Bank, Denver, Colorado, for a $400 loan, which he obtained only after executing a written financial statement for the recited purpose of showing his ability to repay "and inducing Commercial Credit Plan Incorporated to make said loan". The statement, which purports to be a full, complete and correct list of all of the accused's debts and liabilities, shows only one, viz., "Gross Finance - Mortgage on Car - $820.00". Mr. Dwight L. Nelson, the

officer manager handling the accused's application, testified that he relied on this financial statement in making the loan, which was consummated after banking hours on Saturday, 23 October 1943, by the delivery of a check payable to the accused, drawn on the Commercial Credit Plan's bank account with the First National Bank of Denver.

The following Monday morning, about 9:30 - prior to the 10 o'clock opening hour of Denver banks - Mr. Nelson telephoned the accused. "I called him", the officer manager testified,

> "and told him there were certain things about the statement he had made to us that had not checked out, and I didn't want him to put the check through. I wanted him to come in and see me as soon as he could, or sometime during that day before depositing the check. He then told me that he had just returned from the bank, and I said, 'Well, you had better go back and try to get it back.' And he said, 'I don't know if I can or not.' And I said, 'Go back and check on it and see me, or at least see me sometime during the day as to your efforts.' I heard nothing from him that day."

Subsequent to this conversation, at about five minutes after 10 o'clock that same morning, the accused cashed the check at the Colorado National Bank, where he purchased, out of the proceeds, a bank money order for $340 payable to the Southern Commerce and Savings Bank, St. Louis, Missouri. The Commercial Credit Plan's bank promptly stopped payment on its check to the accused; consequently, when it reached the drawee bank (The First National), payment was refused. Acceding, however, to the Colorado National's demands, the Commercial Credit Plan's bank took a new financial statement and a new note from the accused and issued - and procured his indorsement on - another check for $400 with which it redeemed its original $400 check, on which payment had been stopped (R. 40-58; Exs. 9-12).

4. Concerning Specification 1, Charge I, and the Specification, Charge II, the evidence for the defense shows that on 20 October 1943, the accused requested Ray Hellesen, the owner of Hellesen Motors, to hold for a few days the $339.90 check, which the accused had given to Hellesen Motors on the previous day - 19 October 1943 - in part payment for his car. Hellesen replied that he could not, that such a transaction would not conform to the rules and regulations of the Federal Government in such cases. He told the accused, however, that

he would put the check through under slow procedure, which would give him some time. Hellesen then "put the check through" the Moffat County State Bank, Craig, Colorado, and a few days later the accused showed Hellesen a deposit slip indicating that $340 had been deposited in the accused's checking account in the bank on which the $339.90 check was drawn. A duplicate deposit slip issued by Southern Commercial and Savings Bank, St. Louis, shows that on 26 October 1943 the accused's account there was credited with a deposit of $340 (Exs. C, D, E).

5. Concerning Specification 1, Charge I, and the Specification, Charge II, the accused testified that on approximately 10 October 1943 he opened a checking account in the Southern Commercial and Savings Bank, St. Louis, with an initial deposit of $750. Since then, he estimated, as of the date of his trial, between $1600 and $1700 had cleared through this account. On 19 October 1943, believing that his fiancee, Miss Ruth Ann Zentner of St. Louis, had arranged - or would arrange - to comply with his request, made two days before, to deposit $500 in his St. Louis account, he had given Hellesen Motors his check for $339.90 in part payment for the car which he purchased on that date. Several hours later Miss Zentner informed him - via long distance telephone - that she was unable to get the money. (Miss Zentner was employed by her father who owned a chain of restaurants. "The matter of the money doesn't enter into it", asserted the accused on cross-examination, "I mean", he added, by way of explanation, "the $500.00 doesn't mean much to her"). The following morning - 20 October 1943 - he told Hellesen he had been expecting Miss Zentner to put some money in the account, "which hadn't gone through at that time and that the money wouldn't be there until the first of the month * * *. They still had the title", his testimony continues,

> "Mr. Hellesen told me there was no sense in taking the car back. I asked him if he could hold the check until the first of the month and he said, no, he couldn't do that because of Government regulations, but he said he would instruct his bank to put it through slow procedure so that it would reach my bank on the first of the month. Then I got the title to the car. That was October 20."

The accused gave Hellesen his note for the balance. (Hellesen's receipt for the $50 payment was introduced in evidence). The accused sought to explain that the reason there was not enough money in his account to pay the Hellesen check when presented was because, after depositing the bank money order to cover it, the accused delivered to the proprietor of a gambling house which he visited on the night of 28 October, two

checks aggregating $250. "At the time", he testified, "I didn't figure these checks would clear because there wouldn't be enough money for them to clear, and I was figuring on paying them out of my pay * * *. Evidently they cleared. When I got my bank statement I got them back with it."

As for his dealings with Commercial Credit Plan Industrial Bank, on 23 October he applied to Mr. Nelson, the office manager, for a loan of $400. Nelson asked for credit references and told the accused "to come back in an hour and he would let me know * * *. I came back in an hour", the accused testified,

> "and he said he had agreed to make the loan, and then I filled out some papers. * * * I filled out the financial statement myself, I wrote in the amounts. I didn't read it, he just told me to fill it out. * * * The loan was completed and I was given a check for $400.00, to my credit drawn on the Commercial Credit Plan's account at the First National Bank. * * * I brought it out here to the field with me, that was Saturday afternoon, I had it in my possession until Monday morning, and I went down to the branch bank at five minutes after Ten Monday morning and cashed the check and got this $340.00 money order and went back to where I was on duty. About ten minutes after I got back, fifteen minutes, Mr. Nelson called me and told me that payment had been stopped on the check and that I had better bring the check down to him. I told him I had just returned from the bank. Mr. Nelson stated that I had better go back and get the check back. I came over to Headquarters and went in to see Major Schaller and * * * told him that my girl had been trying to get the money and that she hadn't been able to, and that I had to go and make this loan to cover the check. Major Schaller told me by all means to put the check through the bank to cover the $339.00 check, which I did. I immediately sent it air mail to my bank. * * * Two or three days later Mr. Nelson called me, and in the meantime the Colorado National Bank had called Colonel Van Houten, and Colonel Van Houten had sent me down there to see them. I had a talk with Mr. E. L. Robinson, the assistant cashier, and he told me that I in no way had to pay back the money. * * * About the middle

> of November, Mr. Nelson came to see me and * * * asked me to make out a new * * * financial statement, and a new loan, and sign a borrower's statement, and told me if I did this they would make another check payable to me * * * and they would take it to the bank and make the other check good * * *. I filled out a new financial statement and signed it and signed the check and gave it back to Mr. Nelson. I just endorsed it and handed it right back to him".

The loan "on the new deal" was to be repaid in the same manner as "on the original deal", viz., at the rate of $50 a month (R. 72-78, Exs. F,G).

6. Specification 1, Charge I, alleges that the accused wrongfully and unlawfully made and uttered to Hellesen Motors a check for $339.90, well knowing that he did not have and not intending that he should have sufficient funds in the bank on which it was drawn to cover it, thereby fraudulently obtaining from Hellesen Motors an automobile of the value of $1395. The evidence positively corroborates the accused's story to the extent of establishing that after delivering his check for the unpaid balance of the purchase price and thereby obtaining possession of the car, he notified the seller - within twenty-four hours - that he would be slightly delayed in depositing funds to cover it, whereupon the seller agreed to "put it through slow procedure" so it would not reach the bank until the first of the month. The accused promptly borrowed and deposited a sum sufficient to pay the check when presented. Several days later, however, he gave other checks, in payment of chips purchased in a gaming establishment, which reached the bank and were paid out of the accused's account before the Hellesen Motors' check arrived. At the time the accused disclosed to the seller that there were insufficient funds in his account to cover the check, the car itself, although it had been delivered to the accused, was still available to the seller, who acquiesced in the proposed arrangement to delay presentation of the check in order to give the accused time to deposit funds to cover it, which the accused did. The element of fraudulent intent, in the first instance, is not established beyond a reasonable doubt by the showing that the accused gave subsequent checks under circumstances charging him with the knowledge that they would probably reach the bank first, in which case their payment would so deplete his bank account as to result in the non-payment of his check to Hellesen Motors, when presented. The giving of the check, however, knowing or charged with knowledge that his bank account was insufficient to pay it, constituted an offense in violation of Article of War 96 (453 (22) 24, Dig. Ops. JAG, 1912-40). The accused's subsequent abortive arrange-

ment with Hellesen did not absolve him of the guilt involved, though its consummation would have effectively forestalled his ever being called to account. In the opinion of the Board of Review, the evidence supports the finding of guilty of Specification 1, Charge I, except the words "with intent to deceive", "fraudulently" and "and not intending that he should have", in violation of Article of War 96.

7. The Specification, Charge II, alleges that the accused, with intent to defraud, knowingly and falsely represented to Commercial Credit Plan Industrial Bank that his only outstanding debt was one for $820, secured by a mortgage on his car, thereby fraudulently obtaining a loan of $400, in violation of Article of War 96. The evidence is clear that the accused himself made out the false financial statement, omitting therefrom a substantial item of indebtedness, and that the loan company relied thereon in making the requested loan. The accused's conduct with reference to the check representing the proceeds of this loan, after notification of the subsequent discovery by the loan company of the falsity of his financial statement, substantiates the inference that deliberate deception, rather than oversight, was involved in the misrepresentation. The re-execution of the loan papers (under the "new deal") did not, under the circumstances, indicate that the loan company had not relied on the false statement. The damage had been done and the subsequent arrangement merely reflected the lender's attorney's judgment as to the solution least likely to result in further complications. The evidence supports the findings of guilty of Charge II and its Specification.

8. Concerning Specifications 3, 4 and 5, Charge I, the evidence for the prosecution shows that the accused drew three checks on Southern Commercial and Savings Bank, St. Louis, Missouri, payable to the Cosmopolitan Hotel, Denver, Colorado, and received, on the dates on which they were written, cash in full face value of each, as follows:

12 November 1943	-	$20
13 November 1943	-	$20
13 November 1943	-	$10

All three were returned unpaid by the drawee bank because there were not sufficient funds in the accused's checking account there with which to pay any one of them when presented. However, the Cosmopolitan Hotel had cashed checks for the accused, drawn on the same bank, both before and after the above described checks were cashed and returned unpaid, and all such prior and subsequent checks had been paid by the drawee bank (R. 10-22; Exs. 1-6).

9. Concerning Specifications 3, 4 and 5, Charge I, the evidence for the defense shows that early in October 1943, the assistant credit manager, Cosmopolitan Hotel, telephoned the drawee bank at the accused's request, following some trouble with the accused's checks, and that the cashier of the drawee bank told him that the accused had both a savings and checking account there, and that if the hotel would write on the face of the checks then in question the words "Savings account", the drawee bank would pay the check from that account. This was done and the checks were paid. The assistant credit manager imparted to accused the substance of his telephone conversation with the cashier of the drawee bank, previous to which he had already seen a letter from the drawee bank to the accused, requesting the latter to sign the withdrawal slip and signature card for a checking account, referred to as "inclosed". and advising,

> "As soon as we receive the withdrawal slip properly signed, we shall transfer the funds you have on deposit in your savings account to a checking account, and then you will be permitted to write checks against your account. Upon receipt of the signature card, we will immediately forward check book to you".

It was stipulated that on 12 November 1943 the accused's checking account contained $10.67, and $10.17 on the following day, while on both days his savings account contained $43. On 10 November 1943 he had cashed another $10 check at the Cosmopolitan Hotel, which was also returned unpaid, marked "insufficient funds" (R. 60-64; Exs. A, B, B-1, B-2).

10. Concerning Specifications 3, 4 and 5, Charge I, the accused testified that, desiring to transfer his savings to his checking account, he had forwarded to the bank the withdrawal slip and signature card inclosed in the bank's letter of 6 October 1943 (Def. Ex. A), and it was his impression, when the checks were written, that the savings account would have been transferred and that there would have been an adequate sum in his checking account to pay them (R. 67-71).

11. Specifications 3, 4 and 5, Charge I, allege that the accused, with intent to deceive, wrongfully made and uttered to the Cosmopolitan Hotel the checks in question, and by means thereof, did fraudulently obtain in currency the respective amounts for which the checks were drawn, well knowing that he did not have and not intending that he should have sufficient funds in the drawee bank for the payment thereof. The evidence establishes, at most, the accused's carelessness in giving the checks involved. The facts are inadequate to support an inference of criminal intent. He had, in his combined checking and savings accounts

in the drawee bank an aggregate of $53, falling short by a narrow margin of the sum total of the three checks in question - aggregating $50 - and the $10 check which he had cashed at the hotel a day or two previously. The hotel, according to the evidence, continued to cash his checks, drawn on the same bank, after the three described in the Specifications had been returned unpaid. All of the evidence presented is inadequate to support, beyond a reasonable doubt, the inference implicit in the findings that, in cashing the checks, the accused intended to deceive the payee, and that he obtained proceeds knowing that he did not have, and not intending that he should have sufficient funds in the drawee bank for their payment when presented. (A letter from the assistant manager of the Cosmopolitan Hotel addressed to The Judge Advocate General, dated 25 January 1944, and included among the allied papers, tends strongly to confirm the Board's evaluation of the evidence adduced in support of these Specifications). The evidence does not sustain the findings of guilty beyond a reasonable doubt of Specifications 3, 4 and 5, Charge I.

12. The accused is about 20 years of age. War Department records show enlisted service with the Canadian Army from 17 June 1940 to 28 April 1941, and with the American Army from 12 January 1942 to 16 September 1942, when he was temporarily commissioned second lieutenant, Army of the United States.

13. The court was legally constituted. In the opinion of the Board of Review the record is legally insufficient to support the findings of guilty of Specifications 3, 4 and 5, Charge I, legally sufficient to support only so much of the findings of guilty of Specification 1, Charge I and Charge I, as involves the finding of guilty of the Specification omitting therefrom the words "with intent to deceive", "fraudulently" and "and not intending that he should have", in violation of Article of War 96, legally sufficient to support the finding 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 a violation of Article of War 96.

Abner E. Lifscomb, Judge Advocate.

Benjamin R. Sleef Jr., Judge Advocate.

Gabriel H. Goldberg, Judge Advocate.

(Filed without further action in view of the vacation by G.C.M.O. 175, 18 Apr 1944, of the suspension of the sentence against the same officer in a previous case, C.M. 240754, confirmed in G.C.M.O. 38, 24 Jan 1944)

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

SPJGQ
CM 248032

10 FEB 1944

UNITED STATES v. Second Lieutenant JOHN T. JOHNSTON (0-750400), Air Corps.	ARMY AIR FORCES WESTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Mather Field, California, 5 January 1944. Dismissal, total forfeitures, and confinement for ten (10) years.

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

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

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

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

Specification 1: In that 2nd. Lt. John T. Johnston, 952nd Squadron Atchd Unassigned, Mather Field, California, did, at Sacramento, California, on or about 22 September 1943, with the intent to defraud, wrongfully and unlawfully make and utter to the Tropics, a certain check in words and figures as follows, to wit:

90-1109 Sacramento Main Office 90-1109 0-750400
Eighth and J Streets

BANK OF AMERICA
Trust &
National Savings Association

No._____

Sacramento, Calif., Sept. 22 1943

Pay to the
Order of Cash $10.00

Ten & No/100 DOLLARS

John T. Johnston
2nd. Lt. A.U.S.

San Diego

and by means thereof, did fraudulently obtain from the Tropics $10.00, he, the said 2nd. Lt. John T. Johnston; then well knowing that he did not have and not intending that he should have any account with the Bank of America for the payment of said check.

Specification 2: In that 2nd. Lt. John T. Johnston, 952nd Squadron Atchd Unassigned, Mather Field, California, did, at Sacramento, California, on or about 22 August 1943, with the intent to defraud wrongfully make and utter to Tiny's Waffle Shop, a certain check in words and figures as follows, to wit:

B.O.Q. 643 90-1109 ~~Sacramento Main Office~~ 90-1109
Phone -313 Eighth and J Streets

BANK OF AMERICA No_____
Trust &
National Savings Association
Pay to the San Diego, Calif., 8-22 19 43
Order of Cash ~~Sacramento~~ $10.00

Ten & no/100 DOLLARS

Mrs. P. C. Johnston J. T. Johnston
2nd. Lt.

and by means thereof, did fraudulently obtain from Tiny's Waffle Shop $10.00, he, the said 2nd Lt. John T. Johnston, then well knowing that he did not have and not intending that he should have any account with the Bank of America, or authority to draw checks in the manner above set forth.

Specification 3: In that 2nd Lt. John T. Johnston, 952nd Squadron Atchd Unassigned, Mather Field, California, did, at Sacramento, California, on or about 18 August 1943, with the intent to defraud wrongfully make and utter to Albert Oxman, a certain check in the amount of $10.00 drawn on the Bank of America, Sacramento, California, to the order of Cash and signed by himself and by means of said check did fraudulently obtain from Albert Oxman $10.00, he, the said 2nd Lt. John T. Johnston, then well knowing that he did not have and not intending that he should have any account with the Bank of America.

Specification 4: In that 2nd Lt. John T. Johnston, 952nd Squadron Atchd Unassigned, Mather Field, California, did, at Mather Field, Sacramento, California, on or about the 2nd October 1943, with intent to deceive Captain W. R. Chady, the Commandant of student officers at Mather Field, California, officially state to the said Captain W. R. Chady that he, the said 2nd Lt. John T. Johnston, had been restricted from flying, which statement was known by 2nd Lt. John T. Johnston to be untrue in its entirety.

Specification 5: In that 2nd Lt. John T. Johnston, 952nd Squadron Atchd Unassigned, Mather Field, California, having received a lawful order from Captain W. R. Chady to "Report to the Director of Flying and sign the bulletin board daily and sign in and out of my office when leaving the post", or words of similar effect, the said order of Captain Chady having been made in the execution of his office, did, at Mather Field, Sacramento, California, on 2 October 1943 and daily thereafter until 8 October 1943, fail to obey the same.

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

Specification 1: In that 2nd Lieut. John T. Johnston, Air Corps, Mather Field, California, did, at Mather Field, California, on or about September 4, 1943, fail to repair at the fixed time to the properly appointed place for flying training and ground school instruction.

Specification 2: In that 2nd Lieut. John T. Johnston, Air Corps, did, at Mather Field, California, on or about September 5, 1943, fail to repair at the fixed time to the properly appointed place for flying training and ground school instruction.

Specifications 3-20 inclusive are identical in form with Specification 2, except for the dates, which are, respectively: September 19, 21, 22, 23, 24, 25, 26, 28, 29, 30 and October 1, 2, 3, 4, 5, 6, 7 and 8, 1943.

Specification 21: In that 2nd Lieut. John T. Johnston, Air Corps, did, without proper leave, absent himself from his organization at Mather Field, California from about September 17, 1943 to about September 19, 1943.

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

Specification: In that 2nd Lt. John T. Johnston, 952nd Squadron Atchd Unassigned, Mather Field, California, did, at Sacramento, California, on or about 26 August 1943, with the intent to defraud, wrongfully and unlawfully make and utter to the Sacramento Hotel, a certain check in words and figures as follows, to wit:

~~90-1109--SACRAMENTO MAIN OFFICE--90-1109~~
EIGHTH AND J STREETS

NO._____

BANK OF AMERICA

NATIONAL TRUST & SAVINGS ASSOCIATION

San Diego
~~SACRAMENTO~~, CALIF. Aug 26 19 43

PAY TO THE ORDER OF Sacramento Hotel $ 10.00

Ten and no/100 DOLLARS

John T. Johnston
2nd Lt., A.U.S.

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and by means thereof did fraudulently obtain from the Sacramento Hotel $10.00, he the said 2nd Lt. John T. Johnston, then well knowing that he did not have and not intending that he should have any account with the Bank of America for the payment of said check.

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

Specification: In that 2nd Lt. John T. Johnston, 952nd TEFTS, attached unassigned, Mather Field, Sacramento, California, having been duly placed in arrest at Mather Field, California, on or about 26 Oct. 1943, did, at Mather Field, Sacramento, California, on or about 13 Nov. 1943 break his said arrest before he was set at liberty by proper authority.

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

Specification: In that 2nd Lt. John T. Johnston, 952nd TEFTS, attached unassigned, Mather Field, Sacramento, California, did, without proper leave, absent himself from his organization and station at Mather Field, California from about 13 Nov. 1943 to about 27 Dec. 1943.

Accused pleaded guilty to and was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced at the trial. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for twenty-five years. The reviewing authority approved the sentence, remitted fifteen (15) years of the confinement imposed, 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. No evidence of any kind was introduced at the trial by either the prosecution or the defense.

4. The effect in military law of a plea of guilty is too well understood to require much comment, although it is appropriate to remark here that such a plea does not necessarily confess that a particular offense has been committed. It admits only what is precisely charged. If the alleged wrongful act is duly set forth in a specification with such particularity that the language used therein embraces an offense defined and designated as such by law, the commission of such an offense is confessed by a plea of guilty thereto and a formal finding of guilty and conviction thereon must follow. If, however, the facts so pleaded fall short of stating the essential elements of the offense attempted to be charged, or any other offense known to the law, a plea of guilty thereto cannot constitute a judicial confession of the commission of any offense and it follows that there can be no lawful conviction thereon. Nor does such a plea confer jurisdiction where none exists.

In this case, it is, therefore, only necessary to inquire into the jurisdiction of the court and to determine whether the Specifications of the Charges are legally sufficient to comprehend offenses denounced by the Articles of War.

A careful examination of the record of trial discloses that the court was lawfully constituted and had jurisdiction of the accused. Since each Specification clearly sets forth the essential elements of certain offenses defined by the Articles of War and of which the court, likewise, had jurisdiction, it follows, as a matter of law,

that accused was legally convicted upon the findings of guilty upon each specification and charge to which he had pleaded guilty.

There is nothing in the record to indicate that the pleas were improvidently entered by accused or that there was any lack of understanding by him of their full meaning and effect. Indeed, the contrary appears, for after the significance of his pleas and the maximum punishment which could be imposed were explained to him by the law member, accused, nevertheless, chose to let his pleas stand.

Since a plea of guilty did not preclude the taking of evidence, it would have been better practice in this case for the prosecution to have introduced sufficient testimony to apprise the court, the reviewing and the confirming authorities of any matters constituting aggravating or extenuating circumstances. Indeed, any such evidence which was available and admissible should have been introduced (par. 70, M.C.M. 1928). It must be assumed, since none was introduced, that there was no such testimony available and admissible, however absurd such an assumption must appear in the light of a comprehensive report of the investigating officer which accompanies the record.

5. Records of the War Department disclose that accused was born in Beaumont, Texas, and is 25 years 8 months of age. He was graduated from high school and then attended Schreiner Institute for one year. He painted derricks from October 1938 to May 1939 and from May 1941 to the date of his induction was an interviewer for job applicants in the Texas Employment Service. He was inducted 1 August 1941, became an aviation cadet, and on 28 July 1943 was appointed a second lieutenant, Army of the United States, and on the same day was ordered to active duty and assigned to active duty with the Air Corps at Mather Field, Sacramento, California.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed at the trial. A sentence of dismissal is mandatory upon conviction of a violation of Article of War 95 and is authorized upon conviction of a violation of either Article of War 61 or Article of War 69. There is no limitation upon the confinement which may be imposed upon conviction of a violation of Article of War 61 or Article of War 69.

William A. Pounds, Judge Advocate.

Carlos Cohen, Judge Advocate.

Herbert B. Fredericksen, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 18 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 T. Johnston (0-750400), 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 but that the period of confinement be reduced to five years, and that the sentence as thus modified be carried into execution. I further 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

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 Executive action

(Sentence as approved by reviewing authority confirmed but confinement reduced to one year. G.C.M.O. 208, 26 May 1944)

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

SPJGN
CM 248065

11 FEB 1944

UNITED STATES	)	31ST INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Camp Pickett, Virginia, 10 January 1944. Dismissal.
First Lieutenant JACK L. McCRANEY (0-406346), 155th Infantry.	)	

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

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: In that 1st Lt. Jack L. Mc Craney, Company "H", 155th Infantry, did, at Camp Pickett, Virginia on or about October 28, 1943 wrongfully and unlawfully draw on the First National Bank of Hattiesburg, Mississippi, a certain check in words and figures as follows, to wit:

Hattiesburg, Miss. ~~Kenosha, Kansas~~ _____ 1943 No. __ THE FIRST NATIONAL BANK ~~of Kenosha~~ Hattiesburg, Miss. Pay to the order of J. L. McCraney $30.00 thirty and ——— No/100 Dollars. /s/ J. L. McCraney 1st Lt. 155th Inf.	/s/ J. L. McCraney 0-406346 1st Lt. 155th Inf.

and by means thereof, did fraudulently obtain from the Camp Pickett, Virginia branch of the State Planters Bank and Trust Company of Richmond, Virginia thirty ($30.00) dollars in cash money, he, the said 1st Lt. Jack L. McCraney, then well knowing that he did not have and not intending that he should have sufficient funds in The First National Bank of Hattiesburg, Mississippi for the payment of the said check.

Specification 2: In that 1st Lt. Jack L. McCraney, Company "H", 155th Infantry, did, at Camp Pickett, Virginia, on or about December 3, 1943 at 1100 hours, with intent to deceive the Commanding Officer of the 155th Infantry, officially state to the said Commanding Officer, Lt. Col. Virgil S. Adkins, that he had no outstanding dishonored checks, having paid the State Planters Bank and Trust Company, Richmond, Virginia on December 2, 1943 and that he, 1st Lt. Jack L. McCraney, held a receipt for that sum covering check drawn by him on October 28, 1943 on First National Bank, Hattiesburg, Mississippi, said check having been dishonored for insufficient funds, which statement was known by the said 1st Lt. Jack L. McCraney to be untrue in that no payment had been made to said bank and said check was still outstanding and unpaid.

Specification 3: In that 1st Lt. Jack L. McCraney, Company "H", 155th Infantry, did, at Camp Pickett, Virginia on or about December 3, 1943 at 1130 hours, in an affidavit, make under oath a statement in substance as follows, "that he ~~me~~ had no outstanding dishonored checks; that he had paid Weakley-Watson-Miller Hardware Co. of Brownwood, Texas three installments of ten ($10.00) dollars each on his indebtedness to them, the 3rd installment having been mailed to the said Weakley-Watson-Miller Hardware Co., on December 2, 1943; that he owed Lowe and Campbell of Ft. Worth, Texas approximately seventy-two ($72.00) dollars which was being liquidated at ten ($10.00) dollars per month and the last installment was mailed on December 2, 1943", which statements he then knew to be untrue.

He pleaded not guilty to and was found guilty of the Charge and its Specifications excepting from Specification 2 the words "having paid the State Planters Bank and Trust Company, Richmond, Virginia on December 2, 1943" and "in that no payment had been made to said bank and said check was still outstanding and unpaid", of which excepted words he was found not guilty, and substituting therefor respectively the words "having paid to a teller of the State Planters Bank and Trust Company, Richmond, Virginia" and "in that no payment had been made to a teller of said bank and no receipt had been received therefor", of which substituted words he was found guilty. 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.

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JUDGE ADVOCATE GENERAL
NAVY DEPARTMENT

3. The evidence for the prosecution shows that on 28 October 1943 the accused cashed a check for $30 at the State Planters Bank and Trust Company, Richmond, Virginia, through its Camp Pickett Branch. He had drawn the check on the First National Bank, Hattiesburg, Mississippi, and it had been returned unpaid with the notation "EVIDENTLY DRAWN ON US IN ERROR" when presented for payment in the regular course of business. Thereafter, the dishonored check had been turned over to the accused's acting commanding officer, Lieutenant Colonel Virgil S. Adkins, with whom the accused, on 3 December 1943, at about 1100 o'clock, had a conference relative to the accused's requested transfer to the Air Corps. Lieutenant Colonel Adkins, having the dishonored check in his possession and refraining from exhibiting it to the accused because he "knew he would run and pay it like he had done on other occasions", asked the accused whether he had any dishonored checks outstanding and whether the unpaid debts of accused reflected by his 201 file were being paid as agreed. The accused replied that he had no dishonored checks outstanding, that he had taken care of the $30 check on 2 December 1943 by delivering the money to a specified lady cashier at the bank and held a receipt therefor and that he was liquidating the two debts reflected by his file at the rate of $10 per month as agreed. He was then asked whether he would execute an affidavit to that effect and, upon his affirmative reply, another officer prepared such an affidavit, in accordance with the accused's verbal statements, which affidavit recited in part,

> "that he had no outstanding dishonored checks; that he had paid Weakley-Watson Hardware Co. of Brownwood, Texas three installments of ten ($10.00) dollars each on his indebtedness to them, the 3rd installment having been mailed to the said Weakley-Watson Hardware Co., on December 2, 1943; that he owed Lowe and Campbell of Ft. Worth, Texas approximately seventy-two ($72.00) dollars which was being liquidated at ten ($10.00) dollars per month and the last installment was mailed on December 2, 1943".

The accused, after being admonished to read it over and make any changes he desired, signed the affidavit and swore to it before another officer who was authorized to administer oaths. The conference was terminated by the accused being instructed to deliver the receipt for the check's redemption to his commanding officer by 1300 o'clock (R. 6-7, 11-15, 15-16, 23-27; Exs. 1, 4).

The accused did not produce the receipt by the specified time but reported that it was at his home. Having then been directed to deliver it by 0800 o'clock the next morning, he failed to appear at that time but about 30 minutes later was accompanied to his organization's headquarters by his battalion commander. This time his excuse for the non-production of the receipt was that he had been unable to go after it the previous night but that his wife would bring it in by 0900 o'clock. He was then directed to telephone the bank and verify his

claimed payment, his acting commanding officer having ascertained, the previous afternoon, that the bank had not then received the payment. The accused thereupon called the manager of the bank, told him that he had paid the $30 to the lady cashier on 2 December 1943 and was told that the manager would inquire about it when she reported for work at 0930 o'clock, which he repeated to his acting commanding officer who then told him that he had no receipt, that he had told a "damned lie" and that he was going to be restricted and court-martialed (R. 16-17).

Lieutenant Colonel Adkins then proceeded to the bank. While he was there a private delivered to the bank's manager a note from the accused requesting delivery to the bearer of the check or a receipt for $30 dated 2 December 1943 when the accused stated he had mailed such sum to the bank. The banker delivered the note to Lieutenant Colonel Adkins who shortly departed. A few minutes later the bank received by letter, postmarked Camp Pickett, Va., 11-AM 3 December 1943, $30 in cash inclosed in a letter from the accused dated 29 November 1943, explaining that the check had been dishonored because his wife by error had closed their account without notifying him. The note, the letter and the envelope were admitted into evidence (R. 7-10, 15-17, 24; Exs. 2, 3).

The lady cashier at the bank had not been paid the $30 or given a receipt therefor and so testified. An officer of the First National Bank, Hattiesburg, Mississippi, by deposition testified that neither the accused nor his wife had been a depositor with such bank at any time during the year of 1943. Correspondence from the accused's 201 file concerning the accounts of the two Texas creditors was admitted into evidence without objection. It shows that the accused in June, 1942, purchased athletic equipment for the 156th Infantry with which he was then serving as Regimental Athletic Officer in the amounts of $92.49 from Lowe and Campbell and $42 from Weakley-Watson-Miller Hardware Company. It had been determined that the purchases, though made exclusively for the use and benefit of the men in the regiment, were unauthorized and that the debts incurred constituted personal liabilities of the accused who had agreed to liquidate them in $10 monthly installments, commencing in October, 1943. Appropriate employees of the two creditors by depositions testified that on 3 December 1943 no payments whatsoever had been made thereon although on 6 December 1943 the hardware company received $20 from the accused to apply on its account (R. 12, 19-22, 27-39, 31-33, 33-35; Exs. 6, 7, 8, 10, 11).

4. The evidence for the defense shows that, according to the Camp Pickett Postal Officer, for a letter to be postmarked at 1100 o'clock on any certain day it would have to be deposited between such time and 1600 o'clock the preceding day and that if it had been deposited after 1100 o'clock it would bear a later postmark (R. 40-41).

The accused, after explanation of his rights as a witness, elected to make a sworn statement and testified that when he drew and cashed the $30 check on the bank at Hattiesburg, Mississippi, he was under the impression that he had an account there as he had been

informed by his wife that she had established one with such bank; that during November, 1943, while on maneuvers, he learned that she had closed it, and that he had mailed the $30 to the bank early on the afternoon of 2 December 1943. He admitted the falsity of his statements concerning paying the lady cashier and holding her receipt therefor but contended that, since he had mailed the money prior to his conversation with his acting commanding officer, he had no outstanding dishonored checks. He also admitted the falsity of his statements in the affidavit concerning his payments to the two Texas creditors and asserted that he would make untrue statements again if it would facilitate his transfer from the 155th Infantry to the Air Corps (R. 36-40, 41).

5. Specification 1 alleges that the accused, on or about 28 October 1943, wrongfully and unlawfully drew a described check upon a named bank and by means thereof fraudulently obtained from the Camp Pickett, Virginia, branch of the State Planters Bank and Trust Company, of Richmond, Virginia, $30 in cash when he well knew that he did not have and not intending that he should have sufficient funds in the drawee bank for the payment thereof. "Giving a check on a bank where he knows or reasonably should know there are no funds to meet it, and without intending that there should be" is violative of Article of War 95 (MCM, 1928, par. 151).

The evidence for the prosecution conclusively shows that the accused drew and cashed the check as alleged. It equally as conclusively shows that the check was drawn upon a bank in which the accused had no account and that it was dishonored. The infirmity of the accused's asserted belief that his wife had established an account for them at the drawee bank is accentuated by his testimony that she later informed him that she had closed the account. Since no account had been created at the bank it is beyond belief that she would have advised him that it had been closed. Consequently, the accused's asserted defense is wholly incredible and unworthy of belief and it is manifest that he either knew or reasonably should have known, when he drew the check, that he had no account at the drawee bank and did not intend so to have. In fact the inference is inescapable that the accused either deliberately "kited" the check or that he was and is wantonly reckless about his financial affairs to the total disregard of his responsibilities as an officer and a gentleman. All of the credible evidence, therefore, shows beyond a reasonable doubt the commission by the accused of the offense charged and amply supports the findings of guilty of Charge I and the first Specification thereunder.

6. Specifications 2 and 3 allege respectively that the accused, on or about 3 December 1943, at 1100 o'clock, with intent to deceive his commanding officer, officially stated to such officer that he, the accused, had no outstanding dishonored checks, having paid a named bank on 2 December 1943 for a check drawn on 28 October 1943 upon another bank and holding a receipt therefor, which statements were known to be untrue, and that thirty minutes later on the same day he executed

an affidavit which included statements to the effect that he had no outstanding dishonored checks and had made certain payments to two named creditors, which statements he then knew to be untrue. "Knowingly making a false official statement" is violative of Article of War 95 (MCM, 1928, par. 151).

The evidence shows that, prior to the accused's making either the alleged statements or the affidavit, he had mailed sufficient funds to the bank that had cashed the check for its redemption, but it also shows, as admitted by the accused, that his statements about having paid a lady cashier therefor on 2 December 1943 and holding the bank's receipt for such payment were wholly false and were made with the calculated design to deceive. The court, by appropriate exceptions and substitutions, found the accused guilty of Specification 2 in conformity with the evidence which, from the testimony of the lady cashier, the accused's own testimony and his writings subsequent to such statements, beyond a reasonable doubt supports the finding as made by the court. The accused designedly pursued an uninterrupted course of pure dissimulation until he was ensnared in his own fabrications, presenting further proof of the truth in the lines,

"Oh what a tangled web we weave
When first we practice to deceive!"

The evidence conclusively shows that the accused executed the affidavit after reading it and being cautioned to be sure of its accuracy. At such time the bank had not received the payment mailed to redeem the check and no payment had been made by the accused on either of the two accounts of the Texas creditors as related therein by the accused with particularity. The statements therein, described in Specification 3, were therefore wholly false and were known by the accused so to be. The evidence for the prosecution conclusively establishes such falsity which is in effect not only admitted by the accused but by him magnified through his expression of the opinion that he would again make false statements if it would assist his transfer to the Air Corps. The evidence, therefore, beyond a reasonable doubt warrants the findings of guilty of Specifications 2, as found by the court, and 3, Charge I and of Charge I.

7. The accused is about 25 years of age. The War Department records show that he was appointed a second lieutenant in the Enlisted Reserve on 4 March 1941, that he was ordered to active duty on 1 August 1941 since which time he has so served and that he was promoted to first lieutenant on 1 February 1943.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the

findings of guilty of the Charge and Specifications 1, 2 and 3, with exceptions and substitutions as found by the court, 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.

Benjamin R. Sleeper, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

SPJGN
CM 248065

1st Ind.

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

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant Jack L. McCraney (0-406346), 155th Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. The accused's regimental commander, in an affidavit accompanying the record, states that the accused has made several false official statements to him, that the accused has been given "every chance possible to clear himself of suspicion" and that he should not be restored to duty under any circumstances. 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. 140, 27 Mar 1944)

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

SPJGQ
CM 248081

17 FEB 1944

UNITED STATES v. Second Lieutenant LEONARD NOVITCH (0-1554060), Ordnance Department.	ARMY AIR FORCES CENTRAL TECHNICAL TRAINING COMMAND Trial by G.C.M., convened at Sioux Falls, South Dakota, 6 January 1944. Dismissal, total forfeitures, and confinement for one (1) year.

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 94th Article of War.

Specification 1: In that Second Lieutenant Leonard (NMI) Novitch, at Sioux Falls, South Dakota, on or about 18 November 1943, did wrongfully and knowingly sell one case of shot gun shells of the value of about $16.58, property of the United States furnished and intended for the military service thereof.

Specification 2: In that Second Lieutenant Leonard (NMI) Novitch, at Sioux Falls, South Dakota, on or about 18 November 1943, did wrongfully and knowingly sell one-half case of shot gun shells consisting of ten (10) cartons of twenty-five (25) shells each, of the value of about $8.29, property of the United States furnished and intended for the military service thereof.

Specification 3: In that Second Lieutenant Leonard (NMI) Novitch, at Sioux Falls, South Dakota, on or about 26 October 1943, did knowingly and wilfully apply to his own use ten (10) cartons, twenty-five (25) rounds each, of 12 gauge shot gun shells, of the value of about $8.29, property of the United States furnished and intended for the military service thereof.

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

Specification 1: Same as Spec. 1 under Charge I.

Specification 2: Same as Spec. 2 under Charge I.

Specification 3: Same as Spec. 3 under Charge I.

He pleaded guilty to Charge I and its three Specifications except the words "and knowingly" appearing in each Specification. He pleaded not guilty to Charge II and its Specifications. He was found guilty of Charge I and its three Specifications and of the three Specifications under Charge II. He was found not guilty of Charge II. There was no evidence of any previous conviction submitted. 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 a period of 5 years. Six members of the court of nine recommended clemency and that the sentence of confinement imposed by the court be reduced to one year. The reviewing authority approved of the findings of guilty of Charge I and its Specifications except that only so much of the findings as to the value of the property involved in Specification 1 of $12.08, in Specifications 2 and 3 of $6.04 each, were approved. The reviewing authority noted the inconsistency of the findings concerning Charge II and its Specifications and declared them legally insufficient to support any part of the sentence. The sentence was approved but four years of the confinement imposed were remitted. The record of trial was forwarded for action under Article of War 48.

3. In support of the Charges and Specifications the prosecution, notwithstanding the plea of guilty with its exceptions, produced competent evidence which may be summarized as follows:

There was introduced in evidence without objection (R. 48) a voluntarily written statement signed and sworn to by the accused (Pros. Ex. 3) wherein the accused admitted that he was commissioned a second lieutenant in Ordnance Department on 27 February 1943; that on 24 October 1943 he went to the Sioux City Air Base and asked a Captain McNew, the Ordnance Officer, if he could get a case of shotgun shells for him; that Captain McNew telephoned several places and persons endeavoring to procure some shells for the accused; that as a result he did procure some shells from several of the Squadron Armament Officers to whom Captain McNew sent him; that he went hunting the following week with other military personnel; and that on the following Sunday 31 October 1943 he called again at the Sioux City Air Base seeking more shot gun shells and, Captain McNew being absent, he told a lieutenant that the Captain had promised him some shells. As a result of arrangements made by the lieutenant by telephone the accused procured a case and a few

boxes of 12 guage, number 8 shot shells from the Ammunition Dump. The lieutenant told the accused that he would "put them on my expenditure list". On 17 November accused received a telegram from his father stating that his mother was very ill and that his presence was wanted at home. Believing his mother to be seriously ill, and that the shells were his own personal property because of what the lieutenant had told him about the shells being "expended", and needing money with which to travel to his home in New Jersey, he offered a case and a half of the shells for sale for $150 to Mr. O. T. Due, the proprietor of the Brass Rail in Sioux Falls. Mr. Due did not wish to buy them but knew of others who might be interested in their purchase. The accused exchanged the shells at the same Air Base for 7½ shot shells. He then sold half of one case of the exchanged shells to the butcher next door to Mr. Due's place of business for $50, and a case to another man, to whom he had been referred by Mr. Due, for $100. He believed the shells were his property and that therefore he had the right to sell them. With the proceeds he purchased a round trip ticket to New York.

Sergeant Sam Len testified that the accused came to Ordnance Office of the Sioux City Army Air Base on 24 October 1943 and asked Captain S. T. McNew, the officer in charge, for permission to secure shot gun shells presumably for flying personnel at Sioux Falls (R. 6-7). Captain McNew said he would look into the matter. Accused returned the following Sunday 31 October 1943 but Captain McNew was not there. He asked if Captain McNew had left any shells there for him (R. 8).

Private Leonard S. Kaplan was with the accused when he procured about 12 or 15 boxes of 12 guage shot gun shells on 24 October 1943 (R. 11). Accused told him that he had gotten the shells from the Air Base (R. 12). Master Sergeant C. D. Orvik was present on 31 October 1943 when accused came to the Ordnance Office of the Air Base seeking shells and, upon the order of a Lieutenant Sidner, he instructed a Sergeant Hulbert at the Ammunition Area, by telephone, to "give him some shells" (R. 15). The accused said the shells were for friends of his who might be coming to the Base (R. 17). Sergeant A. L. Hulbert related how, on that date, an officer called for the shells and he (Hulbert), as a result of his conversation with Sergeant Orvik, delivered one case and several boxes of shells to the accused by placing them in the automobile which he was driving (R. 19-20). A Sergeant Sweeney of the 714th Bomb Squadron signed for the shells about the 4th of November (R. 20). Sergeant Sweeney had authority to sign for them (R. 22).

Sergeant Ford W. Sheldon and Pfc. C. F. Mitchell went on a hunting trip with the accused in latter part of October 1943. The shells used during the trip were provided by the accused (R. 26, 27).

On 17 November the accused exchanged a case and four or five cartons of 8 chill shot shells for 7½ chill shot shells having a trade name of "Western Xpert" (R. 28-29). As the exchange was an equal one it was not necessary to change any records (R. 29).

There are 500 shells in a case - 25 to a carton (R. 36).

Mr. O. T. Due told about the accused coming to his place of business on 17 November 1943 and offering for sale a case and a half of shot gun shells for $150 stating that he was going to leave town as his mother was dying (R. 37). Mr. Due arranged for two friends of his to purchase the shells. He saw the accused deliver the shells to these two friends that day (R. 37-38). Mr. Kermit Anderson of Sioux Falls saw R. F. Flood purchase a half case of the shells for $50 (R. 41). Mr. Flood himself corroborated this (R. 41-42). The shells were 12 guage Winchesters. He never opened the boxes. The police came three days later and took all of them. The boxes contained the trade name Western Xpert (R. 43-44).

Mr. Don Lawrence of Sioux Falls testified that he purchased on 17 November 1943 from the accused a case of 12 guage, 7½ shot, Western Xpert shells for $100 (R. 45-46).

By stipulation (Pros. Ex. 1) it was admitted that value of shot gun shells of the type involved in the case was $24.17 per thousand.

The court took judicial notice of par. 60, AR 775-10 (4), 30 July 1943, dealing with ammunition allowances for qualifying in arms which reads as follows:

> "Shotgun shell. For individual instruction: Per rated pilot, bombardier, observer, navigator, and aerial gunner, 600 paper shell".

By stipulation it was admitted that accused was not, during the period here in question, a rated pilot, bombardier, observer, navigator, or aerial gunner (Pros. Ex. 2, R. 47).

4. On behalf of the accused, 1st Lieutenant M. J. Parrish testified that he gave accused permission to exchange some No. 8 12-guage shells for some 7½ 12-guage shells (R. 52).

The accused having been advised of his rights by the court, elected to testify as a witness in his own behalf (R. 53). He entered the service 28 September 1941 at Western New York, New Jersey, and, after serving until 27 February 1943 as an enlisted man, was commissioned on that date as a second lieutenant. His present age is 20 years, 11 months. He admitted that he procured from the Sioux City Air Base

approximately two cases of shot gun shells for the purpose of going pheasant hunting, but, later being in need of funds in order to go home to visit his sick mother, he sold a case and a half case of them to civilians for $150. He used part of them for hunting. He believed he had the right to sell the shells; that they were his property and he could do as he pleased with them, because he was told by Lieutenant Sidner that the shells had been "expended" (R. 54-56). He would gladly repay the government but did not know how to do so. His father is a doctor of dental surgery and prosperous (R. 56-57). He could have borrowed the money necessary to make the trip but figured it would be better not to go into debt but to sell the shells which he believed were his property (R. 58). He had no intention of selling them when he procured them - this thought coming to him only after he received the wire concerning his mother's illness (R. 58). He told Captain McNew that he wanted the shells for pheasant hunting. He denied that he told Lieutenant Sidner that the shells were for the use of the flying personnel (R. 59).

Don Lawrence and R. F. Flood, the two civilians who purchased the shells, were recalled and testified that the shells which they had purchased from accused, had been all turned over to the military authorities in the same condition as they were when they received them (R. 61-62). This was corroborated by Sergeant J. R. Becraft (R. 64). The shells themselves were produced by the prosecution and introduced in evidence.

5. The evidence is clear that the shells obtained by the accused at the Sioux City Army Air Base were property of the United States. Apparently the shells were issued to accused by the personnel at the Base under the misapprehension that they were being obtained as training allowances of shot gun shells for the use of flying personnel at the Sioux Falls Army Air Field pursuant to par. 60a (4), AR 775-10, 30 July 1943. Irrespective of the representations or misrepresentations made by the accused to the personnel at the time he obtained the shells, or the collusion of such personnel with the accused, it is clear that the shells were, in fact, property of the United States furnished and intended for the military service thereof. Showing them as expended on the records at the time of their issuance did not change the property interest of the Government therein. Likewise, the subsequent exchange of these shells for other property of the United States also furnished and intended for the military service, did not change the ownership of this property. The accused by his plea of guilty to the Specifications of Charge I, and of Charge I admits these facts and all of the other elements of the offenses alleged under Charge I, except that the accused pleaded not guilty to committing the acts "knowingly." The sole issue therefore as to these Specifications is whether, in selling the shells, and in applying others to his own use, the accused acted knowingly or intentionally. The sole reason the accused gives for believing the offenses committed by him were not knowingly done is,

that, after the shells had been recorded as "expended," he believed the Government had no further property interest in the shells, and that he might do with them as he pleased. This constitutes an allegation on the part of the accused that either he was mistaken or suffering from a misapprehension as to the law. Ignorance of the law is not an excuse for a criminal act. MCM, par. 126a, page 136. Evidence of ignorance of the law will not amount to a defense but may be regarded by the court as an extenuating circumstance. The fact that a person honestly believes that he had a right to do what the law declares to be illegal will not affect the criminality of the act (8 R.C.L., Section 95 of "Criminal Law"). In view of the previous training of the accused at the Ordnance Officers' Candidate School, and his several months experience as an Ordnance officer, and in view of his admission that he knew the property was that of the Government prior to its issuance, the ignorance of the law professed by the accused may be seriously doubted. The court, in view of accused's plea, supported as it is by the evidence of record, could reasonably reach no other conclusion than that the accused was guilty of doing the acts alleged in the Specifications. The accused admitted all of the elements and details of the offense. The plea was only one of extenuation by reason of ignorance of the law. The evidence was ample to support the findings of guilty of Charge I and its Specifications.

It should be noted that the court found the accused not guilty of a violation of the 95th Article of War notwithstanding the fact that the Specifications thereunder (Charge II) were identical with those under Charge I. The court could have properly found the accused guilty of both Charges as the evidence was sufficient to sustain such a finding. A conviction under both AW 95 and AW 94 for the same offense is not illegal (CM 230222, Sec. 395 (44), Dig. Op. JAG, Bull. March 1943). By finding him not guilty of violating AW 95 it must be assumed that it did not consider the accused's conduct dishonored or disgraced him personally as a gentleman so as to make him unfit to remain "a member of the honorable profession of arms" (Winthrop).

6. The records of the Adjutant General show the accused to be 21 years of age and single. His permanent address is Hoboken, New Jersey. He graduated from high school and attended Tulane University of Louisiana for one year. He enlisted in the service 8 September 1941 and served as an enlisted man in the Air Corps from that date until 27 February 1943 during which time he attended, at government expense, Allan Hancock College of Aeronautics for three months, Gardner Field Link Trainer School for three months, and Ordnance OCS for three months. He was commissioned second lieutenant, Ordnance, 27 February 1943. On 30 November 1943 he submitted his resignation for the expressed purpose of joining the Royal Canadian Air Force. On 17 November 1943 he was reprimanded under AW 104 for having been absent without leave the 7th, 8th and 9th of November 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 and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 94.

William A. Rounds, Judge Advocate

Paul Stephen, Judge Advocate

Herbert B. Fredericks, Judge Advocate

1st Ind.

War Department, J.A.G.O., 26 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 Leonard Novitch (O-1554060), Ordnance 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 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.
1 - Record of trial.
2 - Dft. ltr. for sig. S/W.
3 - Form of action.

(Sentence confirmed but confinement and forfeitures remitted. G.C.M.O. 211, 26 May 1944)

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

(115)

SPJGV
CM 248096

29 FEB 1944

UNITED STATES v. Second Lieutenant KENNETH E. BROWN (0-1584102), Quartermaster Corps.	SECOND SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Fort Jay, New York, 7 January 1944. Dismissal.

OPINION of the BOARD OF REVIEW
TAPPY, KIDNER 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 93rd Article of War.

Specification: In that 2d Lt. Kenneth E. Brown, QMC, did at 569 West 150th Street, New York, N.Y., on or about midnight 6 December 1943, with intent to do bodily harm commit an assault upon Alexander Vann Bell by shooting at him with a dangerous weapon, to wit, a .38 Colt Automatic Pistol.

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

Specification: In that 2d Lt. Kenneth E. Brown, QMC, was at New York, N.Y., on or about 6 December 1943 in a public place, to wit, an apartment house at 569 West 150th Street, drunk and disorderly while in uniform.

He pleaded not guilty to and was found guilty of all the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced "to be dismissed the service, to pay to the United States a fine of Three-Hundred ($300.00) Dollars, and to be confined at hard labor at such place as the reviewing authority may direct until said fine is paid, but for not more than three (3) months". The reviewing authority approved only so much of the findings of guilty of Charge I and its Specification as involves findings of guilty of assault with a dangerous weapon, in violation of Article of War 96, approved the sentence but remitted that portion thereof adjudging a fine of $300 and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution shows that at about 11 o'clock p.m. on 6 December 1943 the accused visited the delicatessen shop of Mr. David Elgort at 3659 Broadway, where he purchased a sandwich and a bottle of beer. He fell asleep at his table and slept for about a half hour. Upon awakening he left the store without taking his hat, overcoat and a package. Accused told the proprietor that he would come back for them (R. 11, 12). The package later given to the police contained a quart bottle of "Three Feathers" whiskey which was one-third full. No one had drunk any of its contents from the time accused left it until it was turned over to the police (R. 14, 15, 57, 59, 60, 61).

At about midnight on 6 December the accused entered an apartment house at 569 West 150th Street, New York through a side door leading from the courtyard (R. 18, 19). Accused had a gun in his hand and pointed it at Mr. Alexander Bell (colored), an elevator operator in the apartment house. Bell had not seen the accused before (R. 18). Accused pointed the gun at Bell and commanded "Freeze!" (R. 19, 20, 22). Bell started toward the accused, the accused "removed the safety off" the revolver and Bell "jumped sideways" as the gun went off (R. 22, 23). The shot lodged in the apartment house wall about three and a half feet above the floor. Bell testified that immediately prior to the shot being fired he was standing "directly between a line connecting accused and the bullet hole", indicating that had he not jumped the bullet would have struck him (R. 23, 24). Bell drew a rough sketch of the front hall of the apartment house where the shooting took place, marking the position of the accused and the location of the elevator, stairs, and landing (R. 20, 21). When accused first entered the apartment house, he was about 10 feet away from Bell (R. 25). The accused was not staggering but "you could tell he was drinking". He looked a "little wild" (R. 28). He didn't look normal. He seemed calm. Bell didn't smell any liquor (R. 29). Bell identified the .38 caliber Colt automatic pistol, introduced into evidence as Prosecution's Exhibit 2, as a similar weapon to that fired by the accused on the night of 6 December (R. 31).

After the shooting, accused went to the second floor of the apartment house where the police found him at 12:07 a.m., 7 December (R. 34, 36). The police officer "frisked" him. He did not raise his hands although commanded to do so by the police officer who pointed his gun at the accused (R. 34). The police officer removed the pistol from the belt holster worn by accused (R. 34, 39). Accused's uniform was covered with "marl and dirt" (R. 35). He "had a sluggish, staggering gait" (R. 36). He acted like a man "that had been drinking". In the opinion of Patrolman Ritchie K. de C. Hinds accused was "drunk" (R. 37). Accused was taken to the police station where he was questioned (R. 35, 36). Accused was given a cup of coffee. During his conversation at the police station, he stated, "There's only one thing I am sorry for--I didn't kill that God-damn 'nigger'" (R. 38). He made this statement three times before the arrival at about 2:45 a.m. of "Lieutenant Colonel McNulty", Provost Marshal, Military District No. 1, New York, who questioned accused and took him away in

a car (R. 36, 38, 41). The accused's manners at the station were not "offensive" (R. 40).

4. The defense introduced a stipulation of Mr. William F. Reilly, manager of an apartment house at 745 Riverside Drive, New York City, New York, to the effect that accused had rented an apartment at said address on 6 December at 10:30 p.m. At this time the accused was "quite talkative" and "appeared to have had a few drinks" but was not intoxicated and able to carry on a clear and coherent conversation (R. 42, 43).

The stipulation of Mr. L. Natelson shows that at about 12:00 on 6 December the accused visited a bar at 3640 Broadway. He was without hat or overcoat but "appeared to be all right". He did not cause any disturbance, had one drink and left about five minutes past twelve. He did not appear to be intoxicated and was able to talk without difficulty (R. 43).

The stipulation of Mr. William Schubert, manager of the apartment house at 569 West 150th Street, shows that he was awakened at about 12:15 on 7 December by Alexander Bell. Mr. Schubert called the police. Later he went downstairs where the accused, in uniform, was sitting quietly in a chair. The lobby was "full of police--about a dozen of them". Accused did not appear to be drunk (R. 44).

The stipulation of Mrs. Noel Gorman, a resident of the apartment house at 569 West 150th Street, shows that she was awakened by a sound that seemed to be a shot from a gun, at about 12:15 a.m. on 7 December; that the accused stopped outside her door and asked for his overcoat. Accused looked like he had been drinking but did not look "ossified". He walked straight but his speech did not seem to be normal. He looked as if he were "dazed" (R. 45, 46).

Accused, after being advised of his rights, elected to take the stand and testified under oath substantially as follows: He was inducted 24 November 1942 at Fort McPherson, Georgia, and attended Officer Candidate School from 1 March 1943 to 18 June 1943. For 15 years prior to his Army service he had been a truck and bus driver and private investigator. His civilian occupation made it necessary for him to carry a gun (R. 47, 48). He identified a pistol marked Prosecution's Exhibit 2 as his and stated that he had owned it for about three years (R. 48, 49). At about 5:30 p.m. on 6 December he left his post at Belle Mead, New Jersey, for the purpose of visiting New York and renting an apartment for his fiancee. He was obtaining a divorce from his present wife and expecting the decree "any time" (R. 49). He carried his gun because he was a stranger in New York and had read of a number of shootings and hold-ups in that city. He rented an apartment at 745 Riverside Drive from Mr. Reilly (R. 50, 51). Up to this time, about 9:30, he had four drinks. He had with him a quart bottle of whiskey that he was saving for Christmas. He had not drunk any of it (R. 51). He started up 151st Street toward Broadway and that is the last thing he

remembered until he was in the apartment house where he saw Alexander Bell (R. 51, 52). Bell was advancing toward him in a semi-crouched position. Bell did not use any threatening gestures but did not seem friendly. Accused did not remember shooting "at" Bell but shot "alongside" him (R. 52). He admitted making a statement at the police station to the effect that for all the trouble Alexander Bell had caused he might just as well have killed him (R. 55).

5. The court found accused guilty of assault with intent to do bodily harm, in violation of Article of War 93 and of being drunk and disorderly, in violation of Article of War 95. The reviewing authority, acting in the belief that accused was so drunk that he was without capacity to form the intent necessary to establish the offense of assault with intent to do bodily harm, reduced the finding of Charge I and the Specification to assault with a dangerous weapon, in violation of Article of War 96. There exists little doubt that the accused was very drunk at the time of the shooting. The shooting occurred about midnight of 6 December and as early as 10 o'clock on the same evening accused had appeared to be slightly under the influence of liquor when he rented an apartment at 745 Riverside Drive, New York City. At 11 o'clock he had a bottle of beer at the delicatessen shop of Mr. Elgort and proceeded to go to sleep at the table. He stated that he had drunk nothing from his bottle of "Three Feathers" which he had with him at the delicatessen shop but the evidence shows that two-thirds of the bottle's contents were missing and it may be assumed that the accused drank it but did not remember this act. Accused left the delicatessen shop without his hat or coat on a December evening, proceeding to Natelson's bar nearby where he had another drink. Shortly thereafter he entered a nearby apartment house through the rear entrance and fired a shot at Alexander Bell, a total stranger. At this time the testimony is to the effect that accused was not staggering but "you could tell that he was drinking". He looked a "little wild" (R. 28). He was covered with "marl and dirt" (R. 35). Immediately after the shooting, testimony shows that accused still did not act as a normal person. The testimony is to the effect that he looked like he had been drinking but did not look "ossified". He walked straight but his speech did not seem to be normal. He looked as if he were "dazed" (R. 46) The actions of accused occurred in a public place. He was in uniform and there is ample evidence that the attention of the public was attracted to him both because of his drunken and dirty condition as well as his disorderly conduct.

There exists some discrepancy in the testimony with respect to the exact time of the events which took place but this difference is not so great as to be irreconcilable or material to the issue.

The sentence provided: "to be dismissed the service, to pay to the United States a fine of Three-Hundred ($300.00) Dollars, and to be confined at hard labor at such place as the reviewing authority may direct until said fine is paid, but for not more than three (3) months". The reviewing authority remitted the fine but said nothing about the confinement. However, since the confinement

was effective only until the fine was paid, the remission of the fine also remitted the confinement.

The evidence fully supports the findings that accused committed an assault with a dangerous weapon in violation of Article of War 96 and that he was drunk and disorderly in uniform in a public place in violation of Article of War 95.

6. The accused is 35 years of age. He attended Western Reserve University at Cleveland, Ohio for eight months in 1927. Prior to his induction he was a bus driver and investigator. He was inducted 24 November 1942 and served as an enlisted man until 18 June 1943, when upon graduation from Officer Candidate School, Camp Lee, Virginia, he was commissioned second lieutenant, Quartermaster Corps. He has been serving as an officer since the latter date.

7. 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 as approved by the reviewing authority and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of a violation of Article of War 95 and authorized upon conviction of a violation of Article of War 96.

Thomas N. Jappy, Judge Advocate.

Forbes McIntire, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 4 - 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 Second Lieutenant Kenneth E. Brown (0-1584102), 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, to support 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 foregoing recommendation, should such action meet with approval.

Myron C. Cramer

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

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

(Sentence confirmed. G.C.M.O. 199, 26 May 1944)

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

20 APR 1944

SPJGH
CM 248102

UNITED STATES	)	SEVENTH SERVICE COMMAND ARMY SERVICE FORCES
v.	)	
Captain DAVID ROBERTS (0-505881), Corps of Military Police.	)	Trial by G.C.M., convened at Camp Phillips, Kansas, 4 and 5 January 1944. Dismissal and total forfeitures.

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 93rd Article of War.

Specification 1: In that Captain David Roberts, CMP, did at Prisoner of War Camp, Concordia, Kansas, on or about 24 October 1943, with intent to do her bodily harm, commit an assault upon (Mrs.) Floralou B. Sterling, by shooting her in the abdomen with a dangerous weapon, to-wit:- a caliber 45 revolver.

Specification 2: (Finding of not guilty).

Specifications 3 and 4: (Motion to strike sustained by court).

Specification 5: In that Captain David Roberts, CMP, did at Prisoner of War Camp, Concordia, Kansas, on or about 24 October 1943, with intent to do her bodily harm, commit an assault upon (Mrs.) Mary E. King, by shooting at her with a dangerous weapon, to-wit:-a caliber 45 revolver.

CHARGE II: Violation of the 96th Article of War.
(Finding of not guilty).

Specification: (Finding of not guilty).

He pleaded not guilty to all Specifications and Charges. When the prosecution rested, the court sustained motions to strike Specifications 3 and 4, Charge I. Accused was found guilty of Specifications 1 and 5, Charge I, and of Charge I, and not guilty of Specification 2, Charge I, of the Specification, Charge II, and of Charge II. He was sentenced to be "dismissed from the Service" and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence; recommended that execution of the dismissal be suspended and that the forfeitures in excess of $100 per month for 12 months be remitted; and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution shows that on the evening of Saturday, 23 October 1943, there was a dance at the officers' club at the Prisoner of War Camp, Concordia, Kansas. A diagram (Ex. 1) introduced in evidence shows that the floor plan of the club was substantially as follows: At one end was an entry or hallway about 18 feet long and about six feet wide; on one side of the hall was a radiator about two feet high and about seven feet long; on the other side, and next to the main clubroom, was an opening about nine feet wide leading to the cloak room and telephone booth; the end of the hall away from the outside door, and adjacent to the cloak room, opened into the main clubroom or dance floor, which was about 66 feet long and about 36 feet wide; at the far end of the dance floor or main room were the barroom and locker room. (No reference is made to those parts of the building shown on the diagram but not pertinent to the testimony). Among those present at the dance were Captain Josiah R. King; Mrs. Mary E. King, his wife; Miss Betty King, their daughter, 17 years of age; Mrs. Floralou B. Sterling, the wife of "Colonel Sterling"; First Lieutenant John N. Hummel; and "Lieutenant Wright". Accused, who was officer of the day and also club mess officer, was also present (R. 10-11, 39, 49, 68, 78, 132, 139).

The orchestra, composed of enlisted men, stopped playing at about 1:30 a.m. on 24 October, but several enlisted men remained at the club. Private First Class Jack M. King (not related to Captain King) and the saxophone player were subsequently in the card room with some of the officers' wives and others, who were singing. The bar in the club remained open. There was drinking during the evening, and "everybody was happy". At about 4:00 or 4:15 a.m. on 24 October, Mrs.Sterling, Mrs. King, Betty King and accused were in the hallway at the entrance to the club. Mrs. King was near the radiator. They were preparing to leave the club. At the time, Captain King, Lieutenant Hummel and "Corporal Holley" were in the locker room. Private King was in the card room (adjoining the hallway, but with a single door opening into the main clubroom) putting the instruments away. Shortly before this time Lieutenants Wright and Hummel had been in the hallway with accused and the three ladies. Lieutenant Wright

and a lady with him left the club. Accused, as officer of the day, was armed with a .45 calibre Colt revolver (Ex. 2). At about this time there was an argument in the hallway between accused and others, which was followed by the firing of four shots from the revolver of accused. One bullet struck the wall between the hallway and card room. The remaining bullets were fired in the general direction of the ballroom. Five cartridge cases were taken from the gun (Exs. L to P). Four of these had been fired and the fifth had a dented percussion cap (R. 11-12, 14-17, 26-27, 39-40, 48-49, 57, 61, 68-69, 132-133; Ex. 1).

Mrs. King testified with respect to the argument and shooting substantially as follows:

Accused said they were "spoiling" the enlisted men, that if they worked in the officers' club they would not do their work properly afterward; Mrs. King asked him why he did not report it to "the board"; he replied that he did not think it would do any good; up to this point it was not a serious argument, it was not "really an argument", and there were no raised voices; Betty King then said to accused "Then, well, why don't you shut up"; accused "yelled" at her, "You shut up"; and Betty replied, "I don't have to". Mrs. King then told Betty to "shut up" and go tell Captain King they were ready to go. When Betty left, Mrs. King turned to accused and told him not to speak to her daughter again "like that"; he said "I will speak to her any way I like"; Mrs. King stamped her foot and said "Don't you ever dare speak to her again"; and accused said "I am so sick of you Kings", "pulled the gun out" and stood back. Mrs. Sterling said "Don't do that" and put her hands up toward accused. The "noise of the gun went off", and Mrs. Sterling sank to the floor. Mrs. King remembered being on the floor and Betty coming up. Accused pointed the gun at Betty and nothing happened. Betty "got behind" accused and was trying to scratch him. It was "all hopeless confusion". She heard other shots fired. Accused pointed the gun at Mrs. King (R. 39-42).

On cross-examination, Mrs. King testified that Mrs. Sterling was not holding her (Mrs. King) but it "seems" that she was holding accused "back". Accused was pointing the gun at her (Mrs.King). Betty was not there at the time of the first shot. When the second shot was fired she (Mrs. King) was on the floor by the cloak room. She remembered trying to crawl behind the partition but she could not say where she was on the floor. She felt "exactly like a rabbit feels". She was positive accused shot at her twice. She recalled that Private King entered the "fracas" and said to accused "Remember you are an officer, sir". She recalled making a previous statement that Private King "made a dash" for accused and hit him and that accused hit back. This statement was "right". It was "all so confused". The only "distinct impression" she had was that after the shooting Mrs. Sterling was on the floor, and she (Mrs. King) slapped the face of accused.

She "really" did not "think" accused meant to shoot anyone at the beginning. At one time, she thought, accused was on the floor near the door with Private King and Captain King trying to hold him. Betty was on the back of accused, ~~trying to scratch~~ him, "before anyone came", and she started to scream. Mrs. King screamed too. Mrs. King does not know anything at all about guns. She was very angry and so was Betty. She did not slap the face of accused until after the shooting. When Mrs. Sterling was on the floor, Mrs. King did not realize that she had been shot, and told her to "have some guts" and get up. It "seemed to be happening in a dream that you had no part in". She could not understand how it was that Mrs.Sterling was shot in the back (R. 42-55).

Miss Betty King testified as follows: Accused was talking about his position as mess officer and "got rather quarrelsome" about it. Betty "started to argue back" with him and made "some remark" that was not "appropriate". Accused told her to "shut up and go away", she said she did not have to, and her mother made her leave. When Betty had gone about halfway across the main clubroom, she "happened" to turn around, and saw that the others had moved their relative positions. She saw accused "lunge at" her mother, thought he was going to hit her, "started running back" and accused "started to shoot". Mrs. Sterling pushed herself in front of accused and, Betty believed, put her hands on his shoulders. A shot was fired at that time. She "couldn't say" whether or not that shot struck anyone. It was "kind of a mess and mixed up". Betty "got behind" accused, and he shot at her and at her mother. Private King, Corporal Holley, Lieutenant Hummel and her father, Captain King, came up. Private King hit accused, trying to get the gun away from him, and accused hit him back. Private King said "Remember you are an officer". They "scuffled" with accused "to get the gun away from him" and finally succeeded. Captain King placed accused under arrest. During the argument accused appeared to be angry (R. 10-15).

On cross-examination and examination by the court Miss King testified that at the beginning of the conversation in the hallway Lieutenant Wright, his "friend", and Lieutenant Hummel were present. Accused was "fussing" about being mess officer. Miss King was "standing there", and was not invited into the conversation. When her mother told her to leave, she had gone about 20 feet into the main room when she looked back. At that time accused was "nearer the cloakroom". Accused made a "leap" for her mother, and Betty thought he was going to hit her. Mrs. Sterling was pushing accused. Betty "naturally ran back". She did not recall how far she had "arrived" when the gun went off. She had not reached accused, "I imagine I was somewhere between the two". She did not "imagine" it possible for her to have been back to him "at that point". When the first shot was fired she had "just turned around and started going back". She did not remember how many steps she had taken, "whether it happened when I turned around, or how far I was or anything". She tried to keep accused from seeing her, tried to get behind him, and knew that she scratched his face. She saw the gun, ran down, jumped on accused and tried to scratch

him. She did not remember seeing the gun but remembered "hearing the shot and after I got up I saw the gun in his hand". She saw the gun after the first shot but not before. When the first shot was fired Mrs. King was a foot or two away from accused. It was fired near the entrance to the cloak room, the others farther back in the hall. She did not know when Mrs. Sterling was shot but she (Mrs. Sterling) fell on the floor the first shot. At one time accused was on the floor and Betty was holding him down "for one shot". Private King, who was one of the first there, hit accused and accused pushed him back. At that time accused was "clear up by the door". Betty and several others, including Captain King, hit accused. While accused was down on the floor he shot at Mrs. King, who was trying to help Mrs. Sterling. When the last three shots were fired, accused was on the floor, and Betty was on her knees. While accused was on the floor, Betty was "trying" to put her hand "to his eyes" so he could not see her, and started "scratching at" him after he shot at her mother. Miss King can tell "vaguely" what happened, but it happened so quickly that she cannot "tell you positively". "I can tell you generally, not exactly". A statement (Def. Ex. A) made by Miss King to the investigating officer was introduced in evidence. She knows nothing about firearms (R. 15-39).

It was stipulated (Ex. 3) that Mrs. Sterling would testify that Mrs. King, Betty King and accused had been arguing about something, Betty "seemingly" doing most of the talking, and that all three were very angry. Accused told Betty to "shut up", that running the club was none of her business. When Betty left the group, Mrs. King continued the argument with accused. Mrs. Sterling did not know whether Mrs. King slapped accused or not but "there was some quick movements" and she next saw accused reaching for his gun. When she saw this, Mrs. Sterling stepped in front of accused, pushed Mrs. King aside, and said "don't do that". While she was pushing Mrs. King out of the way, a shot was fired and it struck her in the back. She realized that she had been shot, and lay down on the floor as soon as she could. She did not see what happened afterward, but heard several other shots. Accused was not intoxicated but was beside himself with anger; his actions were those of a "wild man" (R. 56).

Mrs. Sterling testified in person as a witness after the testimony for the defense had been presented, as follows: As they were preparing to leave the club, an argument arose, to which Mrs. Sterling paid little attention. She obtained her coat from the cloak room, and accused helped her put it on. They were standing in a sort of circle in the hallway, Mrs. Sterling standing close to the wall, accused across from her, facing Mrs. King, who was to the right of Mrs. Sterling, and Betty facing Mrs. Sterling and between her mother and accused. Mrs. Sterling saw the hand of accused "slip downward". This "scared" Mrs. Sterling, so she said "Oh, don't do that", and turned and "shoved" Mrs. King. Mrs. King was in a

direct line of fire so Mrs. Sterling took a step forward and shoved her out of the way. She thought she could get Mrs. King out of the way, and at the same time get as close as possible to accused, who had no quarrel with her (Mrs. Sterling). At that time she was shot in the back. "It was distinctly an accident, distinctly so". When she saw the hand of accused go near the gun, Mrs. Sterling did not think he was going to "take that" and use it, but she was frightened because he was angry. Betty had left before the shot was fired, but Mrs. Sterling did not see her go and it was a "mystery" to her how Betty got out. Mrs. Sterling did not know how far away Betty was. She was not where Mrs. Sterling could see her, and may have been "clear over here and turned back" or "just turned out and turned back". She believed no one was behind Captain Roberts when the shot was fired (R. 132-136).

Mrs. Sterling testified on cross-examination that she did not see Mrs. King slap accused, and knew definitely that she did not slap him before the shot. She stated that accused was "extremely conservative" and a good friend of her husband, who regarded accused as an excellent officer. Accused was not drunk at the time of the occurrence. She did not see accused draw his gun because her back was turned to him. There was no "scuffle" at the firing of the first shot. She was not looking at accused at the time, but she heard no scuffling. From the time she saw accused reach for his gun until the shot was fired, there was just time for her to take not more than three or four steps across to Mrs. King, and immediately after she pushed Mrs. King aside she (Mrs. Sterling) was shot (R. 136-144).

Private King testified that while he was in the card room putting away the instruments he heard a shot. He came out the door, turned right, and entered the hallway. He was the first one to arrive. He saw Betty, who was "yelling" to her mother and screaming. He stepped around Mrs. Sterling, who was on the floor, and said to accused, "sir, you are a soldier", because he had the gun in his hand. At this time, Mrs. King was fighting with accused. When Private King spoke to accused, the latter struck him twice. King did not attempt to strike accused. Accused pointed the gun out toward the dance floor and snapped the trigger. It did not fire. As Private King stepped behind the cloak rack, the gun went off. Captain King and Corporal Holley arrived, and Captain King was talking to accused, trying to get the gun. Private King could not say that accused was pointing the gun at any particular person, he was "fumbling around" with it, and was possibly trying to open it. Mrs. King was struggling with accused at first, and then Captain King was, "after he got down". On cross-examination Private King testified that he did not recall that Betty King was on the back of accused at any time, and he did not see her struggling with accused at any time. He did not hit accused at all. He was positive that accused was standing up when all of the shots were fired. He did not know whether or not accused was shooting at him but the gun was raised and pointed out toward the dance floor (R. 57-68).

Captain King testified that he was in the locker room with Corporal Holley and Lieutenant Hummel when he heard "shots" being fired. They ran to the far end of the room, and saw Mrs. King, Betty, Private King and accused struggling, and Mrs. Sterling on the floor. All were in the hallway. Captain King did not know whether or not any shots were fired after he arrived. When he arrived accused had either given up the gun or was just giving it up. During the melee accused struck Private King. Captain King placed accused under arrest. Mrs. King and Mrs. Sterling were wearing dark fur coats. Betty did not have her coat on (R. 78-80, 84).

On cross-examination Captain King testified that when he arrived there was "just a grand struggle", at one time accused was on the floor, but he could not say whether he was on the floor at the time when Captain King arrived. Captain King got in the "scuffle" too, and probably attempted to hit accused, but did not know whether or not he succeeded. At one time they were all on the floor. In response to questioning by the court Captain King stated he did not think it possible for the revolver to have been fired during the struggle unless it was "deliberately squeezed". (R. 80-83).

Lieutenant Hummel testified that he heard the first part of the argument, which concerned the matter of mingling with the enlisted men. Accused did not think the men should mingle with the officers, and Mrs. King and Betty differed with him. Accused did not appear to be angry, and in the opinion of Lieutenant Hummel was sober. Lieutenant Hummel went to the locker room, and was there with Captain King and Corporal Holley when the shooting began. He heard three or four shots. When he arrived at the scene Mrs. King and Betty were struggling with accused. No shots were fired after he arrived. Captain King "threw himself at" accused and they were struggling together. Accused "threw" Captain King away from him and against the wall. At that time, accused still had the pistol, Lieutenant Hummel "reasoned" with him to give it up, and accused finally gave it to him. Lieutenant Hummel thought the pistol was in the right hand of accused during the struggle with Captain King, but after he "threw" Captain King against the wall, accused grasped the pistol in both hands and "it appeared" that he was taking out the cartridges and taking the clips out. He then handed it to Lieutenant Hummel. The latter did not see accused point or fire the pistol at any time (R. 68-71).

On cross-examination and examination by the court, Lieutenant Hummel testified that he was present during the argument in the hallway up to the point when he heard Mrs. King tell accused not to speak to her daughter "that way", to which accused replied that he would speak to her in any fashion he wished. Lieutenant Hummel then went to the locker room and Betty was still with the group. When he came back, accused was standing

up, facing toward the main hall, and struggling with Mrs. King and Betty. Private King was also struggling with accused. When accused "threw" Captain King off, he remarked "Don't forget I still have the gun". At that time he was "free" to use the gun if he wanted to. There were no people on the dance floor at the time (R. 72-77).

The medical officer who attended Mrs. Sterling after the shooting testified that the bullet which struck her entered at a point on her back about two inches below the last rib, near the midline on the right side, passed through her abdomen, and came out in front at about the same level as the point of entry. The direction of the bullet was rather straight. It could not have been fired from the floor while she was standing nor into her as she lay down "because it would have come out through her liver" (R. 86-89).

After being warned of his rights, accused made two voluntary statements (Exs. 5 and 6) to Captain D. M. Renfro, the investigating officer. In these statements accused outlined various difficulties between him and Mrs. King, and also the argument which he had with her and her daughter, both of whom, he stated, were insulting and disrespectful. In one statement he said that these insults together with "an assault in the form of a scratch by these two" were responsible for his actions, which he could not account for because he was angered, and which he could not recall clearly. In the other statement, he said that he had taken four or five highballs that night, but was not drunk, and attributed the incident to a combination of "anger and drink". Just prior to the shooting, he told Mrs. King, civilly, that he did not like her policies, interference and attempts to dominate the affairs of the club. Betty King told him to shut up, and he clearly remembered telling her to "stay out of it". Mrs. King said not to speak to her daughter that way. From this point "things became hazy", and until the time he realized Mrs. Sterling was hurt he remembered nothing. He did not "remember scuffling with anyone". When he began to remember things again he was standing at the south entry to the club and did not have the gun. Lieutenant Hummel and Captain King were there. A psychiatrist who observed accused from 12 November to 6 December 1943 was of the opinion that accused was not psychotic at the time of observation, and probably not at the time of the alleged offense. He did not "believe" that accused was temporarily insane at the latter time (R. 8-9, 89-91).

4. Accused testified that he was born in Wales and served in the British Army from 10 February 1913 to 31 March 1920, as shown by a certificate in lieu of a lost discharge (Def. Ex. B). He served about four years of this time in Arabia, and attained the grade of regimental sergeant-

major. It was stipulated that five discharges from the United States Army show excellent character and enlisted service from 9 August 1920 to 4 August 1922, and from 22 March 1929 to 31 December 1942. He attained the grade of master sergeant. Four of the discharges show that he qualified as an expert with the rifle, and three that he qualified as an expert with the pistol. His final discharge was given so that he could accept a direct commission as first lieutenant (R. 95-99, 122, 145).

Accused testified further that he went on duty as officer of the day at 4:30 p.m. on 23 October. At about 4:30 a.m. on 24 October he was talking to Mrs. Sterling near the radiator in the hallway at the entrance to the club. Lieutenant Wright, secretary and treasurer of the club, and his "lady friend" came up. Accused, who was mess officer of the club, spoke to Lieutenant Wright about the operation of the mess, the personnel of the club, and fraternizing with the enlisted men. At that time Mrs. King and her daughter joined the group and "took up" the argument. They stated that the enlisted men in the mess "were all right and did not need any changing". The objection of accused was that the enlisted men should be out of the club by 2:00 a.m., but some of them had remained in the card room, where the singing was going on. Accused told Betty King not to interfere in the argument, as she was not involved and running the mess was no business of hers. She replied that she did not have to "shut up" and would continue to talk. Accused told her that as long as she interfered he would talk to her as he deemed fit. Lieutenant Wright had left at that time. Mrs. King told Betty to keep quiet and go get her father. When Betty left, Mrs. King became quite angry, stamped her foot, and said "Don't you ever talk to my daughter like that again". Accused stated "I have had enough of you King's" and walked away, in the direction of the cloak room. It was time for him to go out and inspect the guard. It was a cold rainy night and he was going to the cloak room to get his coat (R. 99-103).

Through "habit and instinct", accused stopped to inspect his pistol, before going on a "tour like that". He was partially facing the radiator and anyone in the room could see him pull his pistol. He checked his gun, found it loaded, and closed it in such a way that the "empty" was under the hammer. Before he could return the pistol to the holster, Mrs. King slapped him in the face. He stepped back, and the next thing he knew someone leaped on his back from behind and was scratching at his face and eyes. This person also tried to reach the pistol, which was in his right hand. Accused tried to keep the pistol away and did not have his finger on the trigger. From that time on he did not remember "much more" of what happened, and thought that someone hit him, because later he found that his face and the side of his chin were sore. The last he remembered was trying to get the pistol away from this person (with a feminine hand) who was reaching for it from behind. The next thing he remembered was standing near

the door and being told he was in arrest. At that time he did not have the gun. He remembered that a shot was fired while the person was on his back, but did not know in what direction it was fired, because of being scratched in the face at the time. It was just a matter of seconds from the time Mrs. King slapped him until someone was on his back and the gun went off (R. 104-107).

Accused testified that he had qualified with the pistol every year. He did not recall Mrs. Sterling being shot nor what happened to Mrs. King after she slapped him. His relationship with Colonel and Mrs. Sterling was very cordial. He had no intent to shoot Mrs. Sterling. When he inspected his gun, there were five shells in it, he remembered one shot, but knew nothing of the other shots. He remembered nothing of being on the floor. He did not remember Mrs. King striking him, except the one slap, nor Private King or Captain King striking him, nor being on the floor and wrestling with Mrs. King, Betty and Private King. When Betty was sent away to get her father, that put her behind accused. There had been drinking at the club, and both Captain and Mrs. King showed signs of having had liquor. He had not seen Betty drink, and did not think that she did, but she was nervous and "on tension" (R. 107-112).

On cross-examination, accused stated that his finger was not on the trigger but he could not say whether the other person's finger was on it, though he was of the opinion that someone else had pulled the trigger. He admitted that when Mrs. King and Betty entered into the conversation, he became quite angry. Mrs. King was also angry. Both of them had been drinking. The "person" jumped on him from behind before the first shot was fired. He was holding the pistol by the handle alone in his right hand, with his finger not in the trigger guard. He felt someone's hand over his. He was being scratched on the left side of the face. He was struggling, trying to keep the gun away from the other person, and trying to "get these fingers" out of his eyes. He did not remember Mrs. Sterling saying "Don't do that" or making any movement. He did not recall being on the floor. Accused stated that some of the facts to which he had testified were not contained in his statements to the investigating officer through oversight, he apparently did not remember these facts at the time (R.112-122).

Under examination by the court accused stated he did not usually carry his revolver on "full cock" when on guard. The hammer was down. It was closed on the empty chamber. It requires "some" pressure to pull the trigger in that position (R. 123).

The following character witnesses testified for the defense: Captain Renfro, the investigating officer, stated that accused had an unusually good reputation as an officer, tended to his business and knew his business, his men and the officers liked and respected him, and accused did not have a great deal to say. On the night of the incident, accused definitely had control of his faculties, and there was no indication of intoxication. On cross-examination it was brought out that accused is a powerful man. In the opinion of Captain Renfro all of the people there together could not have overpowered accused. As strong as accused is "he could have held them off with his left hand" and shot anybody he desired. Second Lieutenant Joseph A. Siegel testified that in his opinion was a "very good officer and soldier", and that the men of his organization regarded him highly. On the night of the dance accused had control of his faculties, and Lieutenant Siegel "would not say he was drunk". Lieutenant Hummel, post adjutant, was of the opinion that accused was a good soldier and a "very good" company commander. In his opinion accused was not drunk on the night of the dance. Three enlisted men who had served under accused for six or seven months stated that accused was the "best commanding officer" one of them ever served under, was well liked by the men of the company, was a "top officer", "couldn't be any better", was a capable officer, and the best officer they ever had (R. 124-131).

5. a. A dance was held at the officers' club at the Prisoner of War Camp, Concordia, Kansas, on Saturday evening, 23 October 1943. The orchestra stopped playing at about 1:30 a.m. on 24 October but a number of people remained at the club afterward. There was drinking during the evening and "everybody was happy". At about 4:00 a.m. Mrs. Floralou B. Sterling, wife of "Colonel Sterling", Mrs. Mary E. King, wife of Captain Josiah R. King, Betty King, 17 year old daughter of the Kings, and accused were in the hallway leading from the ballroom to the outside door of the building, and preparing to depart. Accused was officer of the day and was armed with a .45 calibre Colt revolver. Captain King, Lieutenant John N. Hummel and "Corporal Holley" were in the locker room at the opposite end of the ballroom. Private First Class Jack M. King (not related to Captain King) was in a card room which adjoined the hallway but opened into the ballroom.

Accused and another officer had previously been discussing the fraternalizing of the officers and their families with enlisted men, members of the orchestra, at the dance. When the other officer left Mrs. King took up the subject with accused and suggested that if he felt aggrieved he should report it to the "board". Accused said it would not do any good whereupon Betty King said, "Then, well, why don't you shut up". Up to that point, according to Mrs. King, it had not been a real agrument, no voices were raised. Accused then became very angry and "yelled" at

Betty, "You shut up". Betty replied, "I don't have to". Mrs. King then told Betty to "shut up" and go tell Captain King they were ready to go. Mrs. King was very angry and when Betty left, she turned to accused and told him not to speak to her daughter again "like that". Accused remarked he would speak to her any way he liked, whereupon Mrs. King stamped her foot and said, "Don't you ever dare to speak to her again". While the argument was going on Mrs. Sterling had put on her coat with the assistance of accused and was standing there. Accused said, "I am so sick of you Kings" and Mrs. Sterling saw his hand "slip downward" toward his gun. She was frightened because accused was so angry, "he acted like a wild man", and she said "Oh, don't do that", at the same time taking three or four steps forward, pushing Mrs. King out of the way and turning her back to the accused. Mrs. King saw him pull the gun out, it "went off". The bullet struck Mrs. Sterling in the back, entered at a point about two inches below the last rib, near the midline on the right side, passed through her abdomen and came out in front at about the same level as the point of entry.

Betty King was about 20 feet down the ballroom when she turned and saw accused "lunge" at her mother. She started to run back when a shot was fired and she saw Mrs. Sterling sink to the floor. Private King heard the shot, ran out of the card room, across the corner of the ballroom and into the hallway. When Betty reached the hallway accused pointed the gun at her, pulled the trigger but the cartridge did not fire. Betty and her mother were screaming. Private King said to accused, "Remember you are an officer, sir" and accused struck him twice. Private King struck accused. Accused pointed the pistol in the direction of the dance floor and pulled the trigger but the gun did not fire. Private King stepped behind the cloak rack and then the gun went off. Betty King tried to get behind accused and scratch his eyes to keep him from seeing her. Three more shots were fired. Mrs. King was positive accused shot at her twice. She testified she was on the floor trying to crawl behind a partition. She felt "exactly like a rabbit feels". It was all "hopeless confusion". Captain King, Lieutenant Hummel and Corporal Holley ran to the hallway when the shooting began but no shots were fired after they reached there. Some further scuffling followed and accused then surrendered his gun.

Accused made two statements to the investigating officer concerning the shooting, attributing it in one statement to insults and an assault "in the form of a scratch", and in the other to a combination of "anger and drink". He admitted having four or five highballs during the evening. He described events leading up to the shooting but claimed that from the time Mrs. King told him not to speak to her daughter "that way", "things became hazy" and when he began to remember things again Captain King and Lieutenant Hummel were there and he did not have his gun. He did not "remember scuffling with anyone".

Accused testified at the trial in his own behalf relative to events on the night in question. He recounted his conversation with another officer relative to fraternalizing with enlisted men and stated that Mrs. King and daughter joined in the discussion, as testified to by the prosecution's witnesses. After Betty King had left the hallway to get her father, Mrs. King angrily stamped her foot and said "Don't you ever talk to my daughter like that again". Accused said "I have had enough of you Kings" and walked toward the cloak room to get his coat. It was time for him to inspect the guard and through "habit and instinct" he stopped to inspect his revolver, checked his gun, found it loaded with five shells and closed it in such a way that the "empty" was under the hammer. It required "some" pressure to pull the trigger in this position. Before he could return the pistol to his holster, Mrs. King slapped him in the face and then someone leaped on his back from behind and scratched at his face and eyes. He had the pistol in his right hand, and tried to hold it away from this person, who had a "feminine hand", on his back. His finger was not inside the trigger guard. He thought someone struck him at this time and he did not remember "much more" of what happened. He did remember a shot being fired and was of the opinion someone else had pulled the trigger as his own finger was not on it. The next thing he remembered was standing near the door and being told he was under arrest. When asked on cross-examination to reconcile his testimony at the trial concerning a struggle with his statement to the investigating officer containing nothing about a struggle accused stated it was an "oversight" and that he "apparently" had not remembered these facts at the time he made his statement.

The defense presented several character witnesses who testified concerning the previous good character and reputation of accused as an officer and soldier. Several witnesses who saw accused about the time of the shooting testified he was not intoxicated.

b. Although there is some conflict in the evidence for the prosecution as to the course of events, because of the excitement that prevailed, the rapidity with which things happened, and possibly the amount of drinking which had occurred during the evening, the evidence establishes beyond any reasonable doubt, that accused fired his .45 calibre revolver at Mary E. King and that the bullet accidentally struck Floralou B. Sterling in the back. The testimony of Mrs. King and Mrs. Sterling is in substantial agreement as to events leading up to the firing of the first shot. The Board of Review believes that the testimony of Mrs. Sterling, especially, is entitled to great weight because of the friendship existing between her husband, herself and accused, a friendship which was not destroyed by the events in question as is apparent from her attempts on the witness stand to explain the affair as wholly accidental. Both Mrs. Sterling and Mrs. King testified that they and accused were the only persons in the hallway at the time the first

shot was fired, that when accused, displaying great anger, reached for his gun, Mrs. Sterling stepped in between Mrs. King and accused and that a shot fired immediately after struck Mrs. Sterling in the back. The testimony of Mrs. Sterling and Mrs. King concerning events up to this point is in substantial agreement with the testimony of Betty King. Her testimony, considered as a whole, shows that she was part way across the ballroom when she turned and saw accused make a threatening gesture toward her mother and that a shot was fired as she ran back to the hallway.

The credibility of the testimony of accused that he took his revolver out to check it, that Mrs. King slapped his face before he could return it to his holster (specifically denied by Mrs. King and Mrs. Sterling) and that someone, with a "feminine hand", jumped on his back and scratched his face and hands, prior to the firing of the first shot, is of course weakened by his failure to mention any such happenings in the statements made to the investigating officer prior to the trial. It is something more than a mere omission. Accused specifically stated to the investigating officer that he remembered nothing from the time Mrs. King told him not to speak to her daughter until subsequent to the shooting when he had been relieved of his gun. He also stated he did not "remember scuffling with anyone". The great improvement in his memory between the investigation and the trial requires that his testimony be received with caution. Aside from this fact, and the conflict between his testimony and that of the witnesses for the prosecution, it has an inherent improbability which warrants its rejection. If his testimony is believed, while he held the gun the trigger was pulled by a person with a "feminine hand" who jumped on his back at the time Mrs. King supposedly slapped him. Such a person could only have been the 17 year old girl, Betty King. Assuming that a struggle took place it would not be an unusual occurrence, under certain circumstances, for a revolver to be discharged. In this case, however, the gun was not cocked but the hammer was closed on an empty chamber according to the testimony of accused himself. It was necessary therefore to apply pressure to the trigger not merely to release the hammer but with such force as to cock the pistol before it would fire. Captain King testified that such a gun could not be fired unless the trigger was "deliberately" squeezed and accused himself admitted that it took "some" pressure to fire the revolver under such conditions. The Board of Review has carefully examined a pistol of the same type to verify these facts.

While the Board is not concerned with events subsequent to the shooting of Mrs. Sterling, except in so far as they illuminate the preceding events, attention must be given to the fact that the revolver was fired four times and the trigger pulled a fifth time, the cartridge not exploding. The testimony for the prosecution shows that accused fired the revolver each of these times. If this testimony is rejected, presumably it must be said that while accused held the revolver, for it is established beyond dispute that he did not surrender the gun until the firing was over, his assailant or assailants pulled the trigger five times. Why Betty King, or Mrs. King, or perhaps Private King, would be so desirous of firing the gun is not apparent to the Board. The Board is convinced that accused fired the shot

that struck Mrs. Sterling and that he explained it correctly when he told the investigating officer that it was due to a combination of "anger and drink".

c. It is clear that accused was guilty of an assault upon Mary E. King within the wording of the Manual for Courts-Martial (1928), paragraph 149l (p. 177) which defines an assault as "an attempt or offer with unlawful force or violence to do a corporal hurt to another". His intent to do bodily harm to Mrs. King is inferable from the circumstances surrounding the event, the nature of the weapon used, and the character of the injury which resulted to Mrs. Sterling (Dig. Ops. JAG, 1912-40, sec. 451(10)). It is immaterial that injury was not inflicted upon Mrs. King. The following statement in the Manual (p. 178), in connection with a discussion of the offense of assault with intent to murder, is pertinent: "Thus, where a man with intent to murder another deliberately assaults him by shooting at him, the fact that he misses does not alter the character of the offense".

The bullet fired at Mrs. King accidentally struck Floralou B. Sterling and thus accused was likewise guilty of an assault upon the latter. The intent to do Mrs. King bodily harm is transferred to Mrs. Sterling. Again turning to the Manual (par. 149l, p. 179), the following language used in connection with a discussion of the offense of assault with intent to commit murder is applicable to the present case: "But where the accused, intending to murder A, shoots at and wounds B, mistaking him for A, he is guilty of assaulting B with intent to murder him; so also where a person fires into a group with intent to murder someone, he is guilty of an assault with intent to murder each member of the group". It is well settled that there is no difference between shooting B mistaking him for A, whom it is intended to murder, and shooting B accidentally in aiming at A, whom it is intended to murder (see Wharton's Crim. Law, Vol. 1, p. 194).

6. The accused is 47 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 9 August 1920 to 4 August 1922 and from 22 March 1929; temporarily appointed first lieutenant, Army of the United States, 30 November 1942, effective and active duty, 1 January 1943; temporarily promoted to captain, Army of the United States, 21 September 1943.

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

Samuel M. Drivers, Judge Advocate

Robert C. Cannon, Judge Advocate

F. J. Lattuthos, Judge Advocate

1st Ind.

War Department, J.A.G.O., 30 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 Captain David Roberts (0-505881), Corps of Military Police.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. The accused, who as officer of the day was carrying a caliber .45 revolver, in the course of a quarrel with Mrs. Mary E. King in the officers' club, at about 4 a.m. committed an assault upon her with a dangerous weapon with intent to do her bodily harm by shooting at her with such revolver (Spec. 5, Chg. I) and thereby also committed an assault of like character upon Mrs. Floralou B. Sterling in that the bullet directed at Mrs. King inadvertently struck Mrs. Sterling in the back and passed through her abdomen (Spec. 1, Chg. I). A motion to strike Specifications 3 and 4, Charge I, was granted by the court and the accused was found not guilty of Specification 2, Charge I and of Charge II and the Specification thereunder.

All of the members of the court and the trial judge advocate in a recommendation for clemency attached to the record of trial, recommended that because of the long and honorable enlisted service of accused both in the British Army and in the United States Army and the "irritating circumstances" which preceded the commission of the offenses involved, the portion of the sentence adjudging dismissal be suspended and that the total forfeitures be reduced to forfeiture of $1,000. The reviewing authority also recommended that the dismissal be suspended and that the forfeitures in excess of $100 per month for 12 months be remitted.

Although the accused had been drinking he was not drunk. After firing at Mrs. King accused fired three other shots and snapped his pistol, the cartridge not exploding, while various persons were struggling to subdue and take the weapon away from him. Notwithstanding the recommendations for clemency mentioned above, in view of the seriousness of the offenses committed and the lack of adequate provocation therefor, I recommend that the sentence to dismissal and total forfeitures be confirmed, that the forfeitures be remitted, and that the sentence as thus modified be carried into execution.

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

Myron C. Cramer,

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

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

(Sentence confirmed but forfeitures remitted. G.C.M.O. 368, 17 Jul 1944)

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

SPJGK
CM 248104

26 FEB 1944

UNITED STATES	)	FORT HUACHUCA, ARIZONA
v.	)	Trial by G.C.M., convened at Fort Huachuca, Arizona, 10 January 1944. Dismissal, total forfeitures, and confinement for three (3) years.
First Lieutenant RUDOLPH H. PORTER (0-399280), Medical 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. The accused was tried upon the following Charges and Specifications:

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

Specification 1: In that First Lieutenant Rudolph H. Porter, Medical Corps, Medical Department Replacement Pool, Fort Huachuca, Arizona, being assigned to duty as ward officer of ward number twenty four at the Station Hospital, Fort Huachuca, Arizona, did at Fort Huachuca, Arizona, on or about 4 January 1944 wrongfully, dishonorably and to the discredit of the military service receive from Technician Fourth Grade Oscar J. Holmes, a patient in said ward $225.00 in currency in consideration for which the said First Lieutenant Rudolph H. Porter promised to obtain for the said Technician Fourth Grade Oscar J. Holmes a discharge from the Army of the United States.

Specification 2: In that First Lieutenant Rudolph H. Porter, Medical Corps, Medical Department Replacement Pool, Fort Huachuca, Arizona, being assigned as ward officer at the Station Hospital, Fort Huachuca, Arizona, did at Fort Huachuca, Arizona, on or about 19 December 1943, wrongfully, dishonorably and to the discredit of the military service offer to obtain for Technician Fourth Grade Oscar J. Holmes, a patient under the medical care and observation of the said First Lieutenant Rudolph H. Porter, a discharge from the Army of the United States in consideration of the payment of $150.00.

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

Specification: In that First Lieutenant Rudolph H. Porter, Medical Corps, Medical Department Replacement Pool, Fort Huachuca, Arizona, being assigned as ward officer of Ward number twenty four at the Station Hospital, Fort Huachuca, Arizona, did at Fort Huachuca, Arizona, on or about 4 January 1944, wrongfully, dishonorably and to the discredit of the military service, receive from Technician Fourth Grade Oscar J. Holmes, a patient in said ward, $225.00 in currency in consideration for which the said First Lieutenant Rudolph H. Porter promised to obtain for the said Technician Fourth Grade Oscar J. Holmes a discharge from the Army of the United States.

He pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to dismissal, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for three years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Summary of evidence.

It appears from the testimony of Second Lieutenant Mary Wilborn, Army Nurse Corps, Station Hospital Number 1, Fort Huachuca, and Technician 4th Grade Oscar J. Holmes, 37th Special Service Company, Fort Huachuca, that Holmes was admitted to Ward 24 of the hospital on 17 December 1943, for observation of a deformity of his right elbow, with a view to his possibly being sent before a Certified Disability Discharge Board. Holmes had previously (on 18 September 1943) been recommended for a discharge because of the condition of his elbow, but his Company Commander, Captain Kenneth Lowell Johnson, 37th Special Service Company, had "refused to sign the papers" because Holmes was needed in the organization and it was felt that the deformity would not prevent his performing his duties, which were the repair and operation of motion picture projectors. Holmes testified that his arm continued to pain him, however, and that he was again admitted to the hospital (R.12-24,41,42,43,46; Pros. Exs. 1,2 and 3). Accused was the medical officer in charge of Ward 24 on 17 December when Holmes was readmitted to the hospital (R.13). Accused examined Holmes' arm and asked a few questions about it (R.12,24,26,27). Holmes testified that on the morning of 19 December, accused called him into the office and said that "I seemed to be a nice fellow and my age [33] was partly against me, and for a sum he thought I could get a discharge" (R.27). At this point another officer entered the office, and accused excused witness to return to the ward until later. He was called again to accused's office that afternoon (R.26, 27,29). Witness stated that at this time accused told him "that there was a fellow he [accused] could contact that could make arrangements for a discharge" but that the one who "would see the right parties and make

arrangements" was going on leave for the Christmas holidays. It would, therefore, be necessary for witness to have the money and make the arrangements for the discharge before Wednesday, 22 December. The amount required was to be $150. Accused asked witness if he could get the money and if it would be possible to borrow from some person in witness' company (R.28,29,30,40,52). Holmes testified that during this conversation accused also told him that anything he (witness) did or said would involve him rather than the officers, who "would always be in the clear no matter what did happen", and that even if witness were discharged from the Army he could be held for bribing an officer if he said anything about it (R.38,39). Due to the fact that witness had obtained no relief from pain through the treatment of his arm in the previous six weeks, and because "I thought if I got a discharge maybe I could get something done", he decided to accept accused's proposition. He testified: "I was willing to do anything to get out and have something done for my arm" (R.45,46, 49,56).

He told accused that he could obtain the money by cashing some securities, and on either 20 or 21 December obtained a pass from accused, saying that he wanted to go to his company to see if he could obtain some money. Witness also wrote to his wife and to a friend who held a small mortgage on his home, in an effort to increase the mortgage. He did not receive the money by Wednesday, 22 December, and told accused this on Thursday. Accused "wasn't sure he could hold it open much longer", so witness of his own volition asked accused whether if the figure were raised to $225.00 there would still be a possibility of his obtaining a discharge (R. 30,31,59,60,61,118). Holmes testified that accused said "he would see", and that a day or so later accused told witness that "it would be all right", asking witness whether he was positive he could have $225 by Thursday, 30 December. Witness obtained a pass for Thursday, telling accused that he was going to try to get some money, and went to his company and to the post office to see if he had any mail. He also sent a telegram to his wife. He saw accused that evening, promising to try to have the money by the morning of Friday, 31 December 1943. Accused said this would be all right, so witness went again to his company to receive his pay, and to the telegraph office, where he received a telegram from his wife, stating that a power of attorney he had left with her was not in proper form, and that another signature was needed in order to negotiate a loan (R.31,32,61). Holmes stated that up to this time he had planned to pay accused the money and obtain a discharge, "but after thinking it over I thought it wasn't right". So on Saturday, 1 January, he went to Second Lieutenant Alfred W. Watson, Corps of Engineers, 37th Special Service Company, who was the intelligence officer, and told the whole story. Lieutenant Watson took witness to the office of Colonel Edwin N. Hardy, Cavalry, the post commander, where witness was asked to and agreed to go through with his plan of paying the money to accused (R.32,48,56,57,58,62,63).

Witness next talked to accused on Monday, 3 January 1944, telling accused that he had talked to "an officer" of his company on the previous day who had agreed to loan him the money, and that he would have it for accused at 10 o'clock the next morning. To accused's question as to what he had told "the lieutenant", witness replied that he had said that he needed the money to send home, and that as soon as he got some papers drawn up the money would be forthcoming and would be repaid. Accused was satisfied with this answer. Witness asked accused for a pass for that evening in order to keep this appointment at his company at 8:45. Accused told him it would be all right to go and that he would tell the nurse (R.32,33).

At 9:00 o'clock on the next morning witness met with Colonel Hardy, Major John R. Reasonover, Post Provost Marshal, Second Lieutenant Kenneth H. Beckenhauer, Assistant Provost Marshal, and several other officers, in Colonel Hardy's office. Plans were made for the payment by Holmes of the money to accused, and for the various officers to assume posts of observation about the hospital while this was being done. A signal was arranged. Holmes was given $225 in bills of various denominations from $1 to $20, the serial numbers of which were noted on a receipt signed by Holmes and witnessed by two of the officers (R.34,35,44,51,58,59,70, 71,73,74; Pros. Ex. 12). Holmes testified that he then waited in his company area with Lieutenant Watson until the hour appointed for his payment to accused, and that he reached the hospital about 9:50. He found some one in accused's office, waited till the visitor had left, and went in. Accused was looking over some papers, and told witness "to have a seat for a while". Another visitor came in and left, and then accused asked witness if he had the money in a small package. Holmes answered, "Yes, sir", took the money from his pocket, handed it to accused, and asked him if he wanted to count it. Accused said, "No", put it in his left front trousers pocket, and told witness not to say anything, but "to go on as though nothing had happened and things would work out all right" (R.36-38).

As part of the prearranged plan, witness smoked a cigarette while he was paying the money to accused. Apologizing for smoking in the office, he went to the back porch and threw it away, which was the signal for the officers to come in, within a minute or so after the money had passed (R.37,38,40,48,49). Major Reasonover, Lieutenant Beckenhauer, other officers and Holmes entered. Major Reasonover told accused that he was the provost marshal, and asked to see accused's money. Accused handed over his billfold, which contained personal funds. Major Reasonover twice asked accused if he had any other money in the office, in his desk or on his person, and accused twice stated that he did not. Finally accused produced from his left front trousers pocket $226 in bills, which (except for the extra $1) corresponded in denominations and serial numbers to those given to Holmes for the purpose of payment to accused (R.51,64-68,73-76).

Upon cross-examination, Technician Holmes, who was the prosecution's principal witness, was asked whether he had not made "derogatory remarks against" accused. He denied having done so, but admitted having expressed a dislike for the nurse because of tasks which she assigned to him (R.47).

Evidence for the defense.

Technician 5th Grade Kenneth Durden, Company D, Provisional Battalion, Fort Huachuca, testified that while he was a patient in Ward 24 of the station hospital he had heard Holmes say that "he didn't like the doctor in the ward" (accused), and express dislike for Nurse Wilborn (R.91-93). Private Preface Floyd, Company M, 365th Infantry, 92nd Infantry Division, testified that he had known Holmes while they were hospital patients; that Holmes had once asked him what was the penalty for murder, and that to witness' question as to what Holmes meant had replied, "Oh, nothing"; that Holmes had talked obscurely of a wish to have $10,000, and that four or five days prior to the trial, Holmes had said to him, "If I can get this to work, I will be all right", but that Holmes gave no further explanation of his words (R.89,90). Private First Class Frank S. Weaver, Medical Detachment, Fort Huachuca, ward master in Ward 24, testified that he had not heard Holmes express any sentiments concerning his treatment in the ward, but that Holmes had come to him to obtain information about a pass, saying he had to go to his company to get some money to send home (R.96).

Accused's rights were fully explained to him, and he testified in his own behalf (R.105). He stated that one day Holmes came in to his office and asked accused about his arm condition, saying that it pained him when he was out on the field in bad weather. Holmes wanted to know about the probable outcome of his condition, but accused told him that he would have to remain under observation for a while. Holmes said, "Thank you", and went out. On a later date, while accused was making his rounds, Holmes asked him if he would send some money home to Holmes' wife if Holmes obtained it. Accused said that he would. Later Holmes came to accused, asking if he might have a pass on pay day to collect some money. Accused testified that he said, "Come to me on the day you want the pass and I will make arrangements to get it for you", but did not remember that Holmes ever came back to ask for it again. On Monday, 3 January, Holmes asked accused for a pass for the next day. Accused made the same answer he had made to the previous request (R.106). Accused next saw Holmes on the day of the incident. Accused testified that he was working in his office on the medical histories of ward patients when Holmes came in, told accused he had obtained his money, and asked accused if accused would sent it away for him. Accused stated that he told Holmes he would, but that he was busy, and that Holmes should come back later.

Holmes asked him if he would take it (then), handed it to accused, and accused put it in his pocket. Accused said, "Sit here one minute, I want to complete these charts". Holmes said something about being sorry for having a cigarette, which accused had not noticed, and walked out of the office. "In half a minute the police officers came in" and asked to see accused's money. He thought they were joking, and treated the whole incident in that light. He finally understood what they were seeking, and handed over the money in his trousers pocket, telling Major Reasonover that it was not his own - that "it belonged to the fellow that just went out. I couldn't even think of his name at the time" (R.107,108,111).

Accused stated that when Holmes handed him the money, he did not ask Holmes where to send it, nor the name of Holmes' wife, because he had not yet had time to do so, and because Holmes' wife's name and address were already available to him on Holmes' hospital chart. He did not even have time to count the money. "The officers would not tell me what the trouble was" (R.108,109,111). He intended to take Holmes with him to the Western Union office at noon. He said that he recalled having sent one $25 money order for another patient, whose name he did not remember, and having received five or six dollars from a patient to get some cleaning for him (R.109,110).

Evidence for the prosecution in rebuttal.

Holmes was recalled as a witness and testified that his wife was working and received an allotment from his pay, and that he had no occasion during December or January to send money home to her. He denied that he requested accused to send money home for him, and stated that on the contrary, he was attempting to obtain money from home. He also denied telling anyone at the hospital that he did not like accused (R. 117,118).

Captain Kenneth Lowell Johnson, Holmes' company commander, testified that Holmes' reputation for truth and veracity was good (R.113).

4. The evidence requires little recapitulation. An enlisted man was admitted to the hospital ward of which accused had charge, for observation with a view of determining whether he should be discharged for physical disability. Later accused told the soldier that he and other parties whom he did not name could obtain a discharge upon payment by the soldier of $150 by a certain date. Unable to raise that amount by the date fixed, the soldier later offered to pay $225 if the time were extended. Accused agreed. Before the second date set, and after "thinking it over", the soldier made full disclosure of the negotiations to higher authority, including the Post Commander. As a result of this disclosure, it was agreed that he should go through with the plan as arranged by the accused. Accordingly the soldier received from the Provost Marshal $225.00 in marked bills, which money was delivered by the soldier to the

accused at the place and time agreed upon. The marked money was found on accused's person by the Provost Marshal within half a minute after it had been given to him by the soldier.

Accused denied offering to obtain a discharge for $150 and denied accepting $225 for that purpose. He claimed that Holmes had given him this money to be sent home by him to Holmes' wife. The defense also claimed that the soldier bore ill will towards accused.

5. There is no reasonable doubt of accused's guilt of the Charges and Specifications. Accused's version of the affair is patently unworthy of belief.

6. It is unnecessary to determine whether or not the offenses fall within the provisions of the Federal bribery statute (18 U.S.C. 207), for even if they do not, they are tainted with corruptness and moral turpitude. Although violation of Article of War 95 does not permit any punishment except dismissal, the finding of guilty of Specification 2, Charge I, authorizes the total forfeitures and confinement. The forfeitures and confinement likewise are authorized by the conviction under Specification 1, Charge I. It is true that this Specification is identical with the Specification of Charge II, the former being charged under Article of War 96, and the latter under Article of War 95. It is true also that if an accused "is found guilty of two or more offenses constituting different aspects of the same act or omission, the court should impose punishment only with reference to the act or omission in its most important aspect" (M.C.M. 1928, par. 80a). But in the present case, where, as already noted, the offense is tainted with corruptness and moral turpitude, it would seem that the Specification under Article of War 96 represents the more important aspect of the offense. Any other interpretation would limit punishment to dismissal in cases so serious as to call for or at least to justify forfeitures and confinement. The present case is distinguishable from United States v. Law (CM 232592) and United States v. Hightower (CM 224286). In each of those cases the accused was charged under Article of War 95 and convicted of a lesser included offense under Article of War 96. The Board of Review held that since dismissal was the only punishment permitted under Article of War 95, a greater punishment for the lesser included offense was illegal.

7. At the beginning of the trial, defense counsel moved to strike Specification 1, Charge I, in violation of Article of War 96, on the ground that it was identical with the Specification, Charge II, and therefore a multiplication of charges. The law member correctly overruled this motion. Offenses under these articles are not the same. It has been held that a conviction upon three Specifications under Article of War 95 and of the identical Specifications under Article of War 96 did not constitute double jeopardy of accused, nor was it otherwise improper, the two charges not

being one and the same offense. (McRae v. Henkes, 273 Fed. 108, cert. den. 258 U.S. 624; MCM 1928, p. 224; Bull, JAG, Mar. 1943, p. 96.)

8. War Department records show that accused is 28-2/12 years of age and single. He graduated from Wiley College, Marshall, Texas, with the degree of Bachelor of Science in chemistry, in 1935, and from Meharry Medical College, Nashville, Tennessee, with the degree of Doctor of Medicine, in 1939. He was commissioned a First Lieutenant, Medical Corps Reserve, on 16 October 1940, and entered upon active duty 8 March 1942. The records also show that on 26 October 1942, accused was convicted by a general court-martial of using threatening and insulting language to a sentinel in the execution of his duty, in violation of Article of War 96. As approved by the reviewing authority he was sentenced to be restricted to the limits of his post for three months and to forfeit $100 of his pay per month for three months. Evidence of this conviction, though admissible, was not introduced at accused's trial.

9. The court was legally constituted and had jurisdiction of the person and of the subject matter. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 96 and is mandatory upon conviction of a violation of Article of War 95.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 4 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 Rudolph H. Porter (0-399280), 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 of guilty and the sentence and to warrant confirmation thereof. Accused, a medical officer, was found guilty of offering to obtain a discharge for an enlisted man under his care and observation, in consideration of the payment of $150, in violation of Article of War 96, and of receiving from the same enlisted man the sum of $225, for which accused promised to obtain a discharge, in violation of Article of War 95 and of Article of War 96. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for three years. The record of trial shows that the conduct of the accused was grossly dishonorable and substantiates the court's findings in every respect. I recommend that the sentence be confirmed but that the forfeitures be remitted, and that the sentence as thus modified be carried into execution, and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

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 forfeitures remitted. G.C.M.O. 213, 26 May 1944)

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

SPJGN
CM 248108

26 FEB 1944

UNITED STATES	)	SAN BERNARDINO AIR SERVICE COMMAND
	)	
v.	)	Trial by G.C.M., convened at San Bernardino Army Air Field, California, 6-9 December 1943. Dismissal and confinement for one (1) year.
Captain GRANT H. STONE (0-915547), 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 93rd Article of War.
(Finding of Not Guilty).

Specification 1: (Finding of Not Guilty).

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

Specification 1: In that Captain Grant H. Stone, AC, 423d Sub-Depot, U. S. Army Air Forces, being the commanding officer of said sub-depot, did, on or about August 26, 1943, at Los Angeles, California, wrongfully, unlawfully and without proper authority, sell approximately 60,500 feet of 35 mm. motion picture film of the value of over $900.00, property in the lawful custody and possession of the United States, and applied the proceeds thereof to his own use and benefit.

Specification 2: In that Captain Grant H. Stone, AC, 423d Sub-Depot, U. S. Army Air Forces, for the purpose of aiding Sergeant Robert H. Sheets to obtain payment of a false claim against the United States, by presenting to Colonel L. L. Gocker, a Finance Officer of the United States Army, duly authorized to pay such claim did, at Los Angeles, California, on or about June 24, 1943, falsely, wrongfully and unlawfully certify to the fact that services and materials listed on a United States Government purchase order, to wit: 423d Sub-Depot Order No. 3912, in the sum of $375, had been received, which said certificate was false and was then known by the said Captain Grant H. Stone to be false.

Specification 3: (Nolle Prosequi).

Specification 4: (Finding of Not Guilty).

Specification 5: (Nolle Prosequi).

Specification 6: (Nolle Prosequi).

Specification 7: (Nolle Prosequi).

The accused pleaded not guilty to each of the Charges and Specifications. He was found not guilty of Charge I, and its Specification, and of Specification 4 of Charge II but guilty of Specifications 1 and 2 of Charge II and of Charge II. He was sentenced to be dismissed the service and to be confined at hard labor at such place as the reviewing authority might direct for one year. The reviewing authority approved the sentence, but stated that "Pursuant to AW 50½", the order directing execution of the sentence is withheld. The case has been considered as one forwarded under Article of War 48.

3. The evidence for the prosecution shows that the accused, who had been commissioned a captain in the Air Corps in August of 1942, reported for duty on 6 April 1943 to the 1st Motion Picture Unit of Culver City, California. This was a "motion picture outfit organized by the Army Air Forces to make training films and war pictures over the various fronts". Ten days later he was reassigned to the 423rd Sub-Depot, a unit which had been activated "on paper" on 15 March 1943, and was appointed its Commanding Officer. It was originally also located in Culver City but was soon moved to 453 Hollywood Boulevard, Los Angeles, California (unnumbered Exs. SO 58 and SO 191, GHQ, San Bernardino Air Service Command, dated respectively 18 September and 16 April 1943, R. 25, 46, 52, 89).

The 1st Motion Picture Unit used the premises formerly occupied by the Hal Roach studios. When Sergeant James L. Sloan, the noncommissioned officer in charge of its camera department, first entered upon his duties in December of 1942, he found that "in one of the back rooms * * * was a pile of film. It was piled in there at random. It wasn't segregated in any form, just thrown in in utter confusion. This film I was not aware of, had not ordered it, had nothing to do with it." Among the boxes scattered about were several containing film designated as "Background X, Emulsion #102", as Type 2, Class C, Emulsion #99, or as Type 2, Class C, Emulsion #101. Their presence was not recorded in any official document but was noted in an inventory prepared for the personal use of the sergeant by one of his subordinates (R. 89, 91-93, 102, 120-121, 136-138, PE 7).

"Background X" was the manufacturers' name for a variety of film intended only for civilian or "commercial" consumption. The term was not spelled out on the labels affixed to the containers but was represented by the number "1230". Army nomenclature for the same material was "type 2, Class C". It was normally produced in lots of ten or twelve million feet.

Each of these was denoted by a number and, in this particular instance, by the number "102", among others (R. 94-96, 100, 102, 108-109, 111, 116).

A test of the "Background X" film inventoried by the sergeant revealed that its speed had "deteriorated" to a point which rendered it unsuitable for military use. Since it was a "definite fire hazard" and since he had "no storage facilities", he directed that it be boxed and turned over to George Joseph Siegel who represented "Air Corps Supply". After being stored by this organization for a short period, it was on 16 April 1943 delivered to the newly activated 423rd Sub-Depot. Siegel, who did the hauling, put the film "down on the bay * * * and told the men not to inventory it. It wasn't Air Corps property". Some time later the accused specifically instructed Private Carl A. Lieberman, who assisted Private Thereon Tibbot in keeping the receiving debit voucher of the Sub-Depot, that the Background X film was "not to be picked up on accountable records because it was no good." In pursuance to these directions no entry was ever made (R. 32-33, 47-48, 76, 91-93, 103-104, 115-116, 118-123).

Background X film was placed in one of the "regular hundred foot refrigerators" which had been installed on the premises of the 423rd Sub-Depot for the storage of material of this character. It was some time thereafter removed from this repository and installed in several filing cabinets by Mrs. Helen Dulany, a civilian employee. On her own initiative she caused one of these to be labeled "Property of Captain Stone, do not issue, Background X" (R. 33, 48, 55-59).

In July of 1943 Mr. Charles Schwartz, whose business was buying and selling film, met a sergeant of whom he inquired concerning the course to be followed in doing business with the Army. It was suggested that he see the accused. "About a week or so later" on 29 July 1943 Mr. Schwartz "was down in that part of town" in which the Sub-Depot was located. He "stopped in to see" the accused and

> "told him I was referred to him by someone whom I met, a Sergeant Klein, that perhaps at that depot there would be a procedure of going about purchasing film. He said no they don't sell film or anything around there, that the film is sent back to Patterson Field, Ohio. And he gave me the name of a Lieutenant back there to write to, to ascertain from him where and how and all that, which I did."

Mr. Schwartz immediately wrote to the officer referred to, but never received a reply. Three or four weeks later he received a phone call from the accused who informed him that

> "he had a friend that had some film to sell and his friend had asked him whether he knew where he could sell it or dispose of it, being in the film business, and he recalled that I was down there and asked me whether I would be interested."

Mr. Schwartz's answer being in the affirmative, they proceeded to bargain over the price. The accused asked two cents per foot, and Mr. Schwartz was willing to pay only "a cent and three quarters". No agreement was reached, for the accused represented that he would have to consult with his "friend". "About one or two days later" he called once more and agreed to accept the price which had been bid. Mr. Schwartz, however, insisted upon again cutting "it down a bit" because "I have got to pay for financing". His final offer was $900 "spot cash" for 60,000 feet. After reconferring with his "friend", the accused called for the third time and said "it'll be all right". Upon being asked when the film could be "picked up", he replied, "I don't think you can pick it up. I'll have to get a hold of my friend and find out. I'll probably have to bring it up to you" (R. 60-61, 64).

On 25 August 1943 the accused, with the assistance of Gerald Stanlloyd Tierney, one of his civilian employees, took boxes containing 59,200 feet of "Background X" film out of the filing cabinets in which they were kept and loaded them into the trunk compartment of a staff car. The following day the accused transferred these to his own personal car, a Cadillac, and delivered them to Mr. Schwartz's place of business and accepted $900 in bills of large denomination as payment in full. All of the emulsion numbers on the boxes in which the film was packed had previously been "erased or mutilated or marked over with a crayon pencil". Ninety-nine of these containers were ultimately recovered from Mr. Schwartz by Orson T. Myers, an agent of the Federal Bureau of Investigation. The labels on four had been completely cut off. When restored to view, the original markings on the remaining ninety-five showed that fifty-one were 1230-102, thirty-two 1230-99, nine 1230-101, two 1230-92, and one 1230-87 (R. 14-16; P. Ex. 2; R. 65, 100, 127; also accused's testimony: R. 228-229).

The accused and his wife maintained a joint bank account at the Van Nuys Branch of the California Bank. As of 26 August 1943 the balance standing to their credit was $7.69. On 27 August 1943 she deposited $750 of the $900 received from Mr. Schwartz. The other $150 was retained by the accused for his own purposes (R. 131-132; P. Ex's 1, 11, 12).

This transaction had been preceded by another of an equally dubious nature. The 1st Motion Picture Unit in May of 1943 requisitioned the 423rd Sub-Depot for various printed forms which were required in the production of motion pictures. Prior to his entry into the service Sergeant Robert H. Sheets, the purchasing agent of the 423rd Sub-Depot, had been one of the owners of the Hollywood Spotlight Company, the publisher of a news column. He now proposed to the accused that he be given the job of printing the forms requested and that it be let to him in the name of his former firm of which he had become the sole proprietor. The accused agreed and executed purchase order number 43-665. Sergeant Sheets acquired a printing press for the alleged sum of $206 and proceeded to turn out the forms at his home. Being in need of assistance, he retained one of the civilian employees of the 423rd Sub-Depot on a part time basis. This employment arrangement continued for three or four weeks and involved a total expenditure of $40 (R. 160, 164, 170-171; PE 1).

In the meantime the 1st Motion Picture Unit had requisitioned five hundred other forms for which the charge would have been approximately $187. Sergeant Sheets on 24 June 1943,

> "talked to [the accused] * * * and offered to turn the press over to the Sub-Depot if the order was exactly doubled, and we knew the 1st Motion Picture Unit would be calling for more forms of exactly the same kind in a short period of time and I offered to give the press to the Sub-Depot if the order was doubled and there would be no further printing jobs at all to be paid for by the Government, that they would be done by the 423rd Sub-Depot."

The accused found this proposal most satisfactory. He on that day caused purchase order number 43-828 to be drawn up reading in pertinent part as follows:

> "NON-PERSONAL SERVICES:
>
> For furnishing all labor, material and equipment necessary to reproduce special forms used in the filming of motion pictures for the AAF Pilot Training Program.
>
> For the job * * * $375.00"

Immediately thereunder appeared the following certificate which he executed:

> "I hereby certify that the services and/or material called for on this Purchase Order have been rendered in accordance with the terms of the order and the specifications governing same; and that the charges stated hereon are not excessive and are not higher than the rate usually charged the general public for similar services."

Upon presentation of this purchase order to the Finance Officer in Los Angeles, a check dated 28 June 1943 in the sum of $375 was mailed to the Hollywood Spotlight Company and cashed by it (R. 149-153, 160-161, 184; P. Exs. 13, 14, 15, 16).

The press was delivered to the 423rd Sub-Depot and there used to finish purchase order number 43-665 on War Department time with War Department help paid out of War Department funds. As of 24 or 28 June 1943 no part of the material and services covered by order number 43-828 had been furnished or performed. Indeed, the "Hollywood Spotlight Company" never did deliver any of the forms to whose completion the accused had certified. Sergeant Sheets having been taken into custody on a morals charge before any part of the work was commenced, the press was traded to a private concern in exchange for the required services. No authorization was obtained thus to dispose of what was in fact property of the United States Army (R. 161, 164-167, 170-171, 180, 192-194; P. Ex. 1).

After the sale of film to Mr. Schwartz had been uncovered by Special Agent Myers, the accused was ordered "to appear in a small office across the street from the 423rd Sub-Depot". He was brought there by Major Bert C. Brown and was by him introduced to Mr. Myers and to Captain Raymond V. St. Vrain. Upon walking in and seeing on a table some of the boxes which had been found at Mr. Schwartz's place of business, the accused remarked, "Well, gentlemen, looks like you got me". He readily admitted his dealing with Mr. Schwartz and explained that he had been financially embarrassed. Major Brown assured him that

> "no statement was being taken, but we questioned him simply in the course of an investigation to determine whether this statement made by a civilian was true. That what he was stating at that time was not going to be put into a form of a statement. That later the statement, no doubt, would be taken and probably by Colonel Townsend who had jurisdiction in this case as an Inspector General to perform the investigation * * * * Just before leaving [the accused] in the room with Captain St. Vrain and Mr. Myers, I again informed him that our conversation was wholly informal and that later the statement no doubt would be taken, a formal statement, which, no doubt, would be used against him in court."

Upon the Major's departure the confessions and admissions made were, despite these representations, reduced to writing, and the accused was asked to sign. He freely complied with this request in the presence of Mr. Myers and Captain St. Vrain. No threats or promises were used to induce him to affix his signature. The confession related not only the details of the sale to Schwartz but also most of the facts pertaining to the printing orders (R. 8-9, 25-26; P. Ex. 1; also defense testimony: R. 258-259).

4. The accused, after he had been apprized of his rights relative to testifying or remaining silent, took the stand in his own defense. He pointed out that he had accepted his appointment as Commanding Officer of the 423rd Sub-Depot under protest. His entire previous experience had been that of a cameraman, and the position was one which required administrative ability and training in which he was lacking. He felt that he "was going to be very much misplaced" and that he "couldn't give [his] best services in that field". His protests were disregarded, and he was placed in a command for which he was not qualified. There were no records available for his use when he took charge. "It was a mess". He had explicit faith in Sergeant Sheets' handling of the purchase order department. He made a "regular practice" of signing certificates without checking the facts therein stated "because I had all the confidence in the world in those employees, they had been indorsed to me by their initials, and I never questioned their word in that respect". Such was his trust in Sergeant Sheets that he signed purchase order 43-828 without knowledge of its contents. While some "officer assistance" was provided for him, it was never adequate. He finally wrote a letter to his Commanding General the substance of which was that "it was my wish to try to get the confused paper work of the 423rd Sub-Depot straightened out under competent help and trained help" (R. 214, 217-221, 249, 282, 284-285).

It was his position and the position of his counsel that the film sold by him to Mr. Schwartz was "treated as no good and kicked around, nobody's property from the very first day it hit the 1st Motion Picture Unit". In support of this contention he testified that he "was always under the assumption that it was not Government film"; that it belonged to no one; that during his "entire reign as Air Corps Supply Officer" he had never received any film with commercial labels other than that already in the possession of the 1st Motion Picture Unit; and that all "Government film comes in three classes, type 2, Class C, A, and L, and contains a green label, with the exception of sound track negative or positive negative which is barred by a white label and is known as type 2, Class F and Class G". Around 1 April 1943 he had made inquiry concerning the disposition to be made of this film of a Captain Whitley, the head of the 1st Motion Picture Units Camera Department and his former superior. He was allegedly told "to do away with it, either by burning, burying, selling it, or any way in order that it would not get back". That this "verbal order" was given is in part substantiated by one of the witnesses for the prosecution who stated that "I remember this Background X for the simple reason that I gave away several rolls and we destroyed quite a lot of it ourselves * * * the 1st Motion Picture Unit" (R. 79, 83, 229-230, 236, 239, 242, 248, 264-265).

The accused had noticed the label on the filing cabinet ascribing ownership of the Background X film to him. He had made no objection, "Because I naturally considered if it was marked that way there would be no likelihood of it getting out of the Sub-Depot". It had been removed from the refrigerator to make room for a shipment of three hundred and fifty thousand feet of other film. By the time Mr. Schwartz contacted him "every available piece of space was used". The considerations which induced him to sell were threefold:

> "In the first place, to make way for good film. Secondly to prove to myself that I could get a higher price than the Government gets for film. In the third place, to have an argument which I could put into bulletin form and submit to the Commanding General showing the reasons for a disposal base in Hollywood".

This last factor was bound up with a formal recommendation which he had submitted to his Commanding General for the establishment of a motion picture laboratory one of whose purposes it would be "to conduct salvage for the Government" (R. 244-247, 268).

He admitted that he had represented to Mr. Schwartz that the film belonged to a friend. When he closed the deal, his bank balance amounted to only $7.69. He deposited $750 of the $900 in cash paid to him and spent the remaining $150 "on different bills of my own, personal". He conceded that the film did not belong to him, and that he had no right to sell it. When asked whether he deemed his use of the proceeds to be wrong, he said, "It was if I wasn't in a position to reimburse it" (R. 265-266, 273-275).

Some four weeks before he signed the statement introduced into evidence as Prosecutions Exhibit 1, he was relieved from duty as Commanding Officer of the 423rd Sub-Depot and appointed Executive and Supply Officer. Major Brackett B. Fernald succeeded him as Commanding Officer. This was interpreted by the accused as "some kind of reprimand". Major Fernald "had been there about a week * * * when Colonel Townsend, Colonel Kroon and two or three civilians came over to conduct an investigation of which I was not consulted or informed as to why their presence was there." As a result of these events the accused was mentally troubled and disturbed. In his own words, the "oddity of the Investigation insofar as the nature in which it was conducted put me in a very ill frame of mind * * *." "I wasn't myself." This self-analysis was corroborated by Captain St. Vrain, one of the witnesses for the prosecution. He testified that the accused, upon being placed in arrest several hours after the execution of the statement,

> "began talking about the case and he mentioned, he said the psychological effect of having people investigating and all that had been very unnerving, and * * * he was so unnerved from walking back and forth and looking, consulting records and all that, he felt like he was about to make a clean breast of the whole affair then * * * ".

Before interrogating the accused and taking his statement Mr. Myers and Captain St. Vrain did not read the 24th Article of War to him. They did not advise him of his rights until near the close of the questioning when he was instructed that his testimony could be used against him. This warning was repeated in the first paragraph of the confession which states that "I know that this statement may be used in court against me". When asked by his own counsel whether the information contained in the document was "completely false", he replied "In part, sir". One of his objections was to the sentence reading "This film belonged to the United States Government and was in the possession of the United States Air Forces". His version of what he actually did say was that, "This film was in the possession of the 423rd Sub-Depot, Hollywood" (R. 26-27, 224-229; P. Ex. 1).

5. Specification 1 of Charge II alleges that the accused on or about 26 August 1943 did "wrongfully, unlawfully and without proper authority, sell" certain motion picture film "value of over $900.00, property in the lawful custody and possession of the United States, and applied the proceeds thereof to his own use and benefit". Specification 2 alleges that, "for the purpose of aiding Sergeant Robert H. Sheets to obtain payment of a false claim against the United States", the accused on or about 24 June 1943 did "falsely, wrongfully and unlawfully certify to the fact that services and material listed on a (certain) United States Government purchase order * * * had been received, which said certificate was false and was then known by [the accused] to be false." Both offenses are laid under Article of War 96.

An examination of the record discloses that the findings of guilty are sustained by clear and overwhelming evidence. The defense is based upon several contentions of which the more important are:

1. That since the 24th Article of War was not read to the accused and since he was not instructed as to his rights in accordance with paragraph 35 of the Manual for Courts-Martial, 1928, the confession obtained from him was improperly admitted.

2. That the film sold by him to Mr. Schwartz was not property of the United States Government.

3. That the accused's background and experience were that of a cameraman; that he was ignorant of the principles of bookkeeping and accounting; that he had unqualified confidence and trust in the ability and integrity of his employees; and that he consequently signed purchase order 43-828 without reading or otherwise familiarizing himself with its context.

These arguments are untenable. It is true that Major Brown represented that "no statement was being taken", but he left the room before the interrogation was completed. After his departure, the questioning was continued, and the accused was put upon notice that his confession was about to be reduced to writing. Before the statement was actually drafted, he was, as he personally testified, expressly warned that any statement he might give could be used against him. That warning was repeated in the first paragraph of the confession. He read the instrument, made certain minor corrections, initialed every page, and affixed his signature to it. While he has asserted that at the time "I wasn't myself" the only logical inference to be drawn from the record as a whole is that he fully understood the significance of his acts and that, his guilt being apparent and indisputable, he "desired to make a clean breast of the whole affair".

All of the evidence expressly contradicts any imputation of threat or promise by either Mr. Myers or Captain St. Vrain. From the fact that the accused was summoned to the investigation proceedings by Colonel Townsend and accompanied to the examination room by Major Brown, the defense attempted to draw an inference of duress. While confessions made to military superiors should always be carefully scrutinized, the Colonel was not present at the interrogation of the accused and the Major left the room before the statement was reduced to writing. No threats or promises were made prior or subsequent to the Major's departure. The only duress employed was that evoked by the accused's own conscience. The testimony that he was "unnerved" and not himself is strong indication not of any "mental condition" but of fear of punishment and, perhaps, of remorse.

If any doubt could possibly have existed with respect to the introduction of the confession into evidence, its admission is rendered harmless by the accused's

own testimony on the stand. While he disputed and sought to correct some of the language employed in the statement and while he endeavored to "explain", he admitted every pertinent element of the Specifications and Charge of which he was found guilty. He stated that he took the film from the premises of the 423rd Sub-Depot; that it was not his property; that he sold it to Mr. Schwartz; that he used the proceeds for his personal purposes; that he entered into a "printing deal" with Sergeant Sheets evidenced by purchase order 43-665; and that he signed the certificate to purchase order 43-828.

The record is full of testimony to the effect that the film converted by the accused was of a "commercial" type not normally purchased or used by the United States Army. To argue from this circumstance, however, that it was "nobody's" property is, to indulge in a non-sequitur. It was in the possession of the United States Government, and it most certainly did not belong to the accused. Paragraph 149g of the Manual for Courts-Martial, 1928, states with respect to larceny 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" (Underscoring provided).

This principle is equally applicable to a wrongful sale and conversion under Article of War 96.

It is difficult to give any credence to the accused's professions of ignorance with respect to the contents of purchase order number 43-828. The court-martial which tried him gave them due consideration and apparently gave them no weight. The record contains nothing to impugn their determination. Taking his inexperience and lack of proficiency in administrative matters fully into account, he must as an officer have known the significance of the certificate to which he affixed his signature. And if his first printing transaction with Sergeant Sheets be recalled, it must be concluded that he was also cognizant of the terms and circumstances of the second.

6. The accused is about 41 years of age. The records of the War Department show that he was commissioned a Captain on 31 August 1942 and that since that 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.

Abner E. Lifscomb, Judge Advocate.

Benjamin Kaufer, Judge Advocate.

Gabriel H. Goldberg, Judge Advocate.

SPJGN
CM 248108

1st Ind.

War Department, J.A.G.O., 11 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 Captain Grant H. Stone (0-915547), Air Corps.

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

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

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. 301, 17 Jun 1944)

WAR DEPARTMENT
BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES ARMY FORCES CHINA BURMA INDIA

C.M. 248113
(CBI 49)

22 Dec 1943

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

v.

Victor H. Coe
(19090778)

(This opinion will be included in compilation of CBI cases)

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

SPJGN
CM 248120

UNITED STATES	11 FEB 1944 44TH INFANTRY DIVISION
v.	Trial by G.C.M., convened at Fort Lewis, Washington, 5 January 1944. Dismissal and total forfeitures.
Second Lieutenant THOMAS M. CASTELLANO (0-1298191), 324th Infantry.	

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 61st Article of War.

Specification 1: In that Second Lieutenant THOMAS M. CASTELLANO, 324th Infantry, did, without proper leave, absent himself from his station at Fort Lewis, Washington from about 29 October, 1943 to about 1 November, 1943.

Specification 2: In that Second Lieutenant THOMAS M. CASTELLANO, 324th Infantry, did, without proper leave, absent himself from his station at Fort Lewis, Washington from about 2 November, 1943 to about 8 November, 1943.

Specification 3: In that Second Lieutenant THOMAS M. CASTELLANO, 324th Infantry, did, without proper leave, absent himself from his station at Fort Lewis, Washington from about 17 November, 1943 to about 18 November, 1943.

Specification 4: In that Second Lieutenant THOMAS M. CASTELLANO, 324th Infantry, did, without proper leave, absent himself from his station at Fort Lewis, Washington from about 25 November, 1943 to about 27 December, 1943.

He pleaded not guilty to and was found guilty of the Charge and all 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 two (2) years. The reviewing authority approved the sentence but remitted that portion thereof adjudging confinement and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that the accused, without securing an extension of his leave which expired on 29 October 1943, reported back for duty with his organization on 1 November 1943, when he stated he was returning from leave and gave no explanation for his late return. On the latter date he was assigned to the cannon company of his organization and reported to its commander for duty. However, the next day, 2 November 1943, he absented himself without leave and did not report again for duty until 8 November 1943, when he reappeared and announced his readiness for duty. Thereafter, he was detailed for umpire duty on 17 and 18 November 1943 but on both days he failed to report for such duty, and a search was unavailingly made for him as he had no permission for such absence. In the meantime he had been relieved from duty with the cannon company and assigned to Company "A" of his organization, and, after his last unauthorized absence, he was on 20 November 1943 directed by one of his superior officers to report to the hospital on 22 November 1943 for a complete physical and mental examination, and after its completion to report to the duty officer and then join his company in the field. Although the examination was concluded on 24 November 1943, the accused did not report to his company, and again absented himself without leave until 27 December 1943, when he returned and stated to his superior officer, "I have just returned". During this latter period of absence he was not present with his organization and had no authority to be away. Appropriate extract copies of the orders relative to his various assignments, and likewise copies of the morning reports of the organizations to which he had been assigned, showing his absence without leave as alleged, except for 17 and 18 November 1943, were admitted into evidence (R. 6-7, 7-9, 9-12, 12-14, 14-16, 16-20, 20-23; Ex. 1-8).

4. The defense announced that the accused, after explanation of his rights as a witness, did not elect to testify. Subsequent to the court's action finding the accused guilty as charged and prior to the court's determination of the sentence, however, the accused with the permission of the court made a sworn statement seeking clemency. He had overstayed his leave in an effort to assist his father who had suffered serious financial reverses. His subsequent absences without leave had been occasioned because of his continued mental upset over his father's difficulties and the feeling that he was more of a liability

to the regiment and himself than an asset. He had served for more than 29 months without prior disciplinary action being taken against him and, since he had straightened himself out, was anxious to continue in his country's service as he had returned voluntarily each time in an effort to "make a go of it again" (R. 24, 27-29).

5. The four specifications respectively allege that the accused without proper leave absented himself from his station at Fort Lewis, Washington, from about 29 October 1943 to about 1 November 1943, from about 2 November 1943 to about 8 November 1943, from about 17 November 1943 to about 18 November 1943 and from about 25 November 1943 to about 27 December 1943. The elements of the offenses alleged 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 was without authority from anyone competent to give him leave" (M.C.M., 1928, par. 132).

The evidence for the prosecution conclusively shows that the accused was absent without leave for the periods of time alleged in the Specifications, not only by the testimony of appropriate witnesses, but in three of the alleged instances likewise by the documentary evidence furnished by his organization's morning report. The accused, furthermore, in his plea for clemency, entered after he had been found guilty, in effect, admits his commission of the offenses alleged, attributes his culpable actions to an emotional and mental upset which rendered him unable to accept and perform the responsibilities of an officer, and asks for mitigation of punishment. All of the evidence, therefore, establishes, beyond a reasonable doubt, his guilt of the offenses charged and amply supports the findings of guilty of the Charge and its Specifications.

6. The accused is about 25 years old. The War Department records show that he had enlisted service from 23 July 1941 until 31 October 1942 when he was commissioned a second lieutenant upon completion of Officers' Candidate School and that since the latter date he has had active service as an officer.

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

Abner E. Lipscomb, Judge Advocate

Benjamin R. Cooper, Judge Advocate

Gabriel H. Golden, Judge Advocate

SPJGN
CM 248120

1st Ind.

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

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Thomas M. Castellano (0-1298191), 324th 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 as approved by the reviewing authority 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.

(Sentence confirmed but forfeitures remitted. G.C.M.O. 158, 7 Apr 1944)

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

SPJGQ
CM 248189

18 FEB 1944

UNITED STATES v. Captain CHARLES E. RICHARDS (0-381737), Medical Corps.	ARMY AIR FORCES CENTRAL FLYING TRAINING COMMAND Trial by G.C.M., convened at Randolph Field, Texas, 30-31 December 1943 and 10 January 1944. Dismissal and confinement for two and one-half ($2\frac{1}{2}$) years.

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Charles E. Richards, Captain, Medical Corps, Randolph Field, Texas, did, at San Antonio, Texas, on or about 12 December 1943, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection per os with Edward H. Haese, Jr.

He pleaded not guilty to and was found guilty of the Specification and the Charge. Evidence of a previous conviction of a violation of Article of War 95 in having furnished intoxicating liquor to two minor boys, and a violation of Article of War 96 in having contributed to the delinquency of a minor by causing him to become drunk from intoxicating liquor furnished by accused, was introduced at the trial. For these offenses he had been sentenced to be dismissed, which sentence was suspended by the confirming authority. In the instant case 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 and six months. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Edward H. Haese, Jr., a 17-year-old youth employed in the post office at Randolph Field, Texas, had gone alone to a moving picture theater in San Antonio, Texas, at about 9 o'clock p.m. on the evening of 11 December 1943. At approximately midnight he left the theater and after meeting a group of friends, drinking coffee with them and walking about aimlessly until about 2:30 a.m., he left them intending to get a cab in front of the Gunter Hotel to take him home (R. 5).

While he was waiting accused approached him and asked him where he was going. Upon being told by Haese that he was looking for a cab to take him home accused said he would take him home and Haese, after some hesitancy, agreed as the hour was late and it was difficult to find a cab. The boy understood from the offer that accused had a car and would drive him home. Together they then proceeded east on Houston Street engaged in conversation, during which accused asked Haese whether he knew of a place where they could get something to drink. The boy stated there was no possibility of obtaining anything to drink at that time of night and they continued walking along Houston Street engaged in casual conversation until they came to the entrance of Zale's Jewelry Store when accused shoved Haese into the doorway with his shoulder and kissed him on the mouth.

Haese then tried to get away from accused, telling him he wanted to go home but accused persisted in wanting to take Haese home though he (Haese) then found out that accused had no car.

From this place accused led Haese by the hand to a bridge and down a stairway toward a roadway which ran along the banks of the San Antonio river. They went under the bridge to a place where a slight curbing edged a gravel road (R. 6, 7). It was quite dark (R. 17). Accused made Haese stand on the curb while he kneeled on the ground, opened Haese's trousers by unzipping the fly, took out his penis and started sucking on it while he embraced the boy around his waist with both of his hands. Haese's trousers and underdrawers were both pulled down around his knees.

After sucking the boy's penis for a while accused forcibly pushed Haese's head down in an attempt to force the boy to commit an unnatural act upon him (R. 8). The boy did not remember whether accused's trousers were then open but his penis was erect (R. 8, 19). Haese refused to comply and, after accused had given him a "mean look", and then "kind of smiled a little", he again began to suck on the boy's penis.

At this point the rays of a flashlight were thrown upon accused and the boy. Haese pulled up his trousers and started to run away but was alarmed by the firing of a pistol shot and returned

to the scene (R. 9, 12). Though accused and Haese had not seen him, City Detective C. P. Pogue was on duty, in plain clothes, during the early morning hours of 12 December 1943 and had entered the river walk at about 2 o'clock a.m., in search of a prostitute whom he had seen enter the area a few moments before. When he first noticed accused and Haese about 100 yards away he thought they were the girl whom he was seeking and her companion for, although there were street lights along the river, it was extremely dark under the bridge (R. 25, 26). He kept approaching quietly without them observing him, until he was 10 feet away, then turned the flashlight upon them and saw Haese on a cement elevation with his pants "half way down" and accused on his knees, facing the boy and sucking his penis. Haese thereupon tried to run away but the officer fired his pistol in the air and the boy stopped and returned crying. He then questioned the boy and after ascertaining that accused was an Army officer told him to come out from underneath the bridge. Accused was rather stubborn about the matter and wanted to know what the officer "was taking him for" -

> "he asked me two different times what I was taking him for and finally I had him by one arm and he kept pulling away from me and I got him to the first flight of steps and he kept pulling away from me and he kept asking me what I was taking him for and I didn't want to repeat it and he asked me about three times and finally he made me mad and I told him what I was taking him for and I told him if he don't come on I was going to have to use some force."

Accused then asked the officer, "'Can't we talk this over?'" and after the officer had conducted him to the head of the stairs accused asked "'Can't we get together on this thing?'". The officer made no answer but "just kept right on pulling him towards the car". Officer Pogue then took accused and the boy to the police station where he turned them over to the military police (R. 27-30).

Although accused told the officer he had been drinking there was no smell of liquor on his breath and his actions were not those of an intoxicated man. He walked straight, talked normally and appeared perfectly sober (R. 35).

4. Accused elected to be sworn as a witness and testified that he had attended and studied medicine at Dartmouth College and Western Reserve University where he was an outstanding scholar and received several awards and a scholarship as a prize. He was called to active duty in April 1941, served in the Panama Canal Zone from September 1941 to March 1943 and, after his return, at several different stations in the continental United States.

On the night in question accused had a date with a young lady and planned to have dinner and spend the evening at the Anacacha Room of the St. Anthony Hotel in San Antonio with Captain W. Y. Baker

and Captain Allen W. Seigner, both officers of the Medical Corps, and their women companions. He had two drinks of Scotch whiskey before leaving his barracks and he took a full bottle of rum with him to the dinner party. Accused and his companion arrived at the hotel and started drinking at 8 p.m., though the lady had only one drink throughout the evening. The other members of the party arrived at 9:30 p.m. After dinner they continued to drink and dance intermittently until accused had personally consumed all but one drink of the contents of the bottle which, when the party broke up, had only about two inches of liquor remaining in it (R. 40).

After getting their hats and coats and going to the garage for their car there was some confusion and dispute with the attendant about the matter. From that point, according to his testimony, accused's mind was a complete blank. Conscious and lucid recollection returned to him several hours later when he was being held in the police station. This lapse of memory was so complete that, although his lady companion assured him he had taken her home in a taxicab and she had seen him walk to the cab which was still waiting for him, he had no recollection of the incidents whatever. When he did regain his memory he did not know where he was nor why he was being held until taken back to camp by Lieutenant Powers, Officer of the Guard, who gave him the details (R. 41). He testified to similar lapses of memory as the result of overindulgence in alcoholic liquors on four or five previous occasions when he would awaken on the morning following his drinking with no recollection as to his actions beyond a certain hour of the preceding evening and would learn from others what had occurred.

Accused stated unequivocally that he had never had any reason to believe that he would commit such an offense as that with which he stood charged, or that he had any homosexual tendencies or capacities as all his "urges along this line have been pretty normal" and he had "never done a thing like this before" in his life (R. 43).

The substance of accused's defense is contained in his answers to certain questions, as follows:

"Q Now, I believe you testified you're not a homosexual?

A No, sir. So far as I know I have never done anything or had any feelings that would lead me to believe that I was abnormal in that respect.

* * * * * * * * * *

Q *** You don't want this court to understand that you are testifying here that you did not commit this crime which you are charged for on this night, do you?

A Well, there is just this to it. I don't remember. I've never done anything like this before. There is no reason for me to believe that at the age of 29 with a normal past that I would do such a thing. I have a personal feeling that if I could remember the events that happened that night that perhaps there would be more to this story than we heard here this morning.

Q You don't know whether you did this?

A I don't know. I can't honestly say." (R. 46)

After accused had testified defense counsel announced:

(D.C.) "*** the main witnesses the defense wishes to introduce have to do with the mental condition of the accused which, we understand, can only be considered by the court as mitigating circumstances and we will make that statement for all of the witnesses that we bring up later and we want to request permission to introduce these witnesses ***."

(Law Member) "The testimony is being offered solely for the purpose of mitigation and it will be received and considered for that."

(D.C.) "That is correct ***." (R. 49)

Thereupon Captain Allen W. Seigner, Medical Corps, testified that he was a member of the party with accused at the St. Anthony Hotel on the evening of 11 December 1943 and he corroborated accused regarding the amount of rum which accused consumed. Though accused was able "to walk under his own power" he was somewhat unsteady on his feet, his eyes were bloodshot and these circumstances, together with the fact that he insisted upon singing and forgot his hat and coat when he left the hotel, led him to believe accused was intoxicated. During the evening, however, there was nothing which indicated to him, as a doctor, that accused did not know what he was doing (R. 51-55).

Captain Weston W. Jones and Captain Paul McChesney, Medical Corps, who saw accused in the Gunter Hotel at about 1:30 or 1:45 a.m., on the morning of 12 December 1943, both expressed their opinions that he was drunk (R. 56-60).

Captain W. Y. Baker, Medical Corps, Chief Psychiatrist for Fort George Wright, Washington, testified that he also was a member

of the dinner party attended by accused on the night of 11 December 1943. During the evening he observed that a bottle of rum which accused had brought and which was "a quarter gone" when witness arrived was about "three quarters gone" when he left the party and accused had apparently drunk the rum himself. In his opinion accused was drunk when he last saw him at about 1:20 a.m.

Captain Baker further testified as an expert opinion witness that "alcoholic amnesia" is an accepted fact and a recognized physical condition in the field of psychiatry and that, from the amount of alcohol which accused had consumed on the night in question, "he could have had amnesia". He also expressed his expert opinion to the effect that a latent homosexual tendency could express itself under an alcoholic stimulation notwithstanding the fact that the person committing the act had never before been conscious of such a tendency or urge (R. 61-73). Later, when called in surrebuttal to evidence introduced by the prosecution (R. 92-97), he testified that a person with 1 milligram of alcohol in 1 cc of his blood is definitely "under the influence of alcohol" (R. 101).

Lieutenant Colonel Roy R. Grinker, Medical Corps, testified as an expert neurologist and psychiatrist, that it was entirely possible for a person to suffer from alcoholic amnesia and for latent homosexual tendencies to make their appearance for the first time under such circumstances (R. 81-87).

A laboratory technician testified that a specimen of accused's blood taken at 4:30 a.m., 12 December 1943, showed 1 milligram of alcohol present in 1 cc of blood (R. 72), and Lieutenant Colonel Robert C. Anderson, Medical Corps, testified as an expert that he could not, because of the personal equation involved in each case, tell how many persons with that proportion of alcohol in the blood stream would be under the influence of alcohol (R. 75, 76). He further testified that, in his opinion, "the accused has a latent homosexual trend" and "that he was in a state of alcoholic amnesia at the time the offense is said to have occurred" (R. 79).

5. The prosecution called two noncommissioned officers to testify, in rebuttal, as to accused's condition when he was brought to the police station on the morning of 12 December 1943. Technical Sergeant Theodore Russell of the San Antonio Military Police Detachment, testified that he saw accused walk, heard him talk and otherwise observed him closely. He noticed nothing unusual about accused's conduct and in his opinion he was not drunk (R. 92-95). Technical Sergeant Mathew J. Gransick, Provost Sergeant of the 832nd Guard Squadron, was also in the police station at the time when accused was brought in and heard him being questioned by the sergeant of the guard. For a period of an hour and a half Sergeant Gransick heard accused talk, saw him walk and observed his conduct generally.

Thereafter he drove the staff car in which accused was transported to Randolph Field in the custody of the officer of the guard and overheard the conversation between accused and the officer. In his opinion accused was not drunk and gave no indication of having had anything to drink (R. 96-97).

6. The court convened originally for the trial of this case at 9:20 o'clock, 30 December 1943 and, after hearing evidence until 5:05 o'clock p.m. of the same day, adjourned to meet at 9 a.m., 31 December 1943 (R. 1, 102), at which time neither side having anything further to offer, the court heard arguments and closed for the purpose of making findings. Having found accused guilty of the Specification and Charge, the court reopened to hear evidence of previous convictions, if any, and personal data. The announcement by the trial judge advocate that there was no evidence of previous convictions and the personal data were received without objection or comment by accused (R. 104). The court then, in closed session, sentenced accused to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority might direct, for one year, and then adjourned at 12:05 p.m., 31 December 1943.

The court reconvened at the call of the President for further proceedings in the case on 10 January 1944. Except for two members of the court who were then sick in the hospital the personnel of the court was the same as in the sessions of 30 and 31 December 1943. The trial judge advocate, defense counsel, reporter and accused were also present.

The President announced that the record of the prior proceedings had not been finally approved and adopted by the court, nor had the record been authenticated by the signature of the President and trial judge advocate nor had it been forwarded to the appointing authority. The members of the court and the trial judge advocate were admonished that they were still under oath.

The President further announced that it had come to the attention of the court that the evidence of previous convictions submitted in open court on 31 December 1943, after findings of guilt but before deliberation upon sentence, was incorrect and that the court had been reconvened for the purpose of reconsidering and revising its sentence or adjudging a new one (R. 105). Defense counsel strenuously opposed the reconvention of the court for the reasons that the personnel of the court was not identical with the personnel which composed the court on 30 and 31 December 1943 and because he had "reasons to believe that the various members of this court have received information, have entered into discussions, and so forth, about this case, which would have disqualified them for membership on this court in the beginning." After making these objections defense counsel further stated:

"There is one other thing the defense would like to request: That in the event the court is to reconvene, they would like to question members of the court individually as to whether or not they are prejudiced at this time or qualified to sit at this reconvention."

The position of defense counsel not being clear, the law member attempted to clarify the situation thus:

"Law Member: Defense counsel, is it your proposal to challenge some member of the court at this stage of the proceedings?

"Captain Malone (defense counsel): If we think that they have information that would cause them to be in any way prejudiced in this case, we certainly would.

* * * * * * * * * * * *

"Law Member: You don't propose to make a challenge at this time but you ask leave to examine the members of the court before making any challenge?

"Captain Malone (defense counsel): That's right. We don't know what might develop." (R. 107)

The court then closed to consider its ruling and upon reopening the President announced:

"The court has ruled on the counsel's request to the effect that unless the grounds for challenge is one of the first five stated in paragraph 58, e, MCM 1928, that the request is denied inasmuch as the court is convening at this time for the limited purpose stated by the President."

The court likewise denied the request to make preliminary examination of the members of the court (R. 107).

Thereafter the defense did not challenge any member of the court and the court proceeded to receive in evidence General Court-Martial Order No. 306, War Department, Washington, D. C., 9 October 1943 (Pros. Ex. 3). Objection was made to this by the defense on the ground that "it contains evidence of previous charges and specifications on which the accused was acquitted, in addition to charges and specifications on which he was found guilty." As to this objection the law member stated:

"*** Obviously the court is aware of the import of this general court-martial order and aware of the fact that if there are certain charges contained therein, of which the accused was acquitted, that that is not or does not amount to previous convictions and the court will not consider any matters in the order which do not constitute evidence of previous convictions." (R. 109)

The trial judge advocate thereupon asked accused "*** is the evidence of previous convictions as set forth in prosecution's exhibit 3, correct?", to which defense counsel replied by asking leave for accused to take the stand for the purpose of explaining why he made no disclosure of the previous conviction at the former session of the court, which leave was granted and accused was sworn, testified and was cross-examined (R. 109-113).

The court was then closed to consider its sentence and upon reopening the following sentence was announced:

"to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for Two (2) Years and Six (6) Months." (R. 114)

7. There is not the slightest doubt about the commission of the offense as alleged in the Specification. Both the pathic, a minor 17 years of age, and the city detective who apprehended accused in the act of sodomy per os, testified unequivocally to its commission. Accused, who is 29 years of age, did not categorically deny that he committed the crime but testified that, because of an alcoholic amnesia, he was prevented from recalling any of his acts or conduct between the time when he left a dinner party at about 1:30 a.m., and about 3:30 a.m., when his memory was restored and he discovered that he was in a police station.

Although defense counsel admitted that neither intoxication nor amnesia were matters of defense, and it was understood both by him and the court that evidence of accused's drinking and the consequences thereof was tendered and admitted solely for the purpose of mitigation, nevertheless a large amount of such evidence was introduced notwithstanding its questionable competency on any matter save its mitigating effect.

Insofar, then, as the findings upon the Specification and Charge are concerned the record of trial is amply sufficient to legally support them.

The objection of the defense to the reconvening of the court for the purpose of reconsidering its sentence was wholly without merit. In Winthrop's Military Law and Precedents, 2d edition, Reprint 1920, p. 394, it is said:

"So, too, after a sentence has been agreed upon, the court possesses the power to reconsider and modify the same at discretion, at any time before the transmittal of the proceedings to the reviewing officer. This doctrine was substantially affirmed at an early period, (1819), in private Williamson's case, where the action of a court-martial, which, having sentenced the accused to a term of confinement, adjourned and on the ensuing day reconsidered its sentence and substituted one of death, was held by Attorney General Wirt to have been authorized and regular."

The Board of Review has held that a court-martial has the inherent power to vacate a sentence and impose another before its action has become final, using this language:

"A court-martial has the inherent power or right to revoke and increase any sentence pronounced by it as law and justice may require, provided such action is taken before the sentence becomes final in so far as the court is concerned and before any part of the original sentence has been performed." CM 152131, Ross; CM 166782, Berry. See also CM 233806, McCaslin.

The record of trial discloses that, although the court, on 31 December 1943, after announcing the findings and sentence in this case, "proceeded to other matters", it was lawfully reconvened pursuant to the call of the President on 10 January 1944 for further proceedings in the case. It affirmatively appears that the record of the proceedings of the court on 30 and 31 December 1943 had not been formally authenticated by the president and the trial judge advocate of the court within the purview of Article of War 33 but that the trial judge advocate had merely signed the same as a record of each day's proceeding according to the provision of paragraph 41d, Manual for Courts-Martial 1928. Under these circumstances the court still had full and complete control over the proceedings thus far when it reconvened on 10 January 1944 and it was lawfully entitled to reconsider the sentence theretofore imposed and announced for the purpose of correcting any error and imposing a new and different sentence, if, in its discretion, law and justice require such action.

Objection of defense counsel to the reconvening of the court for the reason that two members who had sat in the former sessions of the court were necessarily absent because of illness is likewise untenable. With regard to proceedings in revision it is said in Winthrop's Military Law and Precedents (supra):

"If meanwhile, by absence or any casualty of the service, the members who sat on the trial have been reduced below five, the order cannot take effect. But if five at least can assemble, it is immaterial that their number be considerably less than the original number of the court in the case, provided - for this is essential - such five all took part in the trial and judgment." (page 457)

A fortiori, a court may reconvene to continue the trial of a case with less than the original number of members who sat in earlier sessions present provided at least five of such original members are present and the court had not theretofore finally determined the cause, authenticated the record thereof and transmitted it to the convening authority.

It is difficult to determine what action defense counsel intended when he asked leave "to question members of the court individually as to whether or not they are prejudiced at this time or qualified to sit at this reconvention". If this was a challenge to the array such procedure could not be countenanced and the request was properly denied (sec. 375 (2), Dig. Op. J.A.G. 1912-40). If, on the other hand, defense counsel contemplated challenges for cause, he failed to properly avail himself of this privilege.

"Challenges should be made before the arraignment, but the court may permit a challenge for cause to be presented at any stage of the proceedings. A challenge will be so permitted if the challenger has exercised due diligence or if the challenge is based on any of the grounds stated in clauses first to fifth of 58e." (M.C.M., 1928, par. 58c).

Since no specific challenge for cause against any particular member was interposed by defense counsel at the reconvened session the court had no duty to perform with respect to the competency of the court or any member thereof at that time.

There was no error in permitting the introduction in evidence of the general court-martial order showing a previous trial and conviction of accused. Paragraph 68, Manual for Courts-Martial 1928, provides:

"Subject to the rules as to documentary evidence, including the rules as to the use of copies, proof of former trial by court-martial *** may be *** by the order publishing the case ***."

That the order admitted in evidence contained reference to specifications upon which accused was acquitted constituted no violation of any substantial right of accused. The order specifically denoted the acquittals; the law member ruled in open court that such entries in the order could not, and would not, be considered by the court as "previous convictions"; and hence accused was not adversely affected thereby.

8. Records of the War Department disclose that accused was born in Cleveland, Ohio, and is 29 years of age. He was graduated from Dartmouth College in 1926, after which he attended Dartmouth Medical School for two years. He then transferred to Western Reserve University and was graduated with an M.D. degree in 1939. He served an internship in Albany Hospital, Albany, New York, for nearly two years. He was appointed a first lieutenant, Medical Corps Reserve, on 3 June 1939. He entered upon active duty on 1 April 1941 at Headquarters Ohio Military Area. Thereafter he served with the 58th Signal Battalion at Camp Forrest, Tennessee and at Fort Clayton, Canal Zone. On 1 February 1943 he was promoted to captain, Medical Corps, Army of the United States. Later he served as surgeon of a heavy bomber squadron stationed at Guatemala City, Guatemala. He returned to the United States to attend the School of Aviation Medicine on 3 November 1943.

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 of the Charge and the Specification thereunder, legally sufficient to support the sentence and to warrant confirmation thereof. A sentence of dismissal is authorized, and there is no limit upon the period of confinement which may be imposed, upon conviction of a violation of Article of War 93.

William A. Pounds, Judge Advocate.

Carlos Stohlman, Judge Advocate.

Herbert K. Frederick, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 29 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 Charles E. Richards (0-381737), 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 thereof. While the circumstances under which this offense was committed exclude Captain Richards from the purview of the announced policy of the War Department allowing officers who are true or confirmed and irreclaimable homosexuals to resign for the good of the service, and required trial by court-martial, there seem to be no impelling reasons why confinement should be imposed in this case. Neither the terms of the policy nor the particular circumstances require it. The minor involved was of sufficient age and mentality to understand the offense and to participate in it without coercion or resistance and Captain Richards was, to some extent, under the influence of intoxicating liquor at the time. Although these are neither mitigating nor extenuating circumstances they are persuasive, both in the light of the policy and because confinement would serve no useful purpose in this instance. I recommend that the sentence be confirmed but that the confinement imposed be remitted and that the sentence as thus modified be carried into execution.

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

Myron C. Cramer

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

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

(Sentence confirmed but confinement remitted. G.C.M.O. 251, 30 May 1944)

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

(179)

SPJGK
CM 248197

24 FEB 1944

UNITED STATES	)	PERSIAN GULF COMMAND
	)	
v.	)	Trial by G.C.M., convened at Ahwaz, Iran, 15 and 16 November 1943. Dishonorable discharge (suspended) and confinement for two (2) years. Disciplinary Barracks.
	)	
Private CLYDE E. THOMPSON (20941764), 186th Quartermaster Depot Company.	)	

HOLDING by the BOARD OF REVIEW
LYON, HILL and ANDREWS, Judge Advocates.

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

Penry C. Lyon, Judge Advocate.

(Dissent), Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

(180)

SPJGK
CM 248197

PLEASE ADDRESS REPLY TO
THE JUDGE ADVOCATE GENERAL

WAR DEPARTMENT
ARMY SERVICE FORCES
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON 25

24 FEB 1944

MEMORANDUM for Colonel Morrisette.

Subject: Record of trial in the case of Private Clyde E. Thompson (20941764), 186th Quartermaster Depot Company.

1. Upon a plea of not guilty, the accused was found guilty of Charge II, violation of Article of War 94, and Specifications 5 and 6 thereof, which are as follows:

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

Specification 5: In that Private Clyde E. Thompson, 186th Quartermaster Depot Company, did at or near Ahwaz, Iran, on or about July 9, 1943, wrongfully and knowingly sell about ten (10) packages of razor blades, of the value of about $16.00, and forty three (43) packages of gum, of the value of about $21.50, property of the United States, furnished and intended for the military service thereof.

Specification 6: In that Private Clyde E. Thompson, 186th Quartermaster Depot Company, did at or near Ahwaz, Iran, from March to August 1, 1943, wrongfully and knowingly sell about thirty (30) packages of razor blades, of the value of about $48.00, property of the United States, furnished and intended for the military service thereof.

No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for two years. The reviewing authority approved the sentence and ordered it executed, but suspended the execution of the dishonorable discharge. He designated the United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, omitting the words "Eastern Branch". As noted in the holding of the Board of Review, the record of trial was examined in the Office of The Judge Advocate General, found legally insufficient to support the findings and sentence, and transmitted to the Board of Review for examination under the provisions of Article of War 50½.

2. The only question involved is whether or not the evidence is sufficient to sustain the findings of guilty. If it is, the sentence is legal.

3. The evidence shows that the events herein related occurred at Ahwaz,

FOR VICTORY BUY UNITED STATES WAR BONDS AND STAMPS

Iran. The witnesses for the prosecution were Captain Felix L. Corser, 186th Quartermaster Depot; First Lieutenant Arthur L. Butler, Provisional Unit No. 2734, Army Exchange Unit; and Abdul Wahab, a native. Captain Corser, the Quartermaster Supply Officer, General Depot, arrived at Ahwaz about 13 July 1943 (R.9,10). Lieutenant Butler was the Post Exchange Officer and had held this position since the middle of April 1943 (R.24).

Army supplies from the ports were brought to the "Walled City", at the General Quartermaster Depot. The Walled City was an area in which warehouses were located, inclosed by a native constructed wall. All such supplies were stored in the Walled City, including packages of Gillette Blue Blades and chewing gum (R.11,24,25,27). The blades were put up in packages of 100 and the chewing gum in packages containing 100 sticks (R.26). A package of blades shown to Lieutenant Butler while on the witness stand was marked "service package". He testified that the mark was placed there by the Quartermaster and that the packages stored in the Walled City were identically marked (R.27).

Before the supplies brought to the Walled City were placed in the warehouses, they were kept on the ground outside the warehouses but inside the Walled City (R.11,25). During that time the merchandise was not under "lock and key" and any person gaining entrance to the Walled City would be able to pick up items of property unless interfered with by a guard (R.25).

The razor blades and chewing gum so stored were purchased by the Quartermaster and were the property of the United States Government (R. 10,27,28). From the blades and gum stored in the Walled City the Post Exchanges purchased all their supplies of those articles, and Lieutenant Butler knew of no other source of supply (R.25,27,28). His duties took him to the local native market on various occasions, and he never saw Gillette blades or chewing gum for sale there (R.24). He testified that title to property purchased from the Quartermaster by the Post Exchanges passed when the Post Exchange supply section removed the property from the depot (R.28).

Lieutenant Butler testified that the ration for razor blades was one package of five blades every ten days, and for chewing gum, three packages of five sticks every ten days (R.25). Neither a package of 100 blades nor a package of 100 sticks of gum could "legitimately" leave the Post Exchange as an unbroken package (R.27). It was stipulated that ten packages, of 100 blades each, cost the United States Government $16; that 30 such packages of blades cost $48; and that 43 packages of chewing gum, each containing 100 sticks, cost $21.50 (R.26).

Accused was assigned as a truck driver, and his "regular duty was hauling native food back and forth across the river" (R.11). Wahab testified that during a period of about three months, accused delivered flour to

witness' mill. Evidently this was part of accused's duty. Wahab placed the start of these deliveries as "six months ago or a little more" (R.30). Since the trial took place on 15 and 16 November 1943, the time referred to by Wahab was the middle of May or before (R.30).

Some days after accused's first trip to Wahab's mill, Wahab commenced buying packages of 100 Gillette Blue Blades from accused. It was customary for accused to bring one or two packages daily. Witness testified that the packages looked like the package shown to him by the trial judge advocate, which was the type already referred to (R.30). Over a period of time Wahab received a total of 30 packages, and upon the last visit he received ten more packages, making 40 in all, and 43 packages of chewing gum. Witness was shown the same package of chewing gum which Lieutenant Butler had identified as the type involved in the allegations and proof. Witness stated that this was the kind of package sold to him by accused (R.31,32). His testimony places accused's final visit as somewhere around the middle of July (R.8,9,31).

Wahab agreed to pay accused 100 "rials" for each package of blades and the same amount for each package of gum. He paid for the first 30 packages of blades, but failed to pay for the last ten packages or for the gum (R.31, 32). The court took judicial notice of the fact that one rial has a value of approximately three cents in "American currency". Wahab did not buy "articles of a similar nature" from anyone except accused (R.32).

On cross-examination, Lieutenant Butler testified that he had seen natives working in the Walled City and that in his opinion it would be possible for a native to walk out of the place with packages of blades or gum hidden in his clothing. Witness was not in a position to know whether any blades or gum were missing from the Walled City or from the Post Exchange (R.27).

Master Sergeant Bernard F. Thon, 186th Quartermaster Depot Company, testified for the defense. He was chief clerk at the General Depot and had been on duty there since 1 January (1943), when the depot was opened (R.33). Witness knew that accused was a member of the company prior to June 1943 (R.35). About 3 June, accused commenced driving a truck, hauling rations. This was a "full time job" and consumed all of accused's time during the working day. Witness testified that although accused's job would not take him into the Walled City officially, he had a right to enter that area if he wished, even during the period when he drove the truck (R.33,34). According to witness, razor blades and chewing gum were stored in the Walled City and nowhere else (R.33,35).

In response to questions concerning the ownership of such items as blades and gum, as between the Quartermaster and the Army Exchange, Thon's testimony, in the final analysis, is undeterminative (R.33-35).

Accused did not testify or make an unsworn statement except with reference to the circumstances surrounding an alleged confession, which was not admitted in evidence.

4. The evidence shows without dispute that over a period of some months accused sold to Wahab a total of 4,000 Gillette Blue Blades and 4300 sticks of chewing gum in packages containing, respectively, 100 blades and 100 sticks of gum per package. The ration on blades was five blades every ten days and on gum, 15 sticks every ten days. Specification 6 alleged a period of five months during which blades were sold. The evidence indicated a shorter period, but, giving accused the benefit of the five months' period, his ration would have amounted to 75 blades and 225 sticks of gum. At this rate it would take a prohibitive period of time to hoard 4000 blades and 4300 sticks of gum, and, in addition, there is nothing to suggest that accused neglected to shave during his sojourn at Ahwaz. Furthermore, the evidence indicated that there was no outside source of supply for the articles in question, and packages of 100 blades or 100 sticks of gum, such as those sold by accused, could not "legitimately" leave the Post Exchange.

From the evidence we are forced to the conclusion that accused either obtained the goods wrongfully, brought them with him or received them from home or elsewhere. Manifestly the court believed that he obtained them wrongfully. In conjunction with the rule that guilt must be established beyond a reasonable doubt, paragraph 78a, Manual for Courts-Martial (1928), contains the following apt language:

> "The meaning of the rule is that the proof must be such as to exclude not every hypothesis or possibility of innocence but any fair and rational hypothesis except that of guilt * * *".

In the light of the evidence, the Board of Review believes that the possibility of accused's having obtained the property legitimately is so remote as to justify fully the court's determination.

There remains the question whether the property belonged to the United States. If it belonged to the Post Exchange, it was not property of the United States, and the allegation of ownership was not proved (Dig. Op. JAG, 1912-40, sec. 452(2); Kenny v. U.S., 62 Ct. Cl. 328; AR 210-65, 19 Mar. 1943, and subsequent changes). If the property was taken from the Walled City, the proof shows clearly that it belonged to the United States and was furnished and intended for the military service thereof. In the opinion of the Board of Review, the evidence is sufficient to support the inference that accused took the property from the Walled City. Consequently, there is sufficient proof that accused wrongfully sold property of the United States, as alleged. Under the circumstances, it is logical to infer that he was aware that the property belonged to the United States.

5. For the foregoing reasons the Board of Review holds the record of trial legally sufficient to support the findings of guilty and the sentence.

6. The informal memorandum prepared by the Military Justice Division accompanies the record of trial and sufficiently indicates the reasons for the opinion of that division. It is deemed unnecessary to summarize those reasons in the present memorandum. The cases cited in the memorandum prepared by the Military Justice Division are distinguishable from the present case.

Irving A. Lyon, Judge Advocate.

(Dissent), Judge Advocate.

Fletcher R. Andrews Judge Advocate.

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

(124a)

SPJGK
CM 248197

24 FEB 1944

UNITED STATES	PERSIAN GULF COMMAND
v.	Trial by G.C.M., convened at Ahwaz, Iran, 15 and 16 November 1943. Dishonorable discharge (suspended) and confinement for two (2) years. Disciplinary Barracks.
Private CLYDE E. THOMPSON (20941764), 186th Quartermaster Depot Company.	

DISSENTING OPINION
of
JOHN WARREN HILL, Judge Advocate.

The property sold by accused was not shown to my satisfaction to have been Government property. The Government packages were marked "service property". The prosecution developed only the fact that accused sold packages that "looked like" the Government property.

The post exchange owned substantial quantities of similar property sold to it by the Government. The prosecution failed to show that there had been no larcenies of similar property from the post exchange during the period in question. Where the corpus delicti is proved circumstantially the proof should be so conclusive as to exclude every reasonable hypothesis other than that the crime charged has been committed. It is insufficient if it suggests a theory which is as consistent with the absence of a crime (the crime charged) as it is with the existence of the crime (23 C.J. sec. 916; Goff v. U.S., 257 Fed. 294).

The property sold by accused could have been improperly acquired by him from either the post exchange or the Government dump. There is one difference - it would undoubtedly have been more difficult to steal from the post exchange than from the Government. But this distinction can not overcome the doubt that arises from the fact that both the dump and the post exchange were available as sources of supply. The post exchange is vulnerable to the depredations of thieves from within and without.

John Warren Hill, Judge Advocate.

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

SPJGN
CM 248214

26 FEB 1944

UNITED STATES	COMMUNICATIONS ZONE CALIFORNIA-ARIZONA MANEUVER AREA
v.	Trial by G.C.M., convened at San Bernardino, California, 22 December 1943. Dishonorable discharge and confinement for eight (8) years. Penitentiary.
Staff Sergeant GEORGE R. JAMES (34675514), 223rd Replacement Company, 68th Replacement Battalion.	

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HOLDING by the BOARD OF REVIEW
LIPSCOMB, SLEEPER and GOLDEN, Judge Advocates.

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

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

CHARGE: Violation of the 66th Article of War.

Specification: In that S/Sgt George R. James (Atchd Unasgd) 223rd Repl Co. 68th Repl. Bn., did, at New Camp Site, San Bernardino, California, on or about 0830, 3 December 1943, cause a mutiny in a work detail by questioning the authority of 2nd Lt., John T. Barr, his superior officer, to order Pvt. James A. Farrel to entruck thereby influencing about twenty other soldiers concertedly to disregard and defy the lawful order of 2nd Lt., John T. Barr, their superior officer to entruck, with the intent to override for the time being, lawful military authority.

He pleaded not guilty to and was found guilty of the Charge and the Specification. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for eight years at such place as the reviewing authority might direct. The reviewing authority approved the sentence, designated the United States Penitentiary, Leavenworth, Kansas as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution shows that on the morning of 3 December 1943, Second Lieutenant John Thomas Barr, 68th Replacement Battalion, was in charge of a detail of about 80 enlisted casuals, assigned to labor at the Base General Salvage Depot. In describing the type of enlisted men comprising this detail, Lieutenant Barr testified, "We have a considerable number of men sent to us * * * from the hospitals, supposedly for discharge. They are very reluctant to work. Some of them I do really believe are able to work. They are there on our hands. They report on sick call and they come back, and they are marked 'duty or light duty' and we can do nothing else only order them to report on detail. There is always a number of them who hold back, and are slow and dilitary [sic] in carrying out any orders that are given." It was not usually necessary, however, to "go back after the rest of them are loaded and take care of those who have been hanging back and moving slowly. * * * Ordinarily they are just the last to get on the truck" (R. 6-7).

With reference to the usual procedure - which was followed that morning - "We moved them from our Company area down to a Battalion Street," Lieutenant Barr testified, "where the trucks report. When we get them down there we order them into the truck." On the occasion in question, a group of 8 or 10 held back when ordered to entruck. Lieutenant Barr "went back there" to where they were and "ordered them to get on the truck". There was no response nor reaction of any description. "After that," Lieutenant Barr testified, "I pointed out one man, indicated him and ordered him on the truck. He refused to get on the truck. * * * I ordered two noncommissioned officers to show him to the truck and see that he got on it" (R. 7).

About the time the two corporals seized the soldier, in initial compliance with Lieutenant Barr's order, the accused, a casual unknown to Lieutenant Barr - but the ranking noncommissioned officer with the detail -, alighted from the vehicle in which he had previously entrucked, approached Lieutenant Barr, and stated, "Lieutenant, you are wrong; you have no right to order him on the truck"; informing the officer, at the same time that the men had not been permitted to report on sick call. The accused also told the recalcitrant private that he did not have to get on the truck (R. 7-9).

Due to the confusion then resulting from various soldiers talking simultaneously, "I can't begin to state what was said", Lieutenant Barr testified, "There was too many talking", which he characterized as "quite loud. I don't know how much could be considered insubordinant [sic]. Naturally, I was not paying attention to what everybody was saying. * * * I suppose I might have been excited, naturally" (R. 9, 10).

Within 5 minutes, the noise and confusion abated and the entire detail entrucked in compliance with the lieutenant's orders. Summing up the situation, Lieutenant Barr testified that, prior to the accused's appearance on the scene, the only difficulty he was having with the men was "that they were hanging back", manifesting "a reluctance to get on the truck". The accused's remark "added to the difficulty". The two

corporals, whose seizure of the reluctant soldier, at Lieutenant Barr's command, had precipitated the accused's participation in the affair, in addition to corroborating Lieutenant Barr's testimony, also testified that the accused touched Lieutenant Barr on the chest (R. 11-22).

During the confusion immediately preceding the ultimate entrucking of the detail, First Lieutenant Thomas H. Griffith observed Lieutenant Barr "having a little trouble with some colored men, and two or three of them were talking pretty loud and trying to aid a man in getting on the truck. I heard Lieutenant Barr order them to get on the truck, in a manner, by telling them that they were on a detail, to get on the truck, to get on. I also heard him order two non-commissioned officers of his company to escort the man to the truck. * * * I called the 'At ease', and stopped the whole thing momentarily, * * * ." Observing that the accused "seemed to be taking things in hand," the witness warned him "that if he knew what was good for him" he would carry out Lieutenant Barr's order. The accused replied, in substance, that "they had rights, and that they were going to stand on their rights or something like that." The men gathered around were not in a good humor. However, there was nothing to indicate that "any man was belligerent, or anything of that nature. * * * The men said 'We demand to stand on our rights.'" Lieutenant Griffith did not linger to see the confusion dispelled. After admonishing the accused, he hastened away without tendering further assistance because, he asserted, the men "were not members of my company and there was a Commissioned Officer in charge there." (R. 22-28).

Summoned from headquarters because of reported "trouble" outside, Lieutenant Colonel John E. McLaren observed a group of colored soldiers milling around "about twenty-five feet in front of headquarters." Approximately twenty seemed to be circling some object; the others were scattered. Informed "that they refused to get on the trucks", Lieutenant Colonel McLaren immediately shouted an order for them to do so. At first, they just stood there, so the Lieutenant Colonel "more or less charged them and pointed out individuals, and at the same time other officers started shouting orders, and it seemed to break up suddenly." He could not tell, at the time he came out, whether there was or had been any disobedience of orders. The "milling around" was unusual, and somebody told him the men would not get on the trucks. The Lieutenant Colonel was merely aware of a state of confusion and loud talking. He could not hear anything that was said and, when asked, "Did you see anything of it, or know anybody that was involved in this?" he replied, "No, sir." (R. 28-29).

4. The evidence for the defense shows that on the morning of the alleged offense, seven or eight members of Lieutenant Barr's detail, who had been refused permission to attend sick call, failed to entruck when ordered. Lieutenant Barr specifically ordered one of them to get on the truck. The man said he was sick and Lieutenant Barr ordered two corporals to force him on the truck. When the alleged invalid persisted in his protestations, the accused dismounted from one of the trucks, approached

Lieutenant Barr and said to him, "Sir, you are not supposed to use force on this fellow. If he is not sick then you can use the proper precautionary methods." Upon the lieutenant's continued refusal to permit the enlisted man to attend sick call, the accused addressed the enlisted man himself, saying, "If you are sick I will get you some medicine over to the Base General. We will get some medicine over there." Then the accused put the enlisted man on a truck and had got on, himself, when the Colonel ordered him off and inquired whether he was trying to start a mutiny. "No, sir," the accused replied, explaining that he got down and put the protesting soldier on the truck. The manner of the men improved immediately after the accused took a hand. "He said a few words", according to one witness, "and took the boy and put him on the truck, and was all ready to go when they called him off the truck and put him under arrest." According to another, "* * * that morning when they called us out to roll call, some of the boys asked to get on the sick book, and they said they could not get on the sick book that morning. The boys went on down and were going into the trucks, and some of them are slow; I am crippled, and hopping around, and so were a few of the other boys, and some of the boys were up on the trucks and a few of the other boys were kind of lagging behind, so we went on the trucks, I went to the truck; I got on about the third or fourth, and when I got on there the Sergeant was on the truck, and there was a fuss, or something, down there, and the boy came on to the truck, after Sergeant James did get off the truck and go out there, then in a few seconds Sergeant James did come back and get on the truck, and the man with him, and then the Colonel appeared on the scene and somebody shouted to Sergeant James to come off the truck, which he did; and he saluted the Colonel and the Lieutenant, and I don't know what happened. Sergeant James said he tried to stop them, and I saw the Lieutenant and Sergeant James walk toward the guard house." This same witness testified that the reluctance of the men to entruck ceased upon the arrival of the accused at the scene of the confusion. A third witness corroborated the first two defense witnesses, quoting the accused as saying, "Lieutenant you are wrong. The fellow is wanting to go on sick call;" and testifying that the manner of the men improved as a result of the accused's efforts. "Oh, they improved; they did not get no worse; they got on the truck." (R. 30-40).

5. The accused, after his rights as a witness had been explained to him, elected to take the stand under oath. He testified, "About five minutes after the Company formed some of the men asked to go on sick call, and the Lieutenant stated there would not be any sick call this morning, and the men would work. So the Company was marched off to entruck, and after they got up there to the trucks the majority of the men, with the exception, I would say, of about ten or more men, who were waiting to go on sick call, got in the trucks. In the meantime, I was in the truck along with the majority of the men, and I happened to see two Corporals escort a man to the truck by force. They had him by the arms and were pulling on him, and the man was pulling back; and I went down to the scene. I got to the scene; I told the Corporal, I said, 'You are a little wrong in manhandling a man', and at that Lieutenant Barr, I presume his name is, he said, 'Sergeant', he said, 'that is an order; you have nothing to do with it, I ordered the men to put the man on the truck.' I told the Lieutenant, I said, 'Lieutenant,

you are wrong in manhandling the man. It is against Army regulations to manhandle the men.' I said 'You should ask the man to get on the truck, and if he does not carry out the order, you, through proper procedure, can have the man tried.' 'Well', he said, 'Sergeant, you get on the truck.' I got on the truck, along with the other fellows. This Private James Farrel, I figure that is his name, I told him, I said to get on the truck, 'if the Lieutenant gives you an order, carry it out, and if you have any squeal you can squeal later.' He followed me to the truck, along with some of the other men. We got on the truck. I was on there, I imagine, three or four seconds, and the Lieutenant came after me and said the Colonel wished to speak to me. I got off from the truck and the Colonel asked me what I meant in inciting a riot, trying to start one, and he placed me under arrest in quarters, and that is as far as I know." He denied making the statement "Lieutenant, you are wrong, you can't do that", explaining, "I told the Lieutenant he was wrong in manhandling the man. I told him to ask the man to get on the truck, and if he did not get on the truck then he could have him tried." He thought it was against regulations. He did not tell the protesting soldier not to get on the truck, nor did he recall announcing that "these men have a right to stand on their rights." As a rule he talks loud and, on the occasion in question, talked no louder than usual. He did not touch the Lieutenant. He went out there to get the men on the truck; "the Corporals were pulling on the man and the man did not want to come on the truck; he was pulling back; so I went down there to talk to the man to get him on the truck in a better way. It did not seem like it worked out. I talked to the man and told him to get on the truck, and if he had any squawk to squawk later after carrying out the order, and he, in turn, got on the truck." He was trying to stop the recalcitrant conduct of the protesting soldier. "Whether I stopped it or not, I do not know. I do know the man got on the truck as soon as I talked to them", he testified (R. 41-45).

6. In rebuttal, for the prosecution, Lieutenant Barr testified that he did not make the statement "that these men were not going to be permitted to go on sick call," or that he was not going to have any sick call. The accused did not touch him nor attempt to strike him. He mentioned that some of the men wanted to go on sick call. Asked "what was done about it", Lieutenant Barr described a routine procedure in the following language: "The men are given the privilege of leaving their names in the orderly room to report on sick call at 7:30. We call the Company out, a number of men for shipping, and the number of men that are on alert, and then we announce that each one, or anyone who has reported on sick call will fall out of the Company, and report to the orderly room to go down to the infirmary. Each man has the privilege of reporting on sick call." As to the procedure followed on that particular morning, Lieutenant Barr's answers to specific questions were both unresponsive and inconclusive - apparently significantly so - as shown by the following verbatim question and answer excerpt from the record of trial.

"Q. Was the report made to the men on that particular morning that they could go on sick call?
A. That is a standing order, Sir.

Q. Who made the report?
A. I don't believe I understand.

Q. Who told the men on the morning of December 3 that they could fall out if they wanted to go on sick call?
A. Sergeant Lemnert always tells that.

Q. Did Sergeant Lemnert do it on this particular morning?
A. He does that every morning, yes, sir." (R. 46-47).

7. The Specification alleges that the accused caused a mutiny by questioning the authority of his superior officer, thereby influencing about twenty other soldiers to disregard and defy such officer's lawful order with intent to override for the time being lawful military authority. Winthrop defines mutiny as "an unlawful opposition or resistance to, or defiance of superior military authority, with a deliberate purpose to usurp, subvert or override the same, or to eject with authority from office.

"It is this intent which distinguishes mutiny from the other offenses with which * * * it has often been confused. Thus, disrespect toward a commanding officer * * * has sometimes been charged as mutiny. More frequently the doing or offering violence to a superior officer, and disobedience of orders * * * have been so charged or considered. Still more frequently has the designation of 'mutiny' been attached to disorders of the class known as 'mutinous conduct' - such as defiant behavior or threatening language toward superiors, muttering or murmuring against the restraints of military discipline, combinations of soldiers with a view to acts of violence or lawlessness which however are not committed, intemperate and exciting discussions at meetings held for the purpose of protesting against orders, declining to perform service in the honest belief that the term of service has expired, etc. Such disorders, stopping short of overt acts of resistance, or not characterized by a deliberate intent to overthrow superior authority, do not constitute in general the legal offense of mutiny, but are commonly to be treated as conduct to the prejudice of good order and military discipline * * *.

"The definition of mutiny at military law is indeed best illustrated by reference to the adjudged cases treating of that offense as understood at Maritime law. Thus, in regard to mutiny or revolt on American Merchant vessels, it has been expressly held that an intention to overthrow for the time at least the lawful authority of the Master is an essential element of the crime, that simple violence against the officer, without proof of intent to override his authority, is not sufficient to constitute revolt or mutiny, that mere disobedience by orders, unaccompanied by such intent, does not amount to mutiny; and that insolent language and disorderly behavior is per se insufficient to establish it" (pp. 578-580, Winthrop's Military Law and Precedents, Second Edition, 1920 Reprint).

In the light of the cited authority, the accused's conduct clearly did not cause a mutiny. Not only was Lieutenant Barr's authority not overridden on the occasion in question, but there is no showing to

support the inference, necessary to sustain the conviction, that the accused, in combination with the recalcitrant soldiers, intended to override it. At most, the delay was occasioned by an asserted belief that the allegedly ailing soldiers had a right to attend sick call before entrucking, presenting a direct analogy to the cited instance of "declining to perform service in the honest belief that the term of enlistment has expired". Incidentally, Lieutenant Barr's testimony raises a serious doubt that an opportunity had been afforded the men to attend sick call that morning; expressly and seemingly deliberately limited, as his testimony was, to generalities and custom, indicating very strongly that the lieutenant had no independent recollection that the usual procedure was followed on the occasion in question.

The evidence for the prosecution, however, which the court in the exercise of its inherent judicial discretion accepted at its face value, shows disrespectful behavior on the part of the accused toward Lieutenant Barr, in violation of Article of War 63. This disrespectful behavior is a lesser included offense, comprehended by the language of the Specification which alleges "questioning the authority of" Lieutenant Barr, under circumstances rendering such questioning disrespectful. The evidence, therefore, sustains only so much of the findings of guilty as involve conviction of the lesser included offense of behaving with disrespect toward the accused's superior officer in violation of Article of War 63.

8. The record of trial shows that the accused is about 25 years of age; further that he was inducted at Fort Douglas, Utah, 18 February 1941, and that he has had no prior service.

9. For the reasons stated the Board of Review holds the record of trial legally sufficient to support only so much of the findings of guilty of the Charge and its Specification as involve findings that the accused, at the time and place alleged, behaved with disrespect toward his superior officer, in violation of Article of War 63, and legally sufficient to support only so much of the sentence as involves confinement at hard labor for six months and forfeiture of two-thirds of his pay per month for a like period.

Abner E. Lybarand, Judge Advocate.

Benjamin R. Cooper, Judge Advocate.

Gabriel H. Goldberg, Judge Advocate.

1st Ind.
10 MAR 1944

War Department, J.A.G.O., - To the Commanding Officer, Headquarters Communications Zone, California-Arizona Maneuver Area, San Bernadino, California.

1. In the case of Staff Sergeant George R. James (34675514), 223rd Replacement Company, 68th Replacement Battalion, I concur in the holding by the Board of Review and for the reasons therein stated recommend that only so much of the findings of guilty of the Charge and the Specification thereunder be approved as involves the lesser included offense of disrespectful behavior toward his superior officer in violation of Article of War 63, and only so much of the sentence as involves confinement at hard labor for six months and forfeiture of two-thirds of his pay per month for a like period. Upon compliance with the foregoing recommendation, under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

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

(CM 248214).

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.

24 MAR 1944

SPJGH
CM 248224

UNITED STATES	)	NORTHERN CALIFORNIA SECTOR WESTERN DEFENSE COMMAND
v.	)	Trial by G.C.M., convened at Fort Winfield Scott, California, 3 January 1944. Dismissal.
First Lieutenant BOB J. VAN EPPS (0-1288821), Infantry.	)	

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

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1. The record of trial in the case of the 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 (As amended): In that First Lieutenant Bob J Van Epps, 125th Infantry, did, at or near Miramar, California, on or about 10 October 1943 feloniously embezzle by fraudulently converting to his own use money in the sum of about One Hundred and Fifty Dollars ($150.00), the property of Private First Class Ted L Laroco, Company E, 125th Infantry, entrusted to him by the said Private First Class Ted L Laroco.

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

Specification 1: In that First Lieutenant Bob J. Van Epps, 125th Infantry, did, at or near Santa Cruz, California, on or about 7 August 1943, wrongfully borrow money from Private Joe M Tussey, Company E, 125th Infantry, in the sum of about Twenty Dollars ($20.00) promising that he would repay the same on or about 8 August 1943, and did further dishonorably fail and neglect to pay said indebtedness until on or about 13 September 1943, when he repaid the sum of about Fifteen Dollars ($15.00) thereof, after repeated demands by the said Private Joe M Tussey, and did further dishonorably fail and neglect to pay the balance of said indebtedness until on or about 7 December 1943, after the institution of an official investigation of the subject.

Specification 2: In that First Lieutenant Bob J Van Epps, 125th Infantry, did, at or near Fort Ord, California, on or about 25 September 1943 wrongfully borrow money from Private First Class Ted L Laroco, Company E, 125th Infantry, in the amount of about Twenty Five Dollars ($25.00) and did further dishonorably fail and neglect to pay said indebtedness until on or about 7 December 1943 after the institution of an official investigation of the subject.

Specification 3 (As amended): In that First Lieutenant Bob J Van Epps, 125th Infantry, did, at or near Santa Cruz, California, on or about 7 August 1943, wrongfully borrow money from Private Donald R Chappell, Company E, 125th Infantry, in the sum of about Twenty Dollars ($20.00) promising that he would repay the same on or about 8 August 1943, and did further dishonorably fail and neglect to pay said indebtedness until on or about 9 August 1943 when he repaid the sum of about Four Dollars ($4.00) thereof, and did further dishonorably fail and neglect to pay the balance of said indebtedness, until on or about 14 December 1943.

The accused pleaded not guilty to and was found guilty of all Charges and Specifications. He was sentenced to dismissal and total forfeitures. The reviewing authority approved only so much of the sentence as provides for dismissal and forwarded the record for action under the 48th Article of War.

3. Evidence for the prosecution:

Accused was assigned to Company E, 125th Infantry, sometime in July 1943. Private First Class Donald R. Chappell, a member of the company, was in "a game" with accused in the small boiler room adjoining the pool room downstairs in the "Cliff House" at Santa Cruz around 7 August 1943. Privates "Hackney", "Bryant", and others were present. During the game Chappell loaned accused "three or four dollars", "two or three times" until the total amount was twelve dollars. Accused quit the game and asked Chappell for "the rest to make twenty dollars", which Chappell gave him, stating he had to have it back for his furlough on 21 August. Accused said he would be sure to have it by then and possibly by the next day. Private First Class Joe M. Tussey, also of Company E, was on guard duty at Santa Cruz on the evening of 7 August 1943 when accused approached him and asked if he could borrow $20 until the following morning. Tussey gave him the money, saw accused the following morning but was not repaid. Chappell and Tussey together called on accused on the night of 19 August, talked to him outside the officers' quarters at Palo Alto, and requested the return of their money. Chappell told accused he wanted his money before he left on furlough the following morning and Tussey said he wanted to give Chappell $10 before he

left. Accused promised them he would have the money in the morning "sure" and that he would borrow from another officer if he did not have time to go to the bank. Chappell saw accused the next morning in the command post but did not ask him for the money as "there were other personnel there". Accused did not speak to him and failed to repay the loan until 13 or 14 December. Tussey did not see accused the following morning nor any other time until 13 September. On that date he told accused he was leaving on furlough the next day and asked for his money. Accused wrote him a check for $15 and said he would pay the $5 balance when Tussey returned. Tussey did not speak to accused again about the balance and it was not paid until 7 December (R. 29, 31-36, 36-40, 67).

Private Frank B. Sepeda, a member of Company E, was approached by accused about 25 September at Fort Ord, where the company was then located, and asked if he had any money. Sepeda stated he did not and accused requested that he try to borrow $20 for him, suggesting Private First Class Ted L. Laroco of the company as a prospect. While Sepeda was discussing the matter with Laroco accused came up to them. Laroco offered to lend accused $25 and then asked if accused was going to "Gilroy". Accused said he was and Laroco inquired if accused would deposit $150 in the "Bank of America" for him. Laroco did not have an account in the bank at Gilroy but he "knew" that other men had given money to "Lieutenant Hoffman" and "Lieutenant Francisco" to deposit for them. Accused said, "I will do it for you" and the three went into the company command post where Laroco counted out $175. Accused counted the money, wrote down Laroco's name and serial number on a piece of paper and placed it and the money in his wallet. Accused stated he would repay the $25 but did not say when. He did not ask for or receive permission to use the $150 for himself. On the morning of 9 October, "around nine or ten", Laroco went to accused, at the command post of the company, then stationed at "Miramar", and told him he needed his money as he was going on furlough the next day. Accused stated, "Well, any time you need your money I will go to Gilroy and take it for you". Laroco repeated, "I need my money" and accused said he had a twenty-four hour pass and would go to Gilroy and get the money. Accused did not say when he would return. The following day Laroco went to the command post, inquired for accused and was told he was away on a twenty-four hour pass and would return at one o'clock. Laroco waited until three o'clock, gave "Lieutenant Hoffman" his address where he could be reached while on furlough and then left. He did not see accused until 3 December. Accused repaid him on 7 December. Second Lieutenant Donald M. Hoffman, of Company E, talked to Laroco on 10 October 1943 and "a day or two later" told accused that Laroco "is on his furlough, and he asked me to ask you for the money you owed him so I could send it to him". Accused replied, "Well, you give me his address and I will send it to him myself". Hoffman handed accused a piece of paper on which the address was written and had no further

conversation concerning the matter (R. 6-14, 14-18, 21-28, 28-31, 66, 68, 72-74).

Second Lieutenant William A. McLelland, Jr., of Company E, testified he talked to accused, between nine and ten o'clock on a Saturday morning, he believed it was 9 October. Accused asked if he could ride up to San Francisco with McLelland, saying that he had some money that Private Laroco gave him to keep for him for a furlough, he did not want to carry it around with him and would like to go to town to get rid of it. While he was talking accused displayed a wallet which contained what appeared to be "quite a bit" of money. McLelland agreed and accused left camp with him sometime after five o'clock that day. San Francisco is north, and Gilroy is 83 miles southeast of Miramar. McLelland was positive the date of the conversation was 9 October as it was the first weekend after "we" moved from Fort Ord to Miramar which was on 5 October. When asked if he had testified it was at nine or ten o'clock in the morning, McLelland replied, "It was before dinner on that Saturday; yes, sir". It would take nearly all morning to go to Gilroy and return. He did not know whether accused had gone there that morning; "to his knowledge" accused had been at Miramar all morning (R. 43-45, 51-53, 74-76).

Accused went to the Oakland Area Station Hospital sick on 15 October 1943 and did not return to duty until 10 December 1943 as shown by entries on the morning report of Company E read in evidence. During the "latter part of November" Captain Reed L. Seely of Company E went to see accused at the hospital "with the intention" of asking him "for the money". Captain Seely did not bring the matter up because in the course of their conversation accused said he had some money in a strong box for "one" or "some" of the boys and that he hoped to get a pass to get out. Captain Seely, accompanied by Lieutenant McLelland and Private Laroco called on accused in the hospital on 3 December. Captain Seely told accused he was there because "the regiment" had sent him and asked accused if he had received $175 from Private Laroco, what he intended to do about it and when he would repay it. Accused replied that he had the money in a strong box at Gilroy, had it there all the time, and that he expected to get a twenty-four pass the following Monday, 6 December, at which time he would go to Gilroy, get the money and repay Private Laroco. Captain Seely also asked accused about the money owing Privates Tussey and Chappell. Accused stated that he had given Private Tussey a check before he went on his furlough with the understanding that he was to pay Private Chappell some of the money. Chappell was a patient in the hospital at the time so Captain Seely suggested they talk to him. Private Chappell said he knew that Private Tussey had received a check from accused but did not know he was to receive any part of it and had not received anything (R. 18-19, 40-41, 46-51, 54-56, 58, 60-62, 68-71).

Accused telephoned Lieutenant Colonel Wayland L. Miller, 125th Infantry, on 6 December, and said he could not go to Gilroy as he had previously arranged because of his physical condition which his doctor

thought rendered it inadvisable for him to travel. Colonel Miller inquired if he could not make some arrangements with the bank at Gilroy to get the money so Private Laroco could be paid. Accused replied he did not have the money in the bank at Gilroy, having turned it over to his wife for safekeeping in her safety deposit box when he was at Fort Ord and anticipated a transfer. Accused stated he would get in touch with his wife when she finished work at three o'clock that day, have her mail him a money order and he would mail it to Private Laroco. Colonel Miller conferred with Captain Seely following which Captain Seely telephoned accused at the hospital and asked him to set a definite time when he could bring Private Laroco to the hospital and get the money. Accused said he would have it the following morning (R. 58-59, 62-65).

Captain Seely, accompanied by Privates Laroco and Tussey, went back to the hospital the following day, Tuesday, 7 December. When they walked into the room accused handed Captain Seely $180, stating $5 was for Private Tussey. Accused said he had forgotten about the money he owed Private Chappell but would pay him before he left the hospital. He left the hospital a "couple of days" later and went with Company B at Palo Alto. Around 13 or 14 December accused came over to Miramar to pick up his belongings at which time he offered Captain Seely the money he owed Private Chappell. Captain Seely called Private Chappell in to the command post and accused gave him $20. Private Chappell offered to return $4 which he said he had lost to accused in a pool game but accused said to "leave it go", he had just been playing for fun (R. 19-21, 34-35, 40, 42-43, 54, 56-58).

4. For the defense:

It was stipulated that if Second Lieutenant Mary Ann Van Epps, Army Nurse Corps, were called as a witness and testified in the case she would testify that she is the wife of accused; that in the third week of September 1943, accused gave her $175 to hold for safekeeping for Private Ted Laroco and that it was at all times safe under lock and key and never touched; that she was informed by accused Captain Seely had notified him Private Laroco wanted the money back; that her husband immediately called her and she returned the amount in full to accused at once (R. 71-72).

Accused, cognizant of his rights, elected to remain silent (R.72).

5. a. Specifications 1 and 3, Charge II: Accused, assigned to Company E, 125th Infantry, engaged in "a game" with Private First Class Donald R. Chappell and other members of the company on 7 August 1943, in the course of which he borrowed $12 from Chappell. When accused quit the "game" he asked Chappell for "the rest to make twenty dollars" which Chappell gave him. Accused promised to repay the loan by 21 August when Chappell was leaving on a furlough or sooner. On the evening of the same day, 7 August 1943, accused approached Private First Class Joe M. Tussey, a member of the company, on guard duty at the time, and requested a loan of $20 until the following morning. Tussey gave accused the money and

although he saw accused the next morning, the loan was not repaid.

Chappell and Tussey called on accused together on 19 August 1943. Chappell was leaving on furlough the following day and told accused he wanted his money by that time. Tussey stated he wanted his money so he could loan Chappell $10 before he left. Accused promised he would have the money in the morning "sure" and would borrow it from another officer if he did not have time to go to the bank. Chappell saw accused the next morning in the command post but did not ask him for the money because of the presence of other personnel. Accused did not speak to him and did not repay the loan until 13 or 14 December. Tussey did not see accused again until 13 September, at which time he again requested his money whereupon accused wrote him a check for $15. He promised to pay the balance when Tussey returned from his furlough commencing the next day. Tussey did not speak to accused again about the balance which was not repaid until 7 December.

b. Specification, Charge I; Specification 2, Charge II: Following an unsuccessful attempt to borrow money from Private Frank B. Sepeda, accused succeeded, on 25 September 1943, in securing a $25 loan from Private First Class Ted L. Laroco, no date for repayment being specified. Both enlisted men were members of Company E then located at Fort Ord, California. At the time Laroco made the loan he also gave accused $150 to deposit for him (Laroco) in the Bank of America at Gilroy, California. Accused agreed to make the deposit. Laroco did not have an account there but testified he "knew" that other men had given officers of the company money for deposit. About 0900 or 1000 on 9 October, on which date the company was stationed at Miramar, California, Laroco told accused he needed his money as he was leaving the next day on furlough. Accused said he had a twenty-four hour pass and would go to Gilroy for the money. About the same time or at least "before dinner" on the same day accused asked Second Lieutenant William A. McLelland, Jr., of the same company, if he could ride to San Francisco with him stating he had some money which Private Laroco gave him to hold for a furlough and he wanted to go to town to "get rid of it". Accused displayed a wallet containing "quite a bit" of money. As far as Lieutenant McLelland knew accused had been at camp all the morning of 9 October. Gilroy is 83 miles southeast of Miramar and the round trip would take nearly all morning. Sometime after 1700 that day Lieutenant McLelland and accused drove to San Francisco, which is north of Miramar. Lieutenant McLelland was positive of the date because it was the first weekend after the organization moved from Fort Ord to Miramar, which was on 5 October. The following day, 10 October, Laroco waited at the command post until 1500 but as accused had not returned left camp after giving Second Lieutenant Donald M. Hoffman, of Company E, the address where he could be reached while on furlough. "A day or two" later Lieutenant Hoffman told accused that Laroco had asked him to get his money for him and forward it to him. Accused replied he would send Laroco the money himself and to give him Laroco's address which Lieutenant Hoffman did.

Accused was confined by reason of illness in the Oakland Area Station Hospital on 15 October 1943. Around the latter part of November, his company commander, Captain Reed L. Seely, visited him and in the course of their conversation accused said he had some money for "one" or "some" of the boys and hoped to get a pass to get out. Captain Seely, accompanied by Lieutenant McLelland and Private Laroco, called on accused at the hospital on 3 December and stated he was there because "the regiment" had sent him, inquired if accused had received $175 from Private Laroco and when he intended to repay it. Accused replied that the money had been in a strong box at Gilroy all the time and he intended to go to Gilroy the following Monday, 6 December, and repay Laroco. In response to inquiries about his indebtedness to Privates Tussey and Chappell accused stated that before Tussey left on furlough he had given him a check with the understanding that Tussey would give Chappell part of it.

Accused phoned the regimental commander, Lieutenant Colonel Wayland L. Miller on 6 December and stated he could not go to Gilroy as planned because of his physical condition. When Colonel Miller inquired if he could not make some arrangements with the bank at Gilroy to get the money accused replied that he did not have the money at Gilroy but had turned it over to his wife for safekeeping while stationed at Fort Ord. Accused promised to get in touch with his wife that day and have her mail him a money order. Colonel Miller conferred with Captain Seely who then phoned accused and demanded that he set a definite time when he could bring Private Laroco to the hospital for his money. Accused stated he would have it the following morning. The next day, 7 December, Captain Seely took Privates Laroco and Tussey with him to the hospital and accused paid them $175, and $5, respectively. He promised to pay Chappell before he left the hospital. He returned to duty on 10 December being stationed with another company nearby and on 13 or 14 December came to Miramar and paid Chappell $20 in the presence of Captain Seely. Chappell offered to return $4 which he said he had lost to accused in a pool game but accused insisted he had just been playing for fun.

c. Accused did not testify but it was stipulated that if his wife, Second Lieutenant Mary Ann Van Epps, Army Nurse Corps, were called as a witness and testified, she would testify that in the third week of September 1943, accused gave her $175 to hold for safekeeping for Private Laroco, it was at all times safe under lock and key and never touched, and when her husband notified her Private Laroco wanted the money back she returned the money in full to accused at once.

d. The evidence in support of the Specifications, Charge II, establishes, without contradiction, that accused borrowed money from enlisted men on three occasions as alleged, that he failed to repay the loans when due or when demand therefor was made and by means of false promises evaded payment in full until his commanding officers pressed him to discharge the obligations. A violation of the 96th Article of War is clearly proven

(Dig. Ops. JAG 1912-40, sec. 454 (19); Bull. JAG, July 1942, sec. 454 (19)).

e. The evidence in support of the embezzlement alleged in the Specification, Charge I, establishes that on 25 September 1943, accused was entrusted by an enlisted man with the sum of $150 for deposit in the bank at Gilroy, California. It is shown by the admissions of accused that the money was never deposited there. It is further shown that on 9 October, the enlisted man demanded the immediate return of his money and accused said he would go to Gilroy, get the money and return it. He failed to do so. Also on 9 October accused told an officer in his company that he had the money in his possession, displayed a well filled wallet at the time, and rode to San Francisco, in the opposite direction from Gilroy, for the alleged purpose of finding a safe place for it. Two or three days later he obtained the address of the enlisted man, then away on furlough, and told another officer he would send the enlisted man his money. Again he failed to return the money. Accused was confined in the hospital through illness on 15 October and did nothing further about the matter until 3 December when his company commander demanded he repay the money. At that time accused falsely stated to his company commander that he had the money in a strong box at Gilroy, would go there on 6 December and procure it. However, on 6 December, after first explaining to his regimental commander that he could not go to Gilroy for the money because of his illness, he then stated he had given the money to his wife for safekeeping and would have her forward it. The money was finally repaid on 7 December. The failure of an officer to repay on proper demand funds entrusted to his care, is, in the absence of an adequate explanation, sufficient to establish a prima facie case of embezzlement (Dig. Ops. JAG 1912-40, sec. 451 (17)). Accused here failed to repay money entrusted to him despite demand therefor, and made false and conflicting statements concerning where the money was kept, which, together with his admitted failure to carry out the terms of his trust and other circumstances of the case is sufficient to sustain his conviction of embezzlement.

6. The accused is 24 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 27 December 1939; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School and active duty, 24 July 1942; temporarily promoted to first lieutenant, Army of the United States, 22 April 1943.

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

confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 93rd or 96th Article of War.

Samuel M. Driver, Judge Advocate

Robert J. Conner, Judge Advocate

H. Pollenhos, Judge Advocate

1st Ind.

War Department, J.A.G.O., 3 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 First Lieutenant Bob J. Van Epps (0-1288821), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. The accused embezzled $150 from an enlisted man of his organization (Spec., Chg. I) and wrongfully borrowed $25 from the same man (Spec. 2, Chg. II) and $20 each from two other enlisted men of his organization (Specs. 1 and 3, Chg. II) and dishonorably failed to repay the loans. I recommend that the approved sentence to dismissal be confirmed and carried into execution.

3. Attention is invited to a letter dated 18 March 1944 to The Adjutant General from the Commanding General of the Ninth Service Command which shows that since his trial on 3 January 1944 accused has passed numerous worthless checks and that after his pass privilege had been suspended, he left his station without permission on the morning of 11 March and did not return until the morning of 13 March.

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

Myron C. Cramer

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

4 Incls.
Incl.1- Record of trial.
Incl.2- Drft. ltr. for sig. S/W.
Incl.3- Form of Action.
Incl.4- Ltr. to TAG, dated 18 March 1944.

(Sentence confirmed. G.C.M.O. 289, 13 Jun 1944)

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

SPJGN
CM 248244

31 JAN 1944

UNITED STATES v. Cyril J. Callaghan, an American citizen serving with the Armies in the field, employed by Metcalf-Hamilton Kansas City Bridge Companies, contractors employed by the United States Government in construction.	NORTHWEST SERVICE COMMAND Trial by G.C.M., convened at Whitehorse, Yukon Territory, Canada, 13 December 1943. Confinement for one (1) year. Penitentiary.

HOLDING by the BOARD OF REVIEW
LIPSCOMB, SLEEPER and GOLDEN, Judge Advocates

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Cyril J. Callaghan, a United States Citizen, accompanying or serving with the armies of the United States in the field, employed by Metcalfe-Hamilton, Kansas City Bridge Companies, otherwise known as MHKCB, engaged in a cost plus fixed fee contract by the United States Government, did at Whitehorse, Yukon Territory, Canada, on or about 21 November 1943, while

driving a motor vehicle under the influence of liquor, and on the Alaska Military Highway, and at a speed in excess of 35 miles per hour, wrongfully, recklessly, and with culpable negligence kill Albert O. Poppenhagen, a civilian of the United States of America, by striking him with said Motor vehicle.

He pleaded not guilty to and was found guilty of the Charge and the Specification thereunder. He was sentenced to be confined at hard labor at such place as the reviewing authority might direct for a period of one year. The reviewing authority approved the sentence, designated the United States Penitentiary, Leavenworth, Kansas, 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.

Article of War 42 provides that no person under the sentence of a court-martial shall be confined in a penitentiary unless the period of confinement adjudged by "* * * such court-martial is more than one year * * *". Since the period of confinement imposed in the present case was one year only, the designation of a penitentiary as the place of confinement was unauthorized.

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 confinement at hard labor for one year at a place other than a penitentiary, Federal penal or correctional institution.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Cooper, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

1st Ind.
10 FEB 1944

War Department, J.A.G.O., To the Commanding General, Northwest Service Command, APO 702, c/o Postmaster, Seattle, Washington.

1. In the case of Cyril J. Callaghan, an American citizen serving with the Armies in the field, employed by Metcalf-Hamilton Kansas City Bridge Companies, contractors employed by the United States Government in construction, 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 confinement at hard labor for one year 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 248244).

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.

SPJGV
CM 248276

14 MAR 1944

U N I T E D S T A T E S	)	SECOND AIR FORCE
v.	)	Trial by G.C.M., convened at Dyersburg, Tennessee, 16, 23, 27 December 1943. Dismissal.
Second Lieutenant JAMES H. CRADDOCK (O-801547), Air Corps.	)	

OPINION of the BOARD OF REVIEW
TAPPY, KIDNER and HARWOOD, 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 58th Article of War.

Specification: In that Second Lieutenant James H. Craddock, Air Corps, attached 505th Bombardment Squadron (H), 346th Bombardment Group (H), Army Air Base, Dyersburg, Tennessee, did, at Army Air Base, Dyersburg, Tennessee, on or about 7 September 1943, desert the service of the United States and did remain absent in desertion until he was apprehended at New York City, New York, on or about 24 October 1943.

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

Specification 1: In that Second Lieutenant James H. Craddock, Air Corps, attached 505th Bombardment Squadron (H), 346th Bombardment Group (H), Army Air Base, Dyersburg, Tennessee, did at Fort Worth, Texas, on or about 16 August 1943, with intent to defraud, deceive and injure, wrongfully and unlawfully make and utter to The Blackstone, a certain draft, in words and figures as follows, to-wit:

Fort Worth, Texas, August 16, 1943.

On Demand Pay
To the Order of THE BLACKSTONE $50.00
Fort Worth's Hotel of Distinction.

Fifty and 00/100 ———————————— DOLLARS

with exchange

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

To Guarantee Trust Co. Name of Bank or Trust Co. 61st and Madison Branch New York City City or Town and State N. Y.	James H. Craddock 2nd Lt., AC, 0-801547 Address: 346th Bombardment Dyersburg, Tennessee

and by means thereof, did fraudulently obtain from the said The Blackstone, Fifty Dollars ($50.00) lawful money of the United States; he, the said Second Lieutenant James H. Craddock, then well knowing that he did not have and not intending that he should have any account with the said Guarantee Trust Co., 61st and Madison Branch, New York City, New York, for the payment of said draft.

Specification 2: In that Second Lieutenant James H. Craddock Air Corps, attached 505th Bombardment Squadron (H), 346th Bombardment Group (H), Army Air Base, Dyersburg, Tennessee, did at Fort Worth, Texas on or about 17 August 1943, with intent to defraud, deceive and injure, wrongfully and unlawfully make and utter to The Blackstone, a certain draft in words and figures as follows, to-wit:

Fort Worth, Texas, August 17, 1943.

On Demand Pay
To the Order of THE BLACKSTONE $59.35
Fort Worth's Hotel of Distinction

Fifty Nine and 35/100 ———————— DOLLARS

As maker and/or endorser, I hereby agree in case this check is returned from the bank unpaid, to pay protest fees, if any, and a reasonable investigation charge, and in addition, if placed in attorney's hands for collection to pay a reasonable attorney's fee. All exemption laws

of the State of Texas being hereby waived in the enforcement of the above obligation. This check being payable where the owner and holder of same reside.

To Guarantee Trust Co. Name of Bank or Trust Co. 61st and Madison Branch New York City City or Town and State N. Y.	James H. Craddock 2nd Lt., AC, O-801547 Address: 436 Bombardment Dyersburg, Tennessee

in payment of a hotel bill, he, the said Second Lieutenant James H. Craddock, then well knowing that he did not have and not intending that he should have any account with the said Guarantee Trust Co., 61st and Madison Avenue Branch, New York City, for the payment of said check.

Specification 3: In that Second Lieutenant James H. Craddock, Air Corps, attached 505th Bombardment Squadron (H), 346th Bombardment Group (H), Army Air Base, Dyersburg, Tennessee, did at New York City, New York, on or about 18 October 1943, with intent to defraud, deceive, and injure, wrongfully and unlawfully make and utter to the Restaurant Marguery, New York City, New York, a certain check, in words and figures as follows, to-wit:

October 18, 1943 No.____

Guarantee Trust Co.
60th and Madison Avenue

Pay to the order of CASH ——————————$20.00

Twenty and 00/100 ——————————DOLLARS

James H. Craddock
2nd Lt., AC, O-801547
Westover Field, Massachusetts

and by means thereof, did fraudulently obtain from the said Restaurant Marguery, Twenty Dollars ($20.00), lawful money of the United States, he, the said Second Lieutenant James H. Craddock, then well knowing that he did not have

and not intending that he should have any account with the said Guarantee Trust Co., 60th and Madison Avenue, New York City, New York, for the payment of said check.

Specification 4: In that Second Lieutenant James H. Craddock, Air Corps, attached 505th Bombardment Squadron (H), 346th Bombardment Group (H), Army Air Base, Dyersburg, Tennessee, did at New York City, on or about 18 October 1943 with intent to defraud, deceive and injure, wrongfully and unlawfully make and utter to the Restaurant Marguery, New York City, New York, a certain check, in words and figures as follows, to-wit:

October 18, 1943 No. ____

Guarantee Trust Co.
60th and Madison Avenue
N. Y. C.

Pay to the order of Restaurant Marguery
270 Park Avenue
New York, New York $28.00

Twenty-eight and 00/100 ———————— DOLLARS

James H. Craddock
2nd Lt., AC, 0-801547
505th Bombardment (H)
Westover, Massachusetts

and by means thereof, did fraudulently obtain from Restaurant Marguery, Twenty-eight Dollars ($28.00), lawful money of the United States, he, the said Second Lieutenant James H. Craddock, then well knowing that he did not have, and not intending that he should have any account with the said Guarantee Trust Co., 60th and Madison Avenue, New York City, New York, for the payment of said check.

He pleaded not guilty to all Charges and Specifications. He was found not guilty of Charge I and its Specification, but guilty of the lesser included offense of AWOL in violation of the 61st Article of War and guilty of Charge II and its 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 one year. 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.- Evidence for the prosecution:

a. Charge I. The morning report of accused's organization, showed him from duty to AWOL as of 9 September 1943. It was stipulated between the trial judge advocate, defense counsel and accused that accused was apprehended 24 October 1943 at the Barbary Room, Berkshire Hotel, in New York City, and that he was dressed in proper uniform.

b. Charge II, Specification 1. It was stipulated between prosecution, defense counsel and accused that if W. B. Price, treasurer of the Blackstone Hotel, Fort Worth, Texas, were present and sworn as a witness, he would testify that on 16 August 1943, Paul Walters, a former employee of the hotel, then in the United States Navy, cashed a check in the amount of $50 for Lieutenant James H. Craddock, drawn on the Guarantee Trust Company, 61st and Madison Avenue Branch, New York City; that said check was deposited in a local bank, and on 25 August the check was returned marked "account closed"; that said check had not been paid and that Lieutenant Craddock was still indebted to the Blackstone Hotel for that amount. Prosecution introduced in evidence, without objection by defense, a check dated 16 August 1943, payable to the order of the Blackstone Hotel, Fort Worth, Texas in the sum of $50, drawn on the Guarantee Trust Company, New York, New York (R. 9; Ex. I). There was also introduced in evidence, over objection by defense, W.D.,A.G.O. Form No. 65-1 (accused's identification card) purporting to bear the signature of accused (R. 14-15; Ex. H).

c. Specification 2. It was stipulated between prosecution, defense counsel and accused that if R. C. Williamson, room clerk at the Blackstone Hotel, Fort Worth, Texas, were present and sworn as a witness, he would testify that on 17 August 1943, Second Lieutenant James H. Craddock, Army serial number 0-801547, gave him a check in the amount of $59.35 drawn on the Guarantee Trust Company, 61st and Madison Avenue Branch, New York City; that the check was made in his presence and accepted by him in good faith in payment of a hotel bill (R. 9; Ex. F).

It was also stipulated between prosecution, defense counsel and accused that if W. B. Price, treasurer of the Blackstone Hotel were present and sworn as a witness, he would testify that the check for $59.35 dated 17 August 1943, drawn on the Guarantee Trust Company, 61st and Madison Avenue Branch, New York City, and signed by Lieutenant James H. Craddock, was deposited in a local bank and cleared on the New York bank; that on 25 August 1943 this check was returned with the notation "account closed", and that the amount represented by that check was still unpaid (R. 9; Ex. F).

d. Specifications 3 and 4. It was stipulated between prosecution, defense counsel and accused that if A. Mino, 213 East 49th Street, New York

City were present and sworn as a witness, he would testify that he saw Second Lieutenant James H. Craddock fill in and sign two checks dated 18 October 1943 - one in the sum of $20 and the other $28 - each drawn on Guaranty Trust Company, 60th Street and Madison Avenue Branch, New York City, that he, A. Mino, had the checks cashed, turning the money over to Second Lieutenant James H. Craddock, who paid his bill for food and liqour at Restaurant Marguery. When asked for his identification, Lieutenant Craddock showed A. Mino his serial number, pass and other papers corresponding with those appearing on the checks (R. 9; Ex. E).

It was also stipulated between prosecution, defense counsel and accused that if Ercole Marchisio, owner of the Restaurant Marguery, were present and sworn as a witness he would testify that the checks were deposited in his bank and returned marked "Account closed", and the amount represented by these checks was still unpaid (R. 9; Ex. E).

The prosecution introduced in evidence, without objection by defense, two checks dated 18 October 1943, each drawn on the Guarantee Trust Company, 60th Street and Madison Avenue, New York City, one for $20 and one for $28. The check for $20 was made payable to cash and the one for $28 made payable to Restaurant Marguery, 270 Park Avenue, New York, New York (R. 15; Exs. J, L).

4. After accused's rights as a witness were explained he elected to make an unsworn statement which was substantially as follows:

On 3 September 1943 accused applied for and was granted a 60-hour advance on his regular 48-hour pass, for the purpose of going to New York City to be married. He traveled by motor vehicle from his station to Memphis, Tennessee and from there to New York City by way of the American Airlines, arriving in New York City 4 September 1943. Upon his arrival he made a reservation for return trip via the same airlines to Memphis, Tennessee. After reaching New York he experienced some difficulty in locating his future bride, and when he finally did find her he discovered that she had had a "change of heart". Because of this "shock" and the embarrassment and shame of facing his friends, who had given him a "send off" apropos his forthcoming marriage, he erroneously sought escape in drink. As proof of his intention to return to his home station, accused introduced in evidence a sales slip issued by Saks Fifth Avenue, New York, 14 October 1943 showing the purchase of certain articles of military clothing to be sent to his home station, and also introduced in evidence portions of the outside wrappings of several packages containing articles purchased in New York and bearing accused's address at his home station in Dyersburg, Tennessee. During his testimony he expressed a desire to be assigned to overseas for combat duty. He made no reference to the issuance of any of the checks involved in the Specifications of Charge II.

5. As to Charge I and its Specification, the evidence conclusively shows that accused was absent without leave from 7 September to 24 October 1943,

and fully supports the findings of guilty of this offense in violation of the 61st Article of War.

As to Charge II and its Specifications the evidence sufficiently shows the making and cashing of the checks described, all drawn on the Guarantee Trust Company, New York, New York. All of the checks were dishonored and returned to the respective payees thereof, with a notation appended reading "Account closed". The drawing and uttering of the checks under the circumstances shown was fraudulent. The evidence warrants the conclusion that in each instance accused knew the checks would not be paid on presentation.

6. Accused is 28 years of age. He graduated from high school and pursued a course in Journalism at the University of Nebraska for a portion of one year, but did not graduate. He served as an enlisted man from 24 April 1942 to 29 April 1943, when he was appointed a second lieutenant, Air Corps, in the Army of the United States.

7. The court was legally constituted and had jurisdiction of the person and the subject matter. No errors injuriously affecting the substantial rights of 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 as approved by the reviewing authority and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 61st or 96th Article of War.

Thomas H. Jappy, Judge Advocate.

Herbert M. Kreuer, Judge Advocate.

Robert B. Harwood, Judge Advocate.

SPJGV
CM 248276

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 Second Lieutenant James H. Craddock (0-801547), 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 of the sentence. I recommend that the sentence as approved by the reviewing authority be confirmed and carried into execution.

3. Consideration has been given to the attached letter from Lieutenant Colonel W. Millard, Jr., Signal Corps, requesting clemency.

4. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the 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-Ltr. fr. Lt. Col. W. Millard, Jr.
Incl.3-Dft. ltr. for sig. Sec. of War.
Incl.4-Form of action.

(Sentence as approved by reviewing authority confirmed. G.C.M.O. 201, 26 May 1944)

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

(215)

26 MAY 1944

SPJGH
CM 248322

UNITED STATES v. Private JAMES NELSON (35535634), 93rd Quartermaster Company, 93rd Infantry Division.	)	93RD INFANTRY DIVISION Trial by G.C.M., convened at Essex, California, 12 January 1944. Dishonorable discharge (suspended) and confinement for five (5) years. Rehabilitation Center.

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 pleaded not guilty to and was found guilty of the Charge and Specification. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for ten years. The reviewing authority approved the sentence, remitted five years of the confinement imposed, ordered the sentence as modified executed, suspended execution of the dishonorable discharge, and designated the Rehabilitation Center, Turlock, California, as the place of confinement. The proceedings were published in General Court Martial Orders No. 16, Headquarters 93rd Infantry Division, 15 January 1944.

3. The only question requiring consideration is whether the participation of Captain Frank M. Scott, Corps of Engineers, in the trial of the case as trial judge advocate, was such an error as to require the vacation of the findings and sentence.

4. The record of trial discloses that by paragraph 7, Special Orders No. 325, Headquarters 93rd Infantry Division, 24 December 1943, a general court-martial (hereafter designated Court "A") was appointed, of which Captain St. Elmo P. Henderson was the designated trial judge advocate. The charges in this case were referred for trial to Captain Henderson, as trial judge advocate of Court "A" on 31 December 1943. By paragraph 2, Special Orders No. 1, same headquarters, 1 January 1944, a new court (hereafter designated Court "B") was appointed, of which Captain Henderson was also named trial judge advocate, and all unarraigned cases in the hands of Court "A" were referred to Court "B".

By paragraph 3, Special Orders No. 11, same headquarters, 12 January 1944, Captain Frank M. Scott was substituted as trial judge advocate of Court "A" in place of Captain Henderson. The case was tried on 12 January 1944 by Court "B", except that Captain Scott acted as trial judge advocate in place of Captain Henderson, the designated trial judge advocate of Court "B". The assistant trial judge advocate of both Courts "A" and "B" was Second Lieutenant Samuel W. Allen. The record shows that the members of the court, the personnel of the prosecution and the witnesses were sworn. The record indicates that the case was tried by the "TJA" and Captain Scott authenticated the record.

5. It will be seen from the foregoing that although Captain Henderson was the duly appointed trial judge advocate of the court that tried the case he did not participate in the proceedings but that Captain Scott, who had not been designated as the trial judge advocate of this court, acted as such in the trial of the case. The question is presented whether the participation of Captain Scott in the trial was such an error as to require the vacation of the findings and sentence.

On the authority of CM 200734, Burns (Dig. Op. JAG, 1912-40, sec. 368(1); 5 B.R.1), recently approved and followed by the Board in CM 248464, Adams, the Board of Review is of the opinion that his participation constituted fatal error.

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

Samuel M. Lewis, Judge Advocate

Robert C. Mamer, Judge Advocate

F. J. Lotthuhos, Judge Advocate

1st Ind.

War Department, J.A.G.O., 29 MAY 1944 - To the Secretary of War.

1. Herewith transmitted for your action 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 James Nelson (35535634), 93rd Quartermaster Company, 93rd Infantry Division.

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,
Major General,
The Judge Advocate General.

2 Incls.
Incl.1-Rec. of trial.
Incl.2-Form of Action.

(Findings and sentence vacated by order of the Under Secretary of War. G.C.M.O. 285, 12 Jun 1944)

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

26 MAY 1944

SPJGH
CM 248324

UNITED STATES	)	93RD INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Essex, California, 12 January 1944. Dishonorable discharge (suspended) and confinement for five (5) years. Rehabilitation Center.
Private RICHARD WOODWARD (32607340), 93rd Quartermaster Company, 93rd Infantry Division.	)	

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 pleaded not guilty to and was found guilty of all Charges and Specifications. He was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for eight (8) years. The reviewing authority approved the sentence, remitted three (3) years of the confinement imposed, ordered the sentence as modified executed, but suspended execution of the dishonorable discharge, and designated the Rehabilitation Center, Turlock, California, as the place of confinement. The proceedings were published in General Court Martial Orders No. 22, Headquarters 93rd Infantry Division, 15 January 1944.

3. The only question requiring consideration is whether the participation of Captain Frank M. Scott, Corps of Engineers, in the trial of the case as trial judge advocate, was such an error as to require the vacation of the findings and sentence.

4. The record of trial discloses that by paragraph 7, Special Orders No. 325, Headquarters 93rd Infantry Division, 24 December 1943, a general court-martial (hereafter designated Court "A") was appointed, of which Captain St. Elmo P. Henderson was the designated trial judge advocate. The charges in that case were referred for trial to Captain Henderson, as trial judge advocate of Court "A" on 31 December 1943. By paragraph 2, Special Orders No. 1, same headquarters, 1 January 1944, a new court (hereafter designated Court "B") was appointed, of which Captain Henderson was also named trial judge advocate, and all unarraigned cases in the hands of Court "A" were referred to Court "B". By paragraph 3, Special Orders No. 11, same headquarters,

12 January 1944, Captain Frank M. Scott was substituted as trial judge advocate of Court "A" in place of Captain Henderson. The case was tried on 12 January 1944 by Court "B", except that Captain Scott acted as trial judge advocate in place of Captain Henderson, the designated trial judge advocate of Court "B". The assistant trial judge advocate of both Courts "A" and "B" was Second Lieutenant Samuel W. Allen. The record shows that the members of the court, the personnel of the prosecution and the witnesses were sworn. The record indicates that the case was tried by the "TJA" and Captain Scott authenticated the record.

5. It will be seen from the foregoing that although Captain Henderson was the duly appointed trial judge advocate of the court that tried the case he did not participate in the proceedings but that Captain Scott, who had not been designated as the trial judge advocate of this court, acted as such in the trial of the case. The question is presented whether the participation of Captain Scott in the trial was such an error as to require the vacation of the findings and sentence.

On the authority of CM 200734, Burns (Dig. Op. JAG, 1912-40, sec. 368(1); 5 B.R.1), recently approved and followed by the Board in CM 248464, Adams, the Board of Review is of the opinion that his participation constituted fatal error.

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

Samuel M. Drew, Judge Advocate

Robert J. Clannon, Judge Advocate

F. J. Lattuttos, Judge Advocate

1st Ind.

War Department, J.A.G.O., 29 MAY 1944 - To the Secretary of War.

1. Herewith transmitted for your action 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 Richard Woodward (32607340), 93rd Quartermaster Company, 93rd Infantry Division.

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-Rec. of trial.
Incl.2-Form of Action.

(Findings and sentence vacated by order of the Under Secretary of War. G.C.M.O. 296, 17 Jun 1944)

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

SPJGQ
CM 248375

12 FEB 1944

UNITED STATES v. First Lieutenant HAROLD O. SERMONS (O-1294544), Infantry.	FOURTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Camp Rucker, Alabama, 11 January 1944. 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. The accused was tried upon the following Charges and Specifications:

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

Specification 1: In that First Lieutenant Harold O. Sermons, Montgomery Holding and Reconsignment Point, Montgomery, Alabama, having been detailed as Officer of the Day, did, at Montgomery Holding and Reconsignment Point, Montgomery, Alabama, on or about 23 October 1943, without proper leave, go from the properly appointed place of duty as Officer of the Day, after having repaired thereto for performance of said duty.

Specification 2: In that First Lieutenant Harold O. Sermons, Montgomery Holding and Reconsignment Point, Montgomery, Alabama, did, at Montgomery Holding and Reconsignment Point, Montgomery, Alabama, on or about 23 October 1943, wrongfully and unlawfully, without the consent of the owner, take, carry away and use one (1) motor vehicle of a value of above fifty ($50.00) dollars, property of the United States furnished and intended for the military service thereof.

CHARGE II: (Finding disapproved by reviewing authority).

Specification 1: (Finding disapproved by reviewing authority).

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

Specifications 1, 2, 7, 8 and 9: (Findings disapproved by reviewing authority).

Specification 3: In that First Lieutenant Harold O. Sermons, Montgomery Holding and Reconsignment Point, Montgomery, Alabama, did, at Montgomery, Alabama, on or about 8 October 1943, with intent to defraud, wrongfully and unlawfully make and utter to Mr. J. H. Slagar, an individual doing business as G & S Cleaners, Montgomery, Alabama, a certain check in words and figures substantially as follows, to wit:

UNION BANK & TRUST CO. 61-38

Account No. 1785

Check No. 13353 Montgomery, Ala. Oct 8 1943

Pay to the order of G. & S. Cleaners $10.00

Ten and no/100 Dollars

Harold O. Sermons

and by means thereof did fraudulently obtain from Mr. J. H. Slagar the sum of ten dollars ($10.00), lawful money of the United States, he the said First Lieutenant Harold O. Sermons, then well knowing that he did not have and not intending that he should have sufficient funds in the Union Bank and Trust Company, Montgomery, Alabama, for the payment of said check.

Specifications 4, 5, 6, 10 and 11 were identical in form with Specification 3 above and differ only in the date, amount, and the person to whom the check was given and from whom the money was obtained. These details are as follows:

	DATE OF CHECK	AMOUNT	PERSON DEFRAUDED
Spec. 4:	17 Oct. 1943	$20.00	Tavern Inn Cafe
Spec. 5:	19 Oct. 1943	20.00	Tavern Inn Cafe
Spec. 6:	16 Oct. 1943	20.00	Elite Cafe
Spec.10:	6 Oct. 1943	10.00	City Cafe
Spec.11:	7 Oct. 1943	20.00	City Cafe

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

Specification: In that First Lieutenant Harold O. Sermons, Montgomery Holding and Reconsignment Point, Montgomery, Alabama, did, without proper leave, absent himself from his organization and station at Montgomery, Holding and Reconsignment Point, Montgomery, Alabama, from about 3 November 1943, to about 24 November 1943.

He pleaded not guilty to and was found guilty of all the Charges and Specifications. No evidence of previous convictions was submitted. 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 the specification of Charge II, of Charge II, and specifications 1, 2, 7, 8 and 9, Additional Charge I", approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The competent evidence of the prosecution in support of the charges and the specifications, the findings of which were approved by the reviewing authority, may be summarized as follows:

With reference to Charge I and its Specifications, Captain John D. Reese, Executive Officer at the Montgomery Holding and Reconsignment Point, Montgomery, Alabama (a storage center for overseas material and equipment) testified that on 23 October 1943 the accused was the Officer of the Day at that station. Upon being informed that the accused was not on duty, he made a search for him on the post and was not able to find him. Shortly after midnight of the same day the accused reported to him and stated that he had gone to Montgomery and remained at the Whitley Hotel in that city (R. 12). Captain D. J. Foxgrover corroborated the fact that the accused was detailed as the Officer of the Day at that post from 11 a.m., 23 October 1943, to 11 a.m., 24 October 1943 (R. 19, Ex. C). As Officer of the Day the accused was furnished with a Government jeep to be used in making his patrol of the post. He had no authority to use the vehicle for his own personal purposes. Notwithstanding, the accused drove the jeep off the post on 23 October 1943 at 6:23 p.m. o'clock to the city of Montgomery and drove it back again that night shortly after midnight (R. 13, 21, 22, 24). When the accused drove out of the post, he requested the guard to open the gate and said "If anyone calls for me, you haven't seen me" (R. 24). In order to properly perform the duties of Officer of the Day, it is not necessary to go outside of the post (R. 14). A Government owned vehicle known as a jeep is worth more than $50.00 (R. 16).

With reference to Additional Charge I and Specifications 3, 4, 5, 6, 10 and 11, Julien S. Slagar, who trades under the name of G & S Cleaners

at Montgomery, Alabama, testified that he knew the accused and had cashed checks for him upon different occasions. On 8 October 1943 he cashed accused's check for $10.00 drawn on the Union Bank and Trust Company, Montgomery, Alabama. When presented for payment at that bank, payment was refused for the reason that the accused's account at that bank was overdrawn (R. 25, Ex. D).

Miss Marjorie Murphy, cashier at the Tavern Inn Cafe, Montgomery, Alabama, testified that she knew the accused and on 17 October 1943 she cashed, at his request, his check for $20.00 drawn on the Union Bank and Trust Company, Montgomery, Alabama, which check was returned unpaid and marked "Insufficient funds" (R. 32, Ex. M). Mr. Isaac Franco, proprietor of the Tavern Inn Cafe, corroborated Miss Murphy (R. 33) and testified further that on 19 October 1943 the accused cashed an additional check of $20.00 drawn on the same bank, which check was also returned for insufficient funds (R. 34, Ex. N). Victor Hanan witnessed the cashing of this check (R. 34).

Miss Nell Katz, cashier at the Elite Cafe, Montgomery, Alabama, testified that she knew the accused and that on 16 October 1943, on behalf of her employer, she cashed the accused's check in the sum of $20.00 drawn on the Union Bank and Trust Company, Montgomery, Alabama (R. 30, Ex. L). Pete Xides, proprietor of the Elite Cafe, testified that the check cashed by the accused on 16 October 1943 in the sum of $20.00 although presented twice was not paid by the bank upon which it was drawn (R. 31) and Mr. Xides notified accused by letter that this check had been returned (R. 32).

John Syribeys, proprietor of the City Cafe, Montgomery, Alabama, testified that he knew the accused and that on 6 October 1943 and 7 October 1943, cashed two checks of $10.00 and $20.00, respectively, drawn on the Union Bank and Trust Company, Montgomery, Alabama, which checks when presented for payment were returned because of insufficient funds (R. 27, Exs. G and H).

George Suddith, cashier of the Union Bank and Trust Company, Montgomery, Alabama, produced a record of the accused's account with that bank during October 1943 (R. 36, Exs. O and Oa) which showed that there were not sufficient funds on deposit to the credit of the accused on or after 4 October 1943 to meet payment of any of the checks described above. On that date his balance was $13.50 which was gradually reduced to $.50 on 8 October 1943 and thereafter for the rest of the month his account was overdrawn.

With reference to Additional Charge II and its Specification, it was admitted by stipulation (Ex. B, R. 16) that the accused did,

without proper leave, absent himself from his organization at the Montgomery Holding and Reconsignment Point, Montgomery, Alabama, from 3 November 1943 to 24 November 1943 and that he was apprehended on the latter date at Chicago, Illinois.

4. The accused, having been advised of his rights by the court, elected to take the stand and make an unsworn statement (R. 47). He related that he was born in Beaumont, Texas, in 1920. He finished high school and attended college for two years. He was employed in ferrying automobiles from manufacturer to dealer. In 1940 he joined the National Guard which was taken into Federal service in January 1941. He served as an enlisted man until 24 September 1942, when, upon graduating from Officers' Candidate School at Fort Benning he was commissioned second lieutenant. He was transferred to his present station which is "a bunch of warehouses and 27 officers". He was assigned as Loading and Unloading Officer—"a glorified labor foreman's job". He was not interested in the work as he wanted field duty. He started to drink heavily and ran around at night. He lived off the post at the Y.M.C.A. in Montgomery. He was drinking heavily before, during and after 23 October 1943, when he left his post in the jeep. He continued drinking heavily and was under its influence when he left on 2 November 1943 and continued in that condition until he was apprehended in Chicago. When he issued the checks involved in this case, he believed his bank account was sufficient to take care of the checks. He was careless and did not keep a record of the checks on the stubs so as to know his bank balance. He was under the influence of liquor at the time of the commission of all of the acts alleged in the charges. He intends to repay the checks. The accused also called four officers and six civilians to prove that since September he has been drinking heavily, was drunk most of the time, and was dissatisfied with his assignment as he wanted field duty and wasn't fitted for the work he was doing (R. 39, 41, 42, 43, 44, 45, 46).

5. It was not only clearly established by the evidence but also admitted by the accused that he was detailed as Officer of the Day of his post on 23 October 1943 and, after undertaking the performance of his duty, left his post and appointed place of duty without proper leave. In leaving he took with him for his own personal use and convenience the Government "jeep" supplied to him by the Government for the sole purpose of performing his duties as Officer of the Day. He remained away for about six hours. He therefore committed the acts alleged in the Specifications under Charge I and in doing so violated the 96th Article of War as charged.

He again violated the 96th Article of War when, as alleged and clearly shown (and not denied by the accused), he gave his worthless checks, upon six different occasions, to merchants in Montgomery, Alabama, in exchange for cash when he knew, or should have known, that he did not have sufficient funds on deposit with the bank upon which the checks were drawn to meet them. The court was justified in concluding that he intended to defraud

those who cashed the checks for him from the evidence of the checks themselves, their amounts and dates, and the corresponding record of his account with the bank.

The allegations of the Specification under Additional Charge II were admitted by the accused by a stipulation received in evidence by the court. No further discussion is deemed necessary with reference to this Charge and its Specification.

6. The records of The Adjutant General show the accused to be twenty-three years of age. He graduated from high school in 1938. He was employed as a chainman on a survey gang sixteen months. He enlisted in the National Guard in 1940 and was taken into Federal service 6 January 1941 and served as an enlisted man in Coast Artillery Antiaircraft until he was sent to Officers' Candidate School at Benning, Georgia, from which he graduated 24 September 1942 and was on that date commissioned a Second Lieutenant, Infantry. He was promoted to First Lieutenant 21 November 1942.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty of the Charges and Specifications approved by the reviewing authority and the sentence, and to warrant confirmation of the sentence. A sentence of dismissal and total forfeitures is authorized upon conviction of violation of Articles of War 61 and 96.

William A. Sounds, Judge Advocate

Earle Stephen, Judge Advocate

Herbert B. Frederick, Judge Advocate

1st Ind.

War Department, J.A.G.O. 21 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 First Lieutenant Harold O. Sermons (O-1294544), 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 forfeitures be remitted and that the sentence as thus modified be carried into execution.

3. Attention is invited to the fact that this office was advised 1 February 1944 by the Commanding General, Fourth Service Command, that additional charges have been preferred against this officer, subsequent to the trial of the instant case, in which the accused is charged with driving while drunk on a public highway, making a false official statement, being drunk in uniform, and dishonorably failing to pay certain damages.

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

(Sentence confirmed but forfeitures remitted. G.C.M.O. 215, 26 May 1944)

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

(231)

SPJGQ
CM 248379

14 FEB 1944

UNITED STATES v. Technician 4th Grade LAWRENCE S. WILSON (39196151), DEML Detachment, San Francisco Port of Embarkation, Army Post Office.	SAN FRANCISCO PORT OF EMBARKATION Trial by G.C.M., convened at Fort Mason, California, 30 November 1943. Dishonorable discharge and confinement for five (5) years. Disciplinary Barracks.

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that T/4 Lawrence S. Wilson, DEML Detachment, San Francisco Port of Embarkation, Army Post Office, San Francisco, California, at the San Francisco Port of Embarkation Army Post Office, did, during the period from on or about 1 April 1943, to 23 October 1943, feloniously steal and abstract from various packages contained in the mail in the San Francisco Port of Embarkation Army Post Office, twenty-three (23) watches, * * * in violation of the Federal Penal Code 18 USC 317.

Specification 2: In that T/4 Lawrence S. Wilson, DEML Detachment, San Francisco Port of Embarkation, Army Post Office, San Francisco, California, at the San Francisco Port of Embarkation Army Post Office, did, during the period from on or about 1 April 1943, to 23 October 1943, feloniously steal and abstract from various packages contained in the mail, 2 cigarette lighters, 14 fountain pens, 5 Eversharp pencils, and 1 set of 1st lieutenant bars, in violation of the Federal Penal Code 18 USC 317.

Accused pleaded not guilty to both Specifications and to the Charge. He was found guilty of Specification 1 of the Charge, "except the words, 'BRITIX watch, waterproof stainless steelback, w/sweep colored leather strap, luminous dial-green hands, red sweep second hand. Identification on face INCABLOC; a HIALEAH watch, shockproof, stainless steel, black face, luminous dial, green hands, white sweep second hand', and the words, 'a MILITARY watch, waterproof, anti-magnetic, black face, luminous dial and hands, luminous sweep second hand, steel case,' and up further in line 6 the words 'twenty-three (23).'" He was found guilty of Specification 2 of the Charge "except the words, '14 fountain pens, 5 Eversharp pencils,' substituting therefor, '9 fountain pens and 4 pencils,'" and guilty of the Charge. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for five years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The competent and pertinent evidence of record discloses that accused, a colored sergeant, during the period between 1 April and 23 October 1943, was on duty in the Army Post Office at the Port of Embarkation, San Francisco, California. During this period his specific duties included the repacking of two types of containers of United States mail-sacks, containing packages sent by parcel post, and pouches, containing first class mail (letters) and small first class articles, the contents of which came from civilian post offices at San Francisco (R. 25-26). He transferred their contents back and forth from one to the other until each sack or pouch weighed exactly 50 pounds. After verifying its weight on a scale, accused closed the sack or pouch, sealed it, attached a tag displaying its destination and correct routing, and placed it in a designated group from which it was later picked up and sent to an airport or to a transport pier for future delivery to Army addressees overseas (R. 25, 26, 40). Accused was neither a bonded Army mail clerk nor a bonded assistant, but he did handle, in the course of his prescribed duties, first class mail matter which had not yet passed beyond control of the Post Office (R. 29). The prosecution offered, and the court received into the evidence, as Prosecution Exhibit 23 (R. 25), a copy of the Adjutant General's Field Manual relative to the Army Postal Service, which contains the Act of Congress of August 21, 1941 (Public 238, 77th Congress) and allied Army regulations for the purpose of establishing that an Army Post Office is "an authorized depository for the handling of mail" (R. 30). This exhibit is not with the record of trial. Without resolving this issue at the moment, the court decided to "review this document" (R. 32). Lieutenant Colonel Van Meter, in charge of the Post Office at Fort Mason, testified that "we have

received letters from time to time from the parents, wives and sweethearts of soldiers that they have sent certain items of jewelry, and so forth, which have not been received" (R. 26). This statement is the closest approach in the record to proof of the corpus delicti. Since it is the purpose of this holding to sustain the finding of guilt as to only one allegation contained in Specification 1 of the Charge, and the Charge, and to disapprove, for reasons set forth later herein, the balance of Specification 1 and also to disapprove Specification 2 of the Charge in its entirety, therefore only so much of the legally competent evidence of record as relates to the single allegation in questioning that accused did, at the time and place set forth, "feloniously steal and abstract from various packages contained in the mail in the San Francisco Port of Embarkation Post Office * * * a Banner watch, white face with gold numerals and hands, gold second hand, gold case * * * in violation of the Federal Penal Code 18 USC 317" is summarized herein below.

Acting on information received, Colonel Van Meter caused an investigation to be made regarding accused and detailed Captain D. C. Sherrets and subsequently Captain A. F. Reagan to make this investigation (R.11, R. 13). About 1115 or 1120, 23 October 1943 Captain Sherrets went to the third floor of the Army Post Office and proceeded to the section of the building where accused worked and watched him (R. 41). Accused and another soldier, at about noon, were the last to leave the first-class section where the pouches were being worked. They proceeded to cross the building to where their clothes hung near the latrine which they entered (R. 41). The other soldier came out first and shortly thereafter accused came out, proceeded to change from his fatigue clothes into his OD's and started across the room to go down the stairs. As accused came across the floor, an outline of an object was noted in his right pants' pocket (R. 42) which was bulging out (R. 12). Accused was asked to accompany Colonel Van Meter and Captain Sherrets into the Colonel's office (R. 42). When asked by Colonel Van Meter what he had in his pocket, accused pulled out Prosecution's Exhibit 1 (a Banner wrist watch in a watch box).

Captain Reagan, acting on instruction, went upstairs to the place where accused worked and found a cardboard box in the colored men's latrine. This cardboard box had the notation in ink "PH 13 BEEE" on one end of the box and on the cardboard box top was printed the words "BANNER" in capital letters and "CASED AND TIMED IN USA" (R. 50, R. 51). This box was found about 11:30 A.M., 23 October 1943. On cross-examination witness again testified that the watch box was found in the colored men's latrine.

Two or three days after the investigation of accused's footlocker, Captain Sherrets and Master Sergeant Perkins went to the place on the third floor where the fatigues of the various soldiers are hung on hooks, on two racks adjacent to the colored men's latrine. A man's name is printed and pasted over each hook (R. 43). There was a hook over which accused's name was posted and on this hook were some fatigue clothes. Master Sergeant Perkins and Captain Sherrets went through the fatigue clothes hanging on the hook designated as accused's and there found Prosecution's Exhibit 20-B (a torn end of a cardboard box which fits the box of Prosecution's Exhibit 3 found in the latrine) and Prosecution's Exhibit 20-C (a torn piece of brown wrapping paper) which was found in the right-hand pocket of the fatigue suit, bearing the stamp "Brooklyn N. Y. Oct 20 '43, U.S. Postage Paid .36, from Trading Post Jewelers, 427 Flatbush Ext., Brooklyn, N.Y. Robert Fields, 14048071, 76th C.A. (AA) Btry. C, APO #708 % PM, San Francisco, Calif., Air Mail To Coast. POSTMASTER: Contents merchandise — this parcel may be opened for postal inspection if necessary. Return postage guaranteed." (R. 44, 45). Subsequently Master Sergeant Perkins discovered Prosecution's Exhibit 30 (a small white price tag bearing the letters "PH 13 BEEE") which he found in the left hand pocket of the coat which had been hanging on this hook (R. 56). There was some tissue paper as well as the little cardboard end of the cardboard box found in the fatigue clothes and taken out by Captain Sherrets and witness Perkins (R. 59).

The evidence of record which stands unchallenged and unrebutted shows that as accused was walking away from his work, a watch in its original jeweler's watch box was produced by him from his pocket and a search of the place he had just left disclosed a cardboard box which fitted this particular watch and jeweler's watch box. A torn end of that cardboard box was found in fatigue clothes hanging on the hook assigned to him. A brown wrapping paper which in turn fitted both the cardboard outer box and the watch and jeweler's watch box was found in the right-hand pocket of the fatigue suit hanging on the hook assigned to accused, showing that the package and its contents had been mailed to a soldier overseas. A subsequent search of the fatigue clothes disclosed a small jeweler's price tag with the same notation on it that appeared on the watch box which had been discarded in the colored men's latrine where accused had been shortly before he was apprehended with the watch and the jeweler's watch box in his possession.

4. The accused, upon advice of counsel, elected to remain silent (R. 87) and the only affirmative evidence offered by the defense in his behalf was presented through the testimony of his company commander as a prosecution witness adopted by the defense, which in substance states that the character of accused, prior to these charges, was excellent and his type of service and duty satisfactory (R. 66).

5. The circumstantial evidence as to stealing the "Banner" watch from the mail as alleged is compelling. The mail matter found in the sacks and pouches handled by accused in the Army Post Office had not passed out of the custody of the Government or beyond protection of the law so as to prevent its stealing constituting a violation of section 317 U.S.C. Title 18 (Rosen v. U.S. 245; U.S. 467 (N.Y. 1917). Accused was caught red-handed with the stolen goods consciously concealed in the clothing he was wearing within a few minutes of, and but a short distance from, the time and place of his theft. Although entirely circumstantial, the incriminating circumstances are not only logically and reasonably consistent with his guilt but wholly inconsistent with any reasonable hypothesis of his innocence (C.M. 120937 (1918); C.M. 195705 (1931); Sec. 395(9) Dig. Ops. JAG 1912-40).

6. Omitting the three allegations excepted by the court from its findings of guilty as to Specification 1 of the Charge, and the one allegation of Specification 1 referring to the "Banner" watch herein held to be legally sufficient by the Board of Review, the Board is further of the opinion that the evidence of record is legally insufficient to sustain either the remaining 19 allegations set forth in Specification 1, or to sustain Specification 2 in its entirety, for the following reasons.

In the morning of 23 October 1943, and immediately following detection of accused in the theft of the "Banner" watch as related above; Lieutenant Colonel Van Meter, accused's commanding officer, and a Captain D. C. Sherretts (R. 14) took accused to "his barracks" (R. 14) located at 111 Seventh St., San Francisco, but not on a military reservation (R. 25), requested him to open his footlocker (R. 24, 25) and, without telling accused that he was under investigation (R. 24) or warning him of his rights in the premises (R. 25), his footlocker was opened and numerous articles such as watches, fountain pens, cigarette lighters, etc., were taken therefrom, and from a shelf at the end of accused's bunk (R. 14, 15). These articles were offered by the prosecution at the trial as prosecution exhibits. Over objection by the defense counsel they were received into the evidence by the court (Pros. Exs. 4, 5, 6, 8, 9, 12, 15, 17, 18). The gist of this objection by the defense was, that these articles were inadmissible as evidence because procured from accused's dwelling without a search warrant as required by the 4th amendment to the Constitution (R. 85). The objection was properly overruled (R. 86) by the law member.

> "Authority to make, or order, an inspection or search of a member of the military establishment, or of a public building <u>in a place under military control</u>, even though occupied as an office or as living quarters by a member of the military establishment, always has been regarded as indispensable to the maintenance of good order and

discipline in any military command * * * such a search is not unreasonable and therefore not unlawful." J.A.G. 250.413 July 23,1930 and sec. 395(27) Dig. Ops. JAG 1912-40}. (Underscoring supplied.)

The term "barracks" used in the testimony of record is more fully explained outside the record in the official investigation papers where this building is described as "the colored men's barracks at 111 7th St." in Lieutenant Colonel Van Meter's statement, and again in Captain Sherretts' and in Captain Reagan's statements as accused's "quarters at No. 2 Detachment."

In addition to the watches, pens and other articles found in accused's possession, at that same time and place, there were also discovered in his trunk locker five pawn tickets and six bills of sale covering the pawning or sale of watches by accused. These were signed by L. S. Wilson, L. S. Williams, L. H. Wallson. The dates on the pledge tickets and bills of sale reveal that these transactions occurred between 4 June and 21 October 1943 (Pros. Exs. 18, 31a, 32a, 33a, 34, 35, 36, 37, 38). Three pawnbrokers were called as prosecution witnesses, one of whom could not identify accused (R. 67, 69, 70), and they verified the transactions recited by these eleven tickets. Such possession by accused as was proved was not, of itself, sufficient to raise a presumption that the articles in question had in fact been stolen (Rosenberg v. State, 134 N.E. (Ind.) 856; State v. Lee, 182 S.W. (Mo.) 972). These articles, obviously, could have reached accused's trunk locker or room by other means than by theft. To hold accused's possession of them amounted to a trespass or was accompanied by a felonious intent, would be merely an inference, not a finding on evidence capable of shedding light on the inquiry (62 Southern (Ala.) 270). While paragraph 112a of the Manual for Courts-Martial states, in substance, that proof that a person was in possession of recently stolen property, if not satisfactorily explained, may raise a presumption that such person stole it, nevertheless this presumption is not raised until it first be proven that the property in question was stolen by someone. The corpus delicti may be established by circumstantial evidence but the circumstances proved in the instant case do not suffice for that purpose. Accused's possession was exclusive and conscious, but it would be pushing the rule too far to require one accused of crime to explain his possession of property which was never shown to have been either stolen or missing. The prosecution failed to prove that any of these goods as set forth in either Specification was stolen or missing; that they were stolen from the mail or that they were stolen from "various packages in the main in S.F.P. of E. Army Post Office," or that accused was in any way connected with, or a party to, such larcenies. Furthermore, there is no proof that the alleged stolen articles were ever deposited in the U.S. mail.

It is recognized that in prosecutions under sec. 317 Title 18 U.S. Code it is not necessary to allege or prove all the ingredients of larceny (Thompson v. U.S., 202 F. 401; 120 C.C.A. 575) since the purpose of the act is to preserve the sanctity of the mails and not to punish the theft of another's property. Hence, value and ownership are not essential matters of proof (Bowers v. U.S., 148 F. 379, 78 C.C.A. 193) since the offense, though including larceny, is not restricted to that offense (U.S. v. Trosper, 127 F. 476-1904). However, in the instant case, not only do these elements stand unproven, but the record is entirely barren of any evidence, other than strong suspicion or inference, that the goods found in accused's trunk locker and quarters were stolen goods in the first place or that they were ever stolen or missing from the Army Post Office at Fort Mason, California. Justice according to law demands more than that accused be guilty, it demands that he be proved guilty.

7. Certain irregularities or errors of procedure are noted both in the record and the procedure prior to trial. Accused made a damaging admission to Lieutenant Colonel Van Meter upon the official investigation, such as, "You've got me. It's perfectly obvious. So what's the use of going on with all this"; he denied having an accomplice "and that everything that he had done had been done entirely on his own." Captain Sherrett's statement shows that he was present and heard, not only these other admissions by accused, but also the further statement that accused's reasons for the theft of the watches and fountain pen sets was, in his own words, "because of the value attached to them." These damaging admissions against interest (see par. 114b, p. 116 M.C.M.) were not introduced into the evidence at the trial.

Prior to trial there were no efforts made, apparently, to obtain testimony by depositions from any of the addressors of the articles who had, before this trial, complained by letter to the Commanding Officer of the Army Post Office at Fort Mason, California that the goods they had mailed were never delivered, in order to establish the corpus delicti by many numerous and obvious possibilities of similarity between the articles mailed and those found in possession of accused.

These faults of omission prior to trial play no small part in bringing about a failure of legal proof with the resulting failure of justice in this case. One of the essential elements in establishing a prima facie case, justifying trial by a general court, is some proof, however slight, of the corpus delicti. Without it no set of charges should be referred for trial.

Handling of the exhibits by the prosecution leaves much to be desired. Many pieces of real evidence were introduced by the prosecution and subsequently were withdrawn without substituting a description thereof in the record.

8. Accused was born in St. Louis, Missouri and is now 30 years of age. He claims to have had over two years of pre-medical work at the University of Minnesota. He was drafted at Tacoma, Washington, on 1 December 1942 and has had over one year's service. He was a bartender for a time while in civilian life.

9. The court was legally constituted. For the reasons stated above the Board of Review is of the opinion that the record of trial is legally sufficient to sustain only so much of the finding of guilty of Specification 1 of the Charge as finds that accused did, on or about 23 October 1943, steal from the mail in the San Francisco Port of Embarkation Army Post Office a Banner watch, white face with gold numerals and hands, gold second hand, gold case, in violation of the Federal Penal Code 18 U.S.C. 317; legally insufficient to sustain the finding of guilty of Specification 2 of the Charge, but legally sufficient to sustain the finding of guilty of the Charge, and to support the sentence. No penalty is fixed by the Table of Maximum Punishments (par. 104c, M.C.M.) for this offense as a violation of Article of War 96, nor is there any analagous or closely allied offense. The penalty provided by sec. 317, Title 18 U.S.C. is a fine of not more than $2,000, or imprisonment for more than five years, or both.

William A. Rounds, Judge Advocate.

Paul Stephen, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 3 - MAR 1944 To the Commanding Officer, San Francisco Port of Embarkation, Fort Mason, California

1. In the case of Technician 4th Grade Lawrence S. Wilson (39196151), DEML Detachment, San Francisco Port of Embarkation, Army Post Office, I concur in the foregoing holding by the Board of Review and for the reasons states therein recommend that only so much of the finding of guilty of Specification 1 of the Charge be approved as finds that accused did, on or about 23 October 1943, steal from the mail in the San Francisco Port of Embarkation Army Post Office a Banner watch, white face with gold-numerals and hands, gold second hand, gold case, in violation of the Federal Penal Code 18 U.S.C. 317, that the finding of guilty of Specification 2 of the Charge be disapproved, and that the finding of guilty of the Charge and the sentence be approved. 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 248379).

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.

26 MAY 1944

SPJGH
CM 248390

UNITED STATES	)	93RD INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Essex, California, 12 January 1944. Dishonorable discharge (suspended) and confinement for five (5) years. Rehabilitation Center.
Private WALTER L. ARKWARD (32302958), Headquarters Battery, 594th Field Artillery Battalion.	)	

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 pleaded not guilty to and was found guilty of the Charge and Specification. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for five (5) years. The reviewing authority approved the sentence, ordered it executed but suspended execution of the dishonorable discharge, and designated the Rehabilitation Center, Turlock, California, as the place of confinement. The proceedings were published in General Court Martial Orders No. 9, Headquarters 93rd Infantry Division, 16 January 1944.

3. The only question requiring consideration is whether the participation of Captain Frank M. Scott, Corps of Engineers, in the trial of the case as trial judge advocate, was such an error as to require the vacation of the findings and sentence.

4. The record of trial discloses that by paragraph 1, Special Orders No. 316, Headquarters 93rd Infantry Division, 14 December 1943, a general court-martial (hereafter designated Court "A") was appointed, of which Captain St. Elmo P. Henderson was the designated trial judge advocate. The charges in this case were referred for trial to Captain Henderson, as trial judge advocate of Court "A", on 22 December 1943. By paragraph 7, Special Orders No. 325, same headquarters, 24 December 1943, a new court (hereafter designated Court "B") was appointed, of which Captain Henderson was also named trial judge advocate, and all unarraigned cases previously referred to

Court "A" were referred to Court "B". By paragraph 2, Special Orders No. 1, same headquarters, 1 January 1944, a new court (hereafter designated Court "C") was appointed, of which Captain Henderson was named trial judge advocate, and all unarraigned cases in the hands of Court "B" were transferred to Court "C". By paragraph 3, Special Orders No. 11, same headquarters, 12 January 1944, Captain Frank M. Scott was substituted as trial judge advocate of Court "B" in place of Captain Henderson. The case was tried on 12 January 1944 by Court "C", except that Captain Scott acted as trial judge advocate in place of Captain Henderson, the designated trial judge advocate of Court "C". The assistant trial judge advocate of both Courts "B" and "C" was Second Lieutenant Samuel W. Allen. The record shows that the members of the court, the personnel of the prosecution and the witnesses were sworn. The record indicates that the case was tried by the "TJA" and Captain Scott authenticated the record.

5. It will be seen from the foregoing that although Captain Henderson was the duly appointed trial judge advocate of the court that tried the case he did not participate in the proceedings but that Captain Scott, who had not been designated as the trial judge advocate of this court, acted as such in the trial of the case. The question is presented whether the participation of Captain Scott in the trial was such an error as to require the vacation of the findings and sentence.

On the authority of CM 200734, Burns (Dig. Op. JAG, 1912-40, sec. 368(1); 5 B.R.1), recently approved and followed by the Board in CM 248464, Adams, the Board of Review is of the opinion that his participation constituted fatal error.

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

Samuel M. Driver, Judge Advocate

Walter O'Connor, Judge Advocate

F. J. Lotterhos, Judge Advocate

1st Ind.

War Department, J.A.G.O., 29 MAY 1944 - To the Secretary of War.

1. Herewith transmitted for your action 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 Walter L. Arkward (32302958), Headquarters Battery, 594th Field Artillery Battalion.

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,
Major General,
The Judge Advocate General.

2 Incls.
Incl.1-Rec. of trial.
Incl.2-Form of Action.

(Findings and sentence vacated by order of the Under Secretary of War. G.C.M.O. 287, 12 Jun 1944)

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

SPJGH
CM 248393

28 MAY 1944

UNITED STATES	)	93RD INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Essex, California, 14 January 1944. Dishonorable discharge (suspended) and confinement for five (5) years. Rehabilitation Center.
Private ULYSSES G. WATSON (14067865), Company C, 318th Engineer Combat Battalion.	)	

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 pleaded not guilty to the Charge and the Specifications. He was found guilty of absence without leave from 8 November 1943 to 16 November 1943, in violation of the 61st Article of War, and not guilty of absence without leave from 26 May 1943 to 7 July 1943. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for five (5) years. The reviewing authority approved the sentence, ordered the sentence executed but suspended execution of the dishonorable discharge, and designated the Rehabilitation Center, Turlock, California, as the place of confinement. The proceedings were published in General Court Martial Orders No. 29, Headquarters 93rd Infantry Division, 18 January 1944.

3. The only question requiring consideration is whether the participation of Captain Frank M. Scott, Corps of Engineers, in the trial of the case as trial judge advocate, was such an error as to require the vacation of the findings and sentence.

4. The record of trial discloses that the charges were referred for trial on 14 January 1944, to Captain Frank M. Scott, as trial judge advocate of a general court-martial appointed by paragraph 2, Special Orders No. 1, Headquarters 93rd Infantry Division, 1 January 1944. Examination of that order discloses that Captain St. Elmo P. Henderson was designated trial judge advocate of the court. By paragraph 3, Special Orders No. 11, same headquarters

12 January 1944, Captain Scott was substituted in place of Captain Henderson as trial judge advocate of a previous general court-martial appointed on 24 December 1943. However, there is nothing to show that Captain Scott was ever substituted in place of Captain Henderson as trial judge advocate of the general court-martial appointed on 1 January 1944. The case was tried on 14 January 1944 by the court to which it had been referred except that Captain Scott acted as trial judge advocate. The record shows that the members of the court, the personnel of the prosecution and the witnesses were sworn. The record indicates that the case was tried by the "TJA". Captain Scott authenticated the record as trial judge advocate.

5. The fact that in the first indorsement referring the case for trial, Captain Scott was erroneously stated to be the trial judge advocate of the general court-martial appointed on 1 January 1944 would not, of course, affect the validity of the trial by this court, if Captain Henderson had acted as trial judge advocate (CM 198108, Casey, 3 B.R. 159). Nor would this erroneous designation work a substitution of Captain Scott for Captain Henderson on the court. It is clear that it was not the intention of the general court-martial authority to make a substitution in this irregular manner and that the indorsement was drawn under the erroneous assumption that Captain Scott had previously been substituted in place of Captain Henderson as trial judge advocate of this court.

6. It will be seen from the foregoing that although Captain Henderson was the duly appointed trial judge advocate of the court that tried the case he did not participate in the proceedings but that Captain Scott, who had not been designated as the trial judge advocate of this court, acted as such in the trial of the case. The question is presented whether the participation of Captain Scott in the trial was such an error as to require the vacation of the findings and sentence.

On the authority of CM 200734, Burns (Dig. Op. JAG, 1912-40, sec. 368(1); 5 B.R.1), recently approved and followed by the Board in CM 248464, Adams, the Board of Review is of the opinion that his participation constituted fatal error.

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

Samuel M. Driver, Judge Advocate

T. Allen Clemmer, Judge Advocate

H. Lotterhos, Judge Advocate

1st Ind.

War Department, J.A.G.O., 29 MAY 1944 - To the Secretary of War.

1. Herewith transmitted for your action 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 Ulysses G. Watson (14067865), Company C, 318th Engineer Combat Battalion.

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-Rec. of trial.
Incl.2-Form of Action.

(Findings and sentence vacated by order of the Under Secretary of War. G.C.M.O. 286, 12 Jun 1944)

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

SPJGK
CM 248408

16 FEB 1944

UNITED STATES	MIDDLETOWN AIR SERVICE COMMAND
v.	Trial by G.C.M., convened at Pope Field, Fort Bragg, North Carolina, 22 December 1943. Dismissal.
Second Lieutenant HAYWOOD V. YOUNG, JR. (O-570892), Air Corps.	

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

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

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

CHARGE I: (Finding of not guilty).

Specification: (Finding of not guilty).

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

Specification: In that Second Lieutenant Haywood V. Young, Junior, 83rd Troop Carrier Squadron, 437th Troop Carrier Group, from on or about 26 April 1943 to the date of this charge sheet has been and is now guilty of conduct unbecoming of an officer and a gentleman by wrongfully and dishonorably issuing repeated worthless checks and exhibiting continued indifference to his pecuniary obligations, thereby causing frequent complaints of creditors and bringing scandal upon the military service, in that he has made and uttered the following checks without sufficient funds to cover same when presented for payment: Check dated on or about 26 April 1943 drawn on the National Bank of Fort Sam Houston, San Antonio, Texas, payable to Flight Officer Charles B. Bierbaum, 27th Troop Carrier Squadron, Dunnellon Army Air Field, Dunnellon, Florida, in the sum of Ten Dollars ($10.00); Check dated on or about 28 April 1943 drawn on said National Bank of

Fort Sam Houston payable to said Flight Officer Charles B. Bierbaum in the sum of Forty-Five Dollars ($45.00); Check dated on or about 7 June 1943 drawn on said National Bank of Fort Sam Houston payable to Baer Field Post Exchange in the sum of Thirty Dollars ($30.00); Check dated on or about 7 June 1943 drawn on said National Bank of Fort Sam Houston in the sum of Five Dollars ($5.00); Check dated on or about 26 June 1943 drawn on Third National Bank, Sedalia, Missouri, payable to Peoples National Bank, Warrensburg, Missouri, in the sum of Six Dollars ($6.00); re-presentment for payment on or about 12 July 1943 to said Peoples National Bank of said check dated on or about 26 June 1943 after having closed out his account in said Third National Bank on or about 8 July 1943; Check dated 13 October 1943 drawn on said National Bank of Fort Sam Houston payable to First Citizens Bank and Trust Company, Fort Bragg, North Carolina, in the sum of Twenty Dollars ($20.00); Check dated 20 October 1943 drawn on said National Bank of Fort Sam Houston payable to First Citizens Bank and Trust Company in the sum of Twenty-Five Dollars ($25.00); and further in that the accused failed and refused and still fails and refuses to meet his pecuniary obligations in the following manner: On or about 27 March 1943 the accused became indebted to Army Emergency Relief, Stout Field, Indianapolis, Indiana, in the sum of One Hundred Dollars ($100.00) and then and there promised in writing to pay said indebtedness in two (2) equal installments of Fifty Dollars ($50.00) each on 4 April 1943 and 4 May 1943; yet the accused regardless of said promise and despite repeated requests, warnings and demands failed to pay said first installment until 16 July 1943 and has failed and refused and now fails and refuses to pay said remaining installment of Fifty Dollars ($50.00).

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

Specification: In that Second Lieutenant Haywood V. Young, Jr., 83rd Troop Carrier Squadron, 437th Troop Carrier Group, on or about 15 February 1943 did, at Sedalia Army Air Field, Warrensburg, Missouri, borrow the sum of Ten Dollars $10.00) from Master Sergeant John (NMI) Kvindis, Jr., now of the 85th Troop Carrier Squadron, 437th Troop Carrier Group, the said Second Lieutenant Haywood V. Young, Jr., wrongfully and unlawfully failing to promptly repay five dollars ($5.00) of the said indebtedness.

He refused to plead to any of the Charges and Specifications. The court correctly treated his refusal to plead as a plea of not guilty to all Charges and Specifications. He was found not guilty of Charge I and its Specification, and guilty of Charges II and III and their Specifications. No evidence

of previous convictions was introduced. He was sentenced to dismissal, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year. The reviewing authority approved "only so much of the sentence as provides for" dismissal (the effect of this action being to remit the confinement and forfeitures) and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution.

a. Charge II and Specification.

In order to present a clear recital of the events connected with this Specification, it is necessary to include incompetent testimony in the summary of the evidence.

The prosecution and counsel for accused stipulated "the existence, amounts, dates, and presentation" of "the checks set forth in the Specification of Charge II" (R.17). None of them was introduced in evidence, all testimony concerning this Specification being given by Lieutenant Colonel Donald J. French, Air Corps, Executive Officer of the 437th Troop Carrier Group, and accused's commanding officer.

He testified that about 18 June 1943, it "came to his attention" that two checks drawn on The National Bank of Fort Sam Houston (Texas) presented by accused at the Post Exchange, Baer Field, Fort Wayne, Indiana, had been returned for insufficient funds. Witness called accused into his office, and asked him if the checks, for $30 and $5, were worthless. Accused "admitted them". Upon instructions by witness to do so, accused brought him a money order for $35, which witness sent to Baer Field in payment of the two checks (R.14,15,18,31-33; Def. Ex. E).

Witness testified that on 9 July 1943 "we got another letter from Flight Officer (Charles B.) Bierbaum, of the 27th Troop Carrier Squadron, 10th Carrier Group, Dunellon, Florida", involving "two checks totaling fifty five dollars". Reference to the Specification of Charge II shows these to have been one for $10, dated on or about 26 April 1943, and one for $45, dated on or about 28 April 1943, both drawn on the National Bank of Fort Sam Houston and both payable to Bierbaum. At the time witness talked to accused about these checks "they were unpaid". Witness told accused he should pay them. Accused showed witness a Western Union money order stub for $55, "that he said he had sent to Flight Officer Bierbaum, trying to settle the account. The stub, the Money Order was returned to him without payment" (R.16,17,18,33,34,49,50). Witness assumed that "apparently the man (Bierbaum) was not at the base at the time" (R.34).

Witness also testified that "one check for six dollars came to our attention shortly after that". This check, dated 26 June 1943, was

drawn on the Third National Bank of Sedalia (Missouri) and presented at the Sedalia branch of The People's National Bank of Warrensburg, Missouri. Witness stated that he told accused "to go up and straighten out the check", and that "the check bounced on the second occasion" it was presented. It was also stipulated by defense counsel that upon being presented for payment a second time (about 12 July 1943) the check was again returned for "insufficient funds" (R.18,34).

Witness stated that after their group left Sedalia "further bad checks on Lieutenant Young's part" became known to him. Two checks, drawn on accused's account at The National Bank of Fort Sam Houston, and presented at the Fort Bragg branch of the First Citizens Bank and Trust Company were returned marked "insufficient funds" (R.19,36). Reference to the Specification shows these to have been a check for $20 dated 13 October 1943 and one for $25 dated 20 October 1943. Witness stated that accused told him and a "Major Bradley" in accused's room in the Bachelor Officers' Quarters that "he had passed the two checks in question" (R.19,36).

Witness stated that on 19 June 1943, there was received at Group Headquarters a letter from the "Army Emergency Relief Officer", Stout Field, Indianapolis, Indiana, which "dealt with" an Army Emergency Relief loan of $100 made to accused by that office in the "latter part of March". Witness stated that "apparently $100 was due, they were writing for the first payment". Witness called accused into his office and accused "admitted the indebtedness". Witness told accused to bring him a money order for $50 which witness was to forward to Stout Field. Though accused did not do so, it appears that this payment was made in some other fashion, for it was stipulated that only $50 of the amount remained unpaid at the time of trial (R.15,16).

b. Charge III and Specification.

Master Sergeant John A. Kvindis, 85th Troop Carrier Squadron, 437th Troop Carrier Group, testified that in February of 1943 accused had borrowed $10 from him, an enlisted man in accused's organization. Accused did not repay the money until some time during the first two weeks in April, when witness asked him for repayment of "just what you can spare". He stated that accused then paid him $5 of it. Thereafter witness unsuccessfully asked accused for the remaining $5 "about three or four times". Accused told witness that he did not have the money. On one occasion witness observed accused making a purchase in the Post Exchange, asked him, "Do you have any money?", and though accused denied that he did, witness observed that accused received more than five bills in change with his purchase. In the latter part of May, in the presence of "Lieutenant Lacy" accused denied owing witness, but did pay $5 by check, which witness cashed (R.52-57).

Colonel French testified that when he and "Major Bradley" questioned accused following the non-payment of the checks presented at Fort Bragg, accused stated "that it was his intention through a series of wrongdoings to have his appointment as an officer in the Army of the United States terminated" (R.19,36,39). At another time accused told witness and "Colonel Hudgins that it was never his idea to go to Officers' Candidate School, * * * that he didn't know why he was sent, that it was not to his liking, that he wanted to be a soldier, that it was the height of his ambition" (R.38).

Evidence for the defense.

Technical Sergeant Michael L. Melo, Headquarters, 437th Group, testified that he was Communications Technical Inspector for the Group, that he was communications chief under accused in the 83rd Troop Carrier Squadron, and that he had had experience in communications work for two and one-half years with Pan-American Airways and four years in the Army. He stated that in his opinion accused's ability in radio communications was "above average", that he was able to find immediately the sources of trouble in radio sets which would not operate, that he could "build sets from just scrap", knew "how to handle the operations of a radio", and was a satisfactory administrator (R.58-60). Captain James C. Matheny, 86th Troop Carrier Squadron, testified that he was a communications officer, with 28 years of experience in civilian radio communications, had worked with accused, and believed him highly skilled in radio. He stated that accused could build transmitters, rejuvenate and reconstruct receivers, and build various types of antennae about which an ordinary radio man knew nothing (R.60,61).

Accused's rights were explained to him, and his counsel stated that he did not wish to testify (R.62).

In his closing argument to the court, accused's counsel stated that -

> "* * * passing hot checks, bouncing back from all over, the borrowing of money and refusing to pay, all the indiscretions in the world - he is guilty, he makes no bones about it, he is guilty under the 95th [Article of War]. He stipulates it, everything is stipulated. They are bad checks, he did it intentionally. * * *".

4. It is important to observe that the prosecution failed to introduce competent evidence sufficient to prove the "bad check" offenses. The pertinent statements made by accused to Lieutenant Colonel French were confessions and were incompetent because there was no proof that accused had been advised of his rights. The remainder of Lieutenant Colonel French's testimony was either incompetent or insufficient to sustain the

allegations. However, as noted, the defense stated that it was "willing to stipulate the existence, amounts, dates, and presentation of" the checks set forth in the Specification of Charge II (R. 17). Technically speaking, this stipulation did not embrace every element of the offenses under consideration, but the defense counsel, in his closing argument, made it clear that the intention was to stipulate every fact alleged concerning the checks. Paragraph 126b, Manual for Courts-Martial (1928), states that a stipulation "which practically amounts to a confession" should not ordinarily be accepted by the court where the accused has pleaded not guilty, and of course a failure to plead, as in the present case, amounts to a plea of not guilty. However, the language of the Manual leaves the acceptance or rejection of the stipulation to the discretion of the court, and the court did not abuse its discretion. Furthermore, the language quoted from the closing argument of the defense counsel amounts to an admission of guilt, and under the circumstances the admission is binding upon accused (Dig. Op. JAG, 1912-40, sec. 395(5); CM 171469, Ortiz).

With reference to that portion of the Specification of Charge II relating to the indebtedness to the Army Emergency Relief, the stipulation and closing argument sufficiently establish the guilt of accused.

The facts acknowledged by the stipulations and admissions evince a course of conduct unbecoming an officer and a gentleman, in violation of Article of War 95.

That accused borrowed $10 from an enlisted man in his command, and wrongfully failed promptly to repay $5 of the indebtedness, as alleged in the Specification, Charge III, was proved beyond a reasonable doubt. Such conduct is a violation of Article of War 96 as charged.

5. War Department records show that accused is 22-4/12 years of age and married. He is apparently a high school graduate and attended two colleges for a total of one and one-half years. He enlisted in the Regular Army in October of 1939, rising to the grade of Staff Sergeant. He was discharged to accept a commission as Second Lieutenant, Army of the United States, upon graduating from Army Air Forces Officer Candidate School, Miami Beach, Florida, on 9 December 1942. In recommending him for attendance at Officer Candidate School, his commanding officer, Captain John A. Beshears, Air Corps, stated that he had "demonstrated outstanding qualities of leadership" and "excellent" character.

6. The court was legally constituted and had jurisdiction of the person and the subject matter. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant

confirmation thereof. Dismissal is authorized upon conviction of violation of Article of War 96 and mandatory upon conviction of violation of Article of War 95.

(On Leave), Judge Advocate.

John Rosenfield, Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 21 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 Haywood V. Young, Jr. (O-570892), 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. Accused refused to plead to the Charges and Specifications, which refusal the court treated as a plea of not guilty. It appears from the record that upon more than one occasion, while he was being questioned concerning the offenses alleged, accused voluntarily stated that he had not wanted to become and did not want to remain an officer in the Army, but preferred an enlisted status. He assigned this as the reason for his conduct. I recommend that the sentence be confirmed and carried into execution.

3. Attached to the record of trial are communications dated respectively 24 January and 14 January 1944, from the reviewing authority, Brigadier General John M. Clark, Commanding General, Middletown Air Service Command, and Colonel Glenn C. Salisbury, Commanding Officer, Army Air Base, Pope Field, recommending that accused be permitted to enlist in the Army in the event that the President approves the sentence of dismissal. There is also attached to the record a communication, dated 12 January 1944, from Lieutenant Colonel Willis F. Daniels, Staff Judge Advocate, Middletown Air Service Command, relating thereto.

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.

(Sentence confirmed. G.C.M.O. 152, 4 Apr 1944)

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

SPJGN
CM 248412

18 FEB 1944

UNITED STATES	SAN BERNARDINO AIR SERVICE COMMAND
v.	Trial by G.C.M., convened at Long Beach Army Air Field, Long Beach, California, 14, 15 December 1943. Dismissal.
Second Lieutenant RICHARD H. STODDARD (O-527964), 14th Ferrying Squadron, Air Transport Command.	

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 Specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that 2nd Lt. Richard H. Stoddard, 14th Ferrying Squadron, 6th Ferrying Group, Ferrying Division, Air Transport Command, Long Beach Army Air Field, Long Beach, California, did, at or near Inglewood, California, on or about 20 November 1943 with intent to commit a felony viz: rape, commit an assault upon Miss Patricia Caldwell, by willfully and feloniously taking hold of said Patricia Caldwell and attempting to have carnal knowledge of said female against her will.

He pleaded not guilty to and was found guilty of the Specification except the words "with intent to commit a felony, viz: rape", "and attempting to have carnal knowledge of said female" and "feloniously" for which latter the word "wrongfully" was substituted of which he was found guilty and of the excepted words not guilty, and of the Charge not guilty but guilty of a violation of Article of War 96. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and "pursuant to A.W. 50½ the order directing the execution of the sentence" was withheld which action must be considered as tantamount to forwarding the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that Miss Patricia Caldwell, hereinafter called the prosecutrix, although only eighteen years of age gave the impression of being older from her attire and actions both on the occasion of the accused making her acquaintance on 18 November

1943 and their subsequent "date" on the night of 20 November 1943. She had met the accused, who she did not know was married, at a dance given by the employees of the Los Angeles Port of Embarkation at the Lakewood Country Club where she danced with him, drank several "coke highs" with him and prior to leaving about midnight wrote her name and telephone numbers, both at her home and her place of employment, upon a slip of paper which she gave to him in lieu of granting his request to escort her home. Early on the evening of 20 November 1943 the accused called her and invited her to have dinner with him, which invitation she accepted, giving him her home address and requesting him, if possible, to bring along another officer to escort one of her friends. The accused, however, arrived at her house alone about 2000 o'clock and, after meeting and visiting with her mother for a few minutes, the couple departed in accused's coupe ostensibly for dinner at a hotel in Long Beach, California, as originally suggested by the accused. While riding they changed their destination, at the prosecutrix' suggestion, to the 331 Club, a Cocktail Lounge, in Los Angeles, en route to which they both took a drink or two from a bottle of Vodka which the accused had theretofore procured and had in the glove compartment of the car. Encountering difficulty in locating the 331 Club, they stopped at another cocktail bar where service to her was refused because of her apparent minority, although she protested such indignity and stated that her identification was in the car. Leaving this place, they observed the sign of the 331 Club further down the street and immediately walked thereto (R. 14-19, 23-33, 37-45).

At the latter club the prosecutrix was served at least two "coke highs" and a Planters Punch, drinking all except part of the latter, while the accused drank Scotch and water. At this time, approximately 2130 o'clock, she complained of feeling "kind of dizzy and sleepy" and they returned to the car where the accused kissed her with her neither protesting nor manifesting pleasure. Passersby assisted in pushing the car, which refused to start, and they then drove towards her home with her alternately giving directions and falling asleep. Awaking from one of her naps she found the car had stopped upon a side road about fifteen yards from the main highway and facing it. The accused absented himself for a few minutes and upon returning attempted unsuccessfully to start the car. He then pressed his attentions upon her by kissing her and fondling her person against her will during which preliminaries she attempted to escape by opening the car door which the accused promptly closed, although none of the windows were up and it was hot in the car. He renewed his advances, pressed her down on the car seat while on top of her trying to pull her pants aside while his penis was between her legs and "he started up my dress with his hand and started to force himself in me and put his finger in me. And I screamed and started crying and kept pleading with him to please get off". The prosecutrix managed to extricate herself and to get out of the car where she was pushed to the ground with the accused again on top of her, pushing her shoulders back and trying to spread her knees apart with his leg. During this tussle

she lost a shoe and stocking which at her request they located after a search during which she noticed that his trousers were unzipped. He still persisted in his amorous advances and she struck him over the eye with her shoe causing him to tell her not to do it again. Another struggle ensued during which she twice struck him with the shoe on the back of the head, stunning him and causing a profuse flood of blood which discolored her coat and face and his shirt, undershirt, tie, handkerchief and trousers. Having twice called for help over his protest that she would be sorry, she then backed away from him to the car, snatched her purse and with her shoes and stockings in hand ran to the main highway, leaving the accused lying near the car mumbling "Come here, Honey" (R. 19-23, 34-37, 45-101).

While trudging along the highway about two miles east of the Fox Hills Riding Academy her scratched and bloody face and barefooted condition attracted the attention of two women and a man, in a passing car. Between 2300 and 2400 o'clock they invited her to ride with them and conveyed her to her home, arriving there shortly after midnight. The prosecutrix did not appear to be intoxicated to the women in the car and, upon arrival at her home, the prosecutrix told her mother that she had not been "reached" and the name of the accused's commanding officer but omitted to relate the amount of drinking she had done which was consistent with her claimed aversion to the use of intoxicants. Her mother immediately reported the incident to the accused's commanding officer and a few days later, during the investigation, an enlisted man photographer had attempted to secure photographs of her daughter's facial bruises which had been observed when she had been brought home and the accused had pleaded with her and her daughter to dismiss the charges. Although the mother had contacted her attorney and explained what the damages were, she denied ever having authorized the attorney to secure the dismissal of the charges provided the damages were paid as "the principle of the thing still remained" (R. 9-14, 101-109, 110-112, 112-129).

About 0200 o'clock on 21 November 1943 the Operations Officer, pursuant to orders and accompanied by the Post Officer of the Day, went to the accused's quarters where he was found asleep in his pajamas. He appeared to have been drinking to excess, had a wound in the back of his head and, although not asking why he was being arrested, nodded his head affirmatively when asked whether he had been in a fight. He was escorted to the hospital where he was noncommittal and his wounds, consisting of an abrasion and a short laceration in the back of his head, were treated. Later the same morning the Provost Marshal secured the clothing which the accused had worn on the preceding night. The prosecutrix' memorandum of her telephone numbers was found in the pocket of his shirt. The prosecutrix' coat was similarly obtained but her other clothing, worn on the occasion in question, were being laundered. During the course of the investigation pictures of the accused showing his wounds were also taken and on two occasions, after explanation of his right to speak or remain silent, he had made written statements, one of which was sworn and, according to the accused who took the stand upon voir dire, the other

had been given after his request to see his immediate superior officer and counsel had been refused. The statements were admitted into evidence over the accused's objection but both of them recount only the events preceding the parking of the car on the side road and his return to camp after the prosecutrix' departure with the accused professing an ignorance of the events in the interim. The accused's clothes, the prosecutrix' coat, the address memorandum and the pictures aforementioned, which revealed no injury to the prosecutrix, were also admitted into evidence (R. 129-132, 132-134, 135-136, 137-138, 138-147, 148-149, 149-158, 158-165, 165-168, 169-176, 176-180; Pros. Exs. "A" - "L-2").

4. The defense's motion for findings of not guilty was denied and one of the accused's officer comrades who had attended the dance at the Lakewood Country Club testified concerning the events of that evening. His version thereof did not differ materially from that of the prosecutrix, as hereinabove related, or that of the accused as hereinafter mentioned, except that the prosecutrix looked and acted considerably older than 18 years of age, that she partook very much more extensively of alcoholic beverages than she admitted, that she indulged in telling "dirty jokes" with the group and that she and the accused danced "cheek to cheek; body to body" (R. 182-197).

5. The accused, after explanation of his rights as a witness, testified. His version of the events during the evening at the Country Club did not materially vary from that of the preceding witness. Neither did his version of the events preceding their arrival at the 331 Club on the evening in question materially vary from that of the prosecutrix except that the Club was her selection and that she had maintained that she was 21 years old when she was refused a drink because of her suspected minority. At the 331 Club she had drunk "double coke-highs" and more of them than she had admitted and their departure was occasioned by her remark "I'm pretty drunk, I think you will have to carry me". While assisting her with her coat she had permitted him to kiss her and while driving away she had sat close to him with her arm around his shoulder for a while until she lay down in the seat with her head in his lap during intermittent naps from which she would arouse herself to kiss him and to give directions as to the route. The car was parked on the side road pursuant to her request and they embraced and kissed "to quite an extent at the time" which she apparently enjoyed as she stated it was getting warm in the car and relaxed "just as though she had become excited over the petting". Even then the accused made no effort to get on top of her or to secure intercourse although he did have his hand "inside her leg several times" at which action she did not protest. She then got out of the car and sat on the ground a few feet away where he joined

her and they resumed their amorous actions in a reclining position while discussing whether they would engage in intercourse to which she was demurring because she did not know him well enough. About this time they realized that they were sitting in a patch of sand burs which they had mistaken for grass and she complained of them sticking in her hair and legs. While he was removing them from her hair, she elevated her dress to unhook her stockings which she removed with her shoes disclosing all her undergarments and precipitating further kissing during which she lost a shoe (R. 198-230).

The shoe being found, the accused sat down at another place and requested the prosecutrix to come to him which she did and he clasped his arms around her legs but she tapped him lightly on the forehead with her recovered shoe. He attempted to take the shoe from her and, during the struggle, she hit him twice with it on the back of his head causing a profuse flow of blood. She sat down, held his head to her breast, then screamed "I didn't mean it" and backed away towards the car with him following her saying "Honey, come here" until he fell down and lost consciousness because that was the last he remembered seeing her (R. 230-233).

Upon regaining consciousness he walked to an uninhabited house some distance away, returned to his car which appeared to have been moved and drove to the highway where he picked up an unknown enlisted man who assisted him in returning to his barracks where he undressed and went to sleep until he was awakened and arrested. He had given the two statements because he was under the impression that he had to make some kind of a statement and regretted that he had not elected to make a full disclosure in them. He was unable to give any reason why the prosecutrix had struck him with the shoe except that he was trying to take it away from her. Three pictures of his coupe automobile were admitted into evidence and it was stipulated that an absent officer would testify substantially as the defense's first witness. Upon proper motion all references to the accused's married status were stricken (R. 233-253, 254-258; Def. Exs. 1-3).

6. The Specification alleges that the accused at a designated time and place assaulted the prosecutrix with intent to rape in violation of Article of War 93. The court by exceptions and substitutions found the accused not guilty as specified and charged but guilty of committing an assault upon the prosecutrix by "wrongfully" taking hold of her which the court found as a violation of Article of War 96. Assaulting a female accompanied by indecent liberties with her person is violative of Article of War 96. (CM 188606 [1929] Dig. Ops., JAG, 1912-1940, Sec. 454 [11]). Such conduct, furthermore, is manifestly of a nature to bring discredit upon the military service.

The findings of the court obviate the necessity of evaluating the evidence to ascertain its sufficiency to prove the graver offense originally specified. Suffice it to say that the evidence for the prosecution at the very least shows a wrongful assault upon the prosecutrix by the accused in which he took indecent liberties with her person under the aggravated conditions of her minority, her seeming willingness induced by the use of intoxicants and upon a side road near a main highway. This much even the accused in his testimony admits. The incident has all the characteristics of lewdness, lasciviousness and licentiousness, amounting to drunken debauchery, and was scantily cloaked only by the darkness of night from the public, using the adjacent highway. All of the evidence, therefore, beyond a reasonable doubt supports the findings of guilty of the Specification, as found by the court, in violation of Article of War 96.

7. The accused is about 30 years of age. The War Department records show that he has no prior enlisted service, having been commissioned a second lieutenant on 10 July 1943 after having been employed during the preceding month as civilian pilot by the Ferrying Division of The Air Transport Command.

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 Specification and the Charge, both as found by the court, and the sentence, and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 96.

Abner E. Lipscomb, Judge Advocate

Benjamin R. Sleeper, Judge Advocate

Gabriel H. Golden, Judge Advocate

SPJGN
CM 248412

1st Ind.

War Department, J.A.G.O., 24 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 Richard H. Stoddard (0-527964), 14th Ferrying Squadron, Air Transport Command.

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

(Sentence confirmed but execution suspended. G.C.M.O. 184, 20 May 1944)

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

SPJGV
CM 248438

18 MAR 1944

UNITED STATES	AIRBORNE COMMAND
v.	Trial by G.C.M., convened at Fort Benning, Georgia, 21 December 1943. Dismissal and total forfeitures.
Second Lieutenant MELVIN E. BACKES (0-1031290), Cavalry.	

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OPINION of the BOARD OF REVIEW
TAPPY, KIDNER and HARWOOD, 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 2nd Lieutenant Melvin E. Backes, attached to Pool, 515th Parachute Infantry, Fort Benning, Georgia, did, without proper leave, absent himself from his then organization and station at Fort Benning, Georgia, from about 19 August 1943 to about 25 September 1943.

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

Specifications 1 to 12 inclusive: (Findings of guilty disapproved by reviewing authority).

He pleaded not guilty to all Charges and Specifications. He was found guilty of Charge I, and its Specification; guilty of Charge II and Specifications 8, 9 and 10 thereof; guilty of Specifications 1, 2, 4, 5, 6, 7, 11 and 12, except the words, "with intent to defraud", "fraudulently", "well knowing that he did not have and not intending that he should have", and substituting therefor the words, "not having", of the excepted words, not guilty, of the substituted words guilty; guilty of Specification 3, Charge II, except the words "with intent to defraud", "fraudulently", and "in money legal tender of the United States" and "well knowing that he did not have and not intending that he should have", and substituting therefor the words, "services rendered to the value of" and "not having", of the excepted words, not guilty, of the substituted words, guilty. 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 disapproved the findings of guilty of all Specifications of Charge II; approved the findings of guilty of Charge I, and its Specification, approved the sentence, and forwarded the record of trial for action under the 48th Article of War.

Although the reviewing authority in his action disapproved the findings of guilty of each of the 12 Specifications of Charge II, he failed to also disapprove the finding of guilty of the Charge. This, in effect, amounted to a disapproval of the findings of guilty of the Charge (Dig. Op. JAG, 1912-40, sec. 404).

3. Since the reviewing authority approved only the findings of guilty of Charge I, and its Specification, involving absence without leave in violation of the 61st Article of War, only the evidence pertaining to that Specification and Charge will be discussed.

The evidence for the prosecution is substantially as follows:

An extract copy of the morning report of Company H, 515th Parachute Infantry, Fort Benning, Georgia, showing the accused's unauthorized absence from 19 August 1943 to 25 September 1943 was introduced in evidence (R. 15). It was stipulated that accused was apprehended at the Georgian Terrace Hotel, Atlanta, Georgia, 25 September 1943 (R. 19).

4. For the defense:

After having his rights explained accused elected to make an unsworn written statement, which was read to the court by his counsel (R. 52). No part of this statement touched upon the offense alleged in Charge I and its Specification.

5. The evidence shows, without controversy, that accused was absent without leave from his organization at Fort Benning, Georgia, from about 19 August 1943 until he was apprehended at the Georgian Terrace Hotel, Atlanta, Georgia, on 25 September 1943, and fully supports the findings of guilty of Charge I and its Specification.

6. War Department records show that accused is 26 years old. He attended the Putnam, Oklahoma High School for 3 years. He enlisted 28 March 1940, and served with 12th Cavalry. Completed Officers Candidate course, The Cavalry School, Fort Riley, Kansas and was commissioned second lieutenant, Cavalry, in AUS, 31 December 1942; and has served as an officer since that date.

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 as approved by the reviewing authority, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 61st Article of War.

Thomas H. Tappy, Judge Advocate.

Herbert M. McReduer, Judge Advocate.

Robert B. Harwood, Judge Advocate.

SPJGV
CM 248438

1st Ind.

War Department, J.A.G.O., 21 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 Second Lieutenant Melvin E. Backes (0-1031290), Cavalry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty as approved by the reviewing authority, to support the sentence and to warrant confirmation of the sentence. Accused absented himself without leave from his station at Fort Benning, Georgia, for a period of one month and six days. Although it is not shown in the record of trial proceedings, it appears from the summary of evidence accompanying the investigating officer's report that accused was drunk most of the time while absent from his station. The court found that during the period of his unauthorized absence accused made and uttered numerous worthless checks charged in Specifications 1 to 12 inclusive of Charge II which findings of guilty were disapproved by the reviewing authority. The accused was apprehended by the military police in the Georgian Terrace Hotel, Atlanta, Georgia, 25 September 1943. Although not of record in the trial proceedings or accompanying papers, it appears from the staff judge advocate's review that the discovery by accused that his wife had instituted divorce proceedings may have influenced him in the commission of the alleged offenses. However, this fact, even if true, does not justify any clemency. I, therefore, 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 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 action.

(Sentence confirmed. G.C.M.O. 313, 17 Jun 1944)

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

26 MAY 1944

SPJGH
CM 248448

UNITED STATES	)	93RD INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Essex, California, 12 January 1944. Dishonorable discharge (suspended) and confinement for five (5) years. Rehabilitation Center.
Private KID MILES, JR. (38080545), Company C, 369th 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 pleaded not guilty to and was found guilty of the Charge and Specification. He was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for five (5) years. The reviewing authority approved the sentence, ordered the sentence executed but suspended execution of the dishonorable discharge, and designated the Rehabilitation Center, Turlock, California, as the place of confinement. The proceedings were published in General Court Martial Orders No. 20, Headquarters 93rd Infantry Division, 17 January 1944.

3. The only question requiring consideration is whether the participation of Captain Frank M. Scott, Corps of Engineers, in the trial of the case as trial judge advocate, was such an error as to require the vacation of the findings and sentence.

4. The record of trial discloses that the charges in this case were referred for trial on 11 January 1944, to Captain St. Elmo P. Henderson, as trial judge advocate of a general court-martial appointed by paragraph 2, Special Orders No. 1, Headquarters 93rd Infantry Division, 1 January 1944. The case was tried on 12 January 1944 by the court to which it was referred, except that Captain Frank M. Scott acted as trial judge advocate in place of Captain Henderson. There is nothing to show that Captain Scott was ever substituted for Captain Henderson as trial judge advocate of this court although by

paragraph 3, Special Orders No. 11, same headquarters, 12 January 1944, he was substituted as trial judge advocate in place of Captain Henderson on a previous general court-martial appointed by paragraph 7, Special Orders No. 325, same headquarters, 24 December 1943. The record shows that the members of the court, the personnel of the prosecution, and the witnesses were sworn. The record indicates that the case was tried by the "TJA". Captain Scott authenticated the record as trial judge advocate.

5. It will be seen from the foregoing that although Captain Henderson was the duly appointed trial judge advocate of the court that tried the case he did not participate in the proceedings but that Captain Scott, who had not been designated as the trial judge advocate of this court, acted as such in the trial of the case. The question is presented whether the participation of Captain Scott in the trial was such an error as to require the vacation of the findings and sentence.

On the authority of CM 200734, Burns (Dig. Op. JAG, 1912-40, sec. 368(1); 5 B.R.1), recently approved and followed by the Board in CM 248464, Adams, the Board of Review is of the opinion that his participation constituted fatal error.

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

Samuel M. Davis, Judge Advocate

Robert Coleman, Judge Advocate

T. J. Lotthus, Judge Advocate

1st Ind.

War Department, J.A.G.O., 29 MAY 1944 - To the Secretary of War.

1. Herewith transmitted for your action 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 Kid Miles, Jr. (38080545), Company C, 369th 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,
Major General,
The Judge Advocate General.

2 Incls.
Incl.1-Rec. of trial.
Incl.2-Form of Action.

(Findings and sentence vacated by order of the Under Secretary of War. G.C.M.O. 298, 17 Jun 1944)

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

(273)

23 MAY 1944

SPJGH
CM 248453

UNITED STATES	)	93RD INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Essex, California, 13 January 1944. Dishonorable discharge (suspended) and confinement for five (5) years. Rehabilitation Center.
Private ARCHIE L. FIELDS (34005721), Company L, 368th 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 pleaded not guilty to and was found guilty of all Charges and Specifications. Evidence was introduced of two previous convictions by special courts-martial of absence without leave for five days and breach of arrest; and of absence without leave for about two months and six days. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for ten (10) years. The reviewing authority approved the sentence, remitted five years of the confinement imposed, ordered the sentence as modified executed, suspended execution of the dishonorable discharge, and designated the Rehabilitation Center, Turlock, California, as the place of confinement. The proceedings were published in General Court Martial Orders No. 28, Headquarters 93rd Infantry Division, 17 January 1944.

3. The only question requiring consideration is whether the participation of Captain Frank M. Scott, Corps of Engineers, in the trial of the case as trial judge advocate, was such an error as to require the vacation of the findings and sentence.

4. The record of trial discloses that by paragraph 1, Special Orders No. 316, Headquarters 93rd Infantry Division, 14 December 1943, a general court-martial (hereafter designated Court "A") was appointed, of which Captain St. Elmo P. Henderson was the designated trial judge advocate. The charges in this case were referred for trial to Captain Henderson, as trial

judge advocate of Court "A", on 21 December 1943. By paragraph 7, Special Orders No. 325, same headquarters, 24 December 1943, a new court (hereafter designated Court "B") was appointed, of which Captain Henderson was also named trial judge advocate, and all unarraigned cases previously referred to Court "A" were referred to Court "B". By paragraph 2, Special Orders No. 1, same headquarters, 1 January 1944, a new court (hereafter designated Court "C") was appointed, of which Captain Henderson was named trial judge advocate, and all unarraigned cases in the hands of Court "B" were transferred to Court "C". By paragraph 3, Special Orders No. 11, same headquarters, 12 January 1944, Captain Frank M. Scott was substituted as trial judge advocate of Court "B" in place of Captain Henderson. The case was tried on 13 January 1944 by Court "C", except that Captain Scott acted as trial judge advocate in place of Captain Henderson, the designated trial judge advocate of Court "C". The assistant trial judge advocate of both Courts "B" and "C" was Second Lieutenant Samuel W. Allen. The record shows that the members of the court, the personnel of the prosecution and the witnesses were sworn. The record indicates that the case was tried by the "TJA" and Captain Scott authenticated the record.

5. It will be seen from the foregoing that although Captain Henderson was the duly appointed trial judge advocate of the court that tried the case he did not participate in the proceedings but that Captain Scott, who had not been designated as the trial judge advocate of this court, acted as such in the trial of the case. The question is presented whether the participation of Captain Scott in the trial was such an error as to require the vacation of the findings and sentence.

On the authority of CM 200734, Burns (Dig. Op. JAG, 1912-40, sec. 368(1); 5 B.R.1), recently approved and followed by the Board in CM 248464, Adams, the Board of Review is of the opinion that his participation constituted fatal error.

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

Samuel M. Driver, Judge Advocate.

Robert Wolomon, Judge Advocate.

F. J. Lotterhos, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 29 MAY 1944 - To the Secretary of War.

1. Herewith transmitted for your action 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 Archie L. Fields (34005721), Company L, 368th 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-Rec. of trial.
Incl.2-Form of Action.

(Findings and sentence vacated by order of the Under Secretary of War. G.C.M.O. 288, 12 Jun 1944)

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

26 MAY 1944

SPJGH
CM 248454

UNITED STATES	)	93RD INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Essex, California, 13 January 1944. Dishonorable discharge (suspended) and confinement for five (5) years. Rehabilitation Center.
Private ALFONSO L. BRAY (39555281), Company A, 25th 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 pleaded not guilty to and was found guilty of the Charge and Specification. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for five years. The reviewing authority approved the sentence, ordered it executed but suspended execution of the dishonorable discharge, and designated the Rehabilitation Center, Turlock, California, as the place of confinement. The proceedings were published in General Court Martial Orders No. 30, Headquarters 93rd Infantry Division, 19 January 1944.

3. The only question requiring consideration is whether the participation of Captain Frank M. Scott, Corps of Engineers, in the trial of the case as trial judge advocate, was such an error as to require the vacation of the findings and sentence.

4. The record of trial discloses that by paragraph 1, Special Orders No. 316, Headquarters 93rd Infantry Division, 14 December 1943, a general court-martial (hereafter designated Court "A") was appointed, of which Captain St. Elmo P. Henderson was the designated trial judge advocate. The charges in this case were referred for trial to Captain Henderson, as trial judge advocate of Court "A", on 21 December 1943. By paragraph 7, Special Orders No. 325, same headquarters, 24 December 1943, a new court (hereafter designated Court "B") was appointed, of which Captain Henderson was also named trial judge advocate, and all unarraigned cases previously referred to

Court "A" were referred to Court "B". By paragraph 2, Special Orders No. 1, same headquarters, 1 January 1944, a new court (hereafter designated Court "C") was appointed, of which Captain Henderson was named trial judge advocate, and all unarraigned cases in the hands of Court "B" were transferred to Court "C". By paragraph 3, Special Orders No. 11, same headquarters, 12 January 1944, Captain Frank M. Scott was substituted as trial judge advocate of Court "B" in place of Captain Henderson. The case was tried on 13 January 1944 by Court "C", except that Captain Scott acted as trial judge advocate in place of Captain Henderson, the designated trial judge advocate of Court "C". The assistant trial judge advocate of both Courts "B" and "C" was Second Lieutenant Samuel W. Allen. The record shows that the members of the court, the personnel of the prosecution and the witnesses were sworn. The record indicates that the case was tried by the "TJA" and Captain Scott authenticated the record.

5. It will be seen from the foregoing that although Captain Henderson was the duly appointed trial judge advocate of the court that tried the case he did not participate in the proceedings but that Captain Scott, who had not been designated as the trial judge advocate of this court, acted as such in the trial of the case. The question is presented whether the participation of Captain Scott in the trial was such an error as to require the vacation of the findings and sentence.

On the authority of CM 200734, Burns (Dig. Op. JAG, 1912-40, sec. 368(1); 5 B.R.1), recently approved and followed by the Board in CM 248464, Adams, the Board of Review is of the opinion that his participation constituted fatal error.

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

Samuel M. Drivers, Judge Advocate

Robert J. Glasmann, Judge Advocate

H. Lotterhos, Judge Advocate

1st Ind.

War Department, J.A.G.O., 29 MAY 1944 - To the Secretary of War.

1. Herewith transmitted for your action 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 Alfonso L. Bray (39555281), Company A, 25th 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,
Major General,
The Judge Advocate General.

2 Incls.
Incl.1-Rec. of trial.
Incl.2-Form of Action.

(Findings and sentence vacated by order of the Under Secretary of War. G.C.M.O. 293, 17 Jun 1944)

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

26 MAY 1944

SPJGH
CM 248456

UNITED STATES	)	93RD INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Essex, California, 13 January 1944. Dishonorable discharge (suspended) and confinement for five (5) years. Rehabilitation Center.
Private LEONARD S. MEEKS (35118255), Company B, 368th 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 pleaded not guilty to and was found guilty of all Charges and Specifications. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for eight (8) years. The reviewing authority approved the sentence, remitted three (3) years of the confinement imposed, ordered the sentence as modified executed, but suspended execution of the dishonorable discharge, and designated the Rehabilitation Center, Turlock, California, as the place of confinement. The proceedings were published in General Court Martial Orders No. 32, Headquarters 93rd Infantry Division, 19 January 1944.

3. The only question requiring consideration is whether the participation of Captain Frank M. Scott, Corps of Engineers, in the trial of the case as trial judge advocate, was such an error as to require the vacation of the findings and sentence.

4. The record of trial discloses that the charges in this case were referred for trial on 11 January 1944, to Captain St. Elmo P. Henderson, as trial judge advocate of a general court-martial appointed by paragraph 2, Special Orders No. 1, Headquarters 93rd Infantry Division, 1 January 1944. The case was tried on 13 January 1944, by the court to which it was referred, except that Captain Frank M. Scott acted as trial judge advocate in place of Captain Henderson. There is nothing to show that Captain Scott was ever substituted for Captain Henderson as trial judge advocate of this court although by paragraph 3, Special Orders No. 11, same headquarters, 12 January 1944, he

was substituted as trial judge advocate in place of Captain Henderson on a previous general court martial appointed by paragraph 7, Special Orders No. 325, same headquarters, 24 December 1943. The record shows that the members of the court, the personnel of the prosecution, and the witnesses were sworn. The record indicates that the case was tried by the "TJA". Captain Scott authenticated the record as trial judge advocate.

5. It will be seen from the foregoing that although Captain Henderson was the duly appointed trial judge advocate of the court that tried the case he did not participate in the proceedings but that Captain Scott, who had not been designated as the trial judge advocate of this court, acted as such in the trial of the case. The question is presented whether the participation of Captain Scott in the trial was such an error as to require the vacation of the findings and sentence.

On the authority of CM 200734, Burns (Dig. Op. JAG, 1912-40, sec. 368(1); 5 B.R.1), recently approved and followed by the Board in CM 248464, Adams, the Board of Review is of the opinion that his participation constituted fatal error.

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

Samuel M. Drucker, Judge Advocate

Robert C. Clamor, Judge Advocate

H. Fotterhos, Judge Advocate

1st Ind.

War Department, J.A.G.O., 29 MAY 1944 - To the Secretary of War.

1. Herewith transmitted for your action 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 Leonard S. Meeks (35118255), Company B, 368th 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,
Major General,
The Judge Advocate General.

2 Incls.
Incl.1-Rec. of trial.
Incl.2-Form of Action.

(Findings and sentence vacated by order of the Under Secretary of War. G.C.M.O. 295, 17 Jun 1944)

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

(285)

26 MAY 1944

SPJGH
CM 248459

UNITED STATES	)	93rd INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Essex, California, 14 January 1944. Forfeiture of thirty-three dollars ($33) per month for six (6) months.
Private WILLIE WATSON, JR. (34320860), 93rd Military Police Platoon, 93rd Infantry Division.	)	

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 pleaded not guilty to all Specifications and Charges and was found not guilty of willful disobedience of the order of a noncommissioned officer and guilty of using threatening language toward a noncommissioned officer, in violation of Article of War 65, assault with intent to do bodily harm, and being drunk and disorderly in uniform while on military police duty in a public place, in violation of Article of War 96. He was sentenced to forfeit thirty-three dollars ($33.00) of his pay per month for six (6) months. The reviewing authority approved only so much of the finding of guilty of assault with intent to do bodily harm as involves simple assault, approved the sentence and ordered it executed. The proceedings were published in General Court-Martial Orders No. 35, Headquarters 93rd Infantry Division, 20 January 1944.

3. The only question requiring consideration is whether the participation of Captain Frank M. Scott, Corps of Engineers, in the trial of the case as trial judge advocate, was such an error as to require the vacation of the findings and sentence.

4. The record of trial discloses that the charges were referred for trial on 14 January 1944, to Captain Frank M. Scott, as trial judge advocate of a general court-martial appointed by paragraph 2, Special Orders No. 1, Headquarters 93rd Infantry Division, 1 January 1944. Examination of that order discloses that Captain St. Elmo P. Henderson was designated trial judge advocate of the court. By paragraph 3, Special Orders No. 11, same headquarters,

12 January 1944, Captain Scott was substituted in place of Captain Henderson as trial judge advocate of a previous general court-martial appointed on 24 December 1943. However, there is nothing to show that Captain Scott was ever substituted in place of Captain Henderson as trial judge advocate of the general court-martial appointed on 1 January 1944. The case was tried on 14 January 1944 by the court to which it had been referred except that Captain Scott acted as trial judge advocate. The record shows that the members of the court, the personnel of the prosecution and the witnesses were sworn. The record indicates that the case was tried by the "TJA". Captain Scott authenticated the record as trial judge advocate.

5. The fact that in the first indorsement referring the case for trial, Captain Scott was erroneously stated to be the trial judge advocate of the general court-martial appointed on 1 January 1944 would not, of course, affect the validity of the trial by this court, if Captain Henderson had acted as trial judge advocate (CM 198108, Casey, 3 B.R. 159). Nor would this erroneous designation work a substitution of Captain Scott for Captain Henderson on the court. It is clear that it was not the intention of the general court-martial authority to make a substitution in this irregular manner and that the indorsement was drawn under the erroneous assumption that Captain Scott had previously been substituted in place of Captain Henderson as trial judge advocate of this court.

6. It will be seen from the foregoing that although Captain Henderson was the duly appointed trial judge advocate of the court that tried the case he did not participate in the proceedings but that Captain Scott, who had not been designated as the trial judge advocate of this court, acted as such in the trial of the case. The question is presented whether the participation of Captain Scott in the trial was such an error as to require the vacation of the findings and sentence.

On the authority of CM 200734, Burns (Dig. Op. JAG, 1912-40, sec. 368(1); 5 B.R.1), recently approved and followed by the Board in CM 248464, Adams, the Board of Review is of the opinion that his participation constituted fatal error.

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

Samuel M. Drwer, Judge Advocate

Albert Clanner, Judge Advocate

F J Lotterhos, Judge Advocate

1st Ind.

War Department, J.A.G.O., 29 MAY 1944 - To the Secretary of War.

1. Herewith transmitted for your action 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 Willie Watson, Jr. (34320860), 93rd Military Police Platoon, 93rd Infantry Division.

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-Rec. of trial.
Incl.2-Form of Action.

(Findings and sentence vacated by order of the Under Secretary of War. G.C.M.O. 294, 17 Jun 1944)

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

9 MAY 1944

SPJGH
CM 248464

UNITED STATES	)	93RD INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Essex, California, 14 January 1944. Dishonorable discharge and confinement for ten (10) years. Federal Correctional Institution.
Private JEFFERY ADAMS (39158609), Company K, 368th Infantry.	)	

HOLDING 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 upon the following Charges and Specifications:

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

Specification 1: In that Private Jeffery Adams Company K, 368th Infantry, did, without proper leave, absent himself from his station at Camp Clipper, California, from about 7 October 1943 to about 29 October 1943.

Specification 2: In that Private Jeffery Adams Company K, 368th Infantry, did, without proper leave, absent himself from his Company at Camp Clipper, California, from about Aug. 7, 1943 until 7 October 1943.

CHARGE II: Violation of the 69th Article of War.
(Withdrawn by appointing authority).

Specification: (Withdrawn by appointing authority).

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

Specification 1: (Withdrawn by appointing authority).

Specification 2: In that Private Jeffery Adams Company K, 368th Infantry, did, at Los Angeles, California, on or about 3 November 1943 feloniously take, steal and carry away an auto, value more than fifty dollars ($50.00), the property of Chet Brewer.

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

Specification: In that Private Jeffery Adams, Company K, 368th Infantry, did, at Los Angeles, California, on or about 4 November 1943, without authority, appear in civilian clothing.

Accused pleaded not guilty to, and was found guilty of all Charges and Specifications. Evidence of one previous conviction by special court-martial of absence without leave for six days was introduced. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for twenty (20) years. The reviewing authority approved the sentence but remitted ten (10) years of the confinement imposed, designated the Federal Correctional Institution, Englewood, Colorado, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The record of trial presents the question whether the participation of Captain Frank M. Scott, Corps of Engineers, in the trial of this case as trial judge advocate, was such an error as to require the vacation of the findings and sentence.

4. The record discloses that the Charges in this case were referred for trial on 29 December 1943 to Captain St. Elmo P. Henderson, Division Headquarters, trial judge advocate of a general court-martial appointed by paragraph 1, Special Orders No. 316, Headquarters 93rd Infantry Division, 14 December 1943 (hereafter designated Court "A"). Prior to the date of the reference of the charges for trial, all unarraigned cases referred to Court "A" were by paragraph 7, Special Orders No. 325, same headquarters, 24 December 1943, referred to a new court (hereafter designated Court "B"), of which Captain Henderson was the trial judge advocate. By paragraph 2, Special Orders No. 1, same headquarters, 1 January 1944, all unarraigned cases in the hands of Court "B" were referred to a new court (hereafter designated Court "C"), of which Captain Henderson was also the trial judge advocate. By paragraph 3, Special Orders No. 11, same headquarters, 12 January 1944, Captain Frank M. Scott, Corps of Engineers, was substituted for Captain Henderson as trial judge advocate of Court "B". The case was tried on 14 January 1944 by a court whose personnel, prosecution and defense counsel, were identical with that of Court "C", except that Captain Scott acted as trial judge advocate in place of Captain Henderson, the designated trial judge advocate of Court "C". The assistant trial judge advocate of both Courts "B" and "C" was Second Lieutenant Samuel W. Allen. The record shows that the members of the court, the personnel of the prosecution, and the only witness, were sworn. The evidence for the prosecution was presented and the witness was examined by the "TJA". The record of trial was authenticated by Captain Scott.

5. It will be seen from the foregoing that although Captain Scott had been designated trial judge advocate of the preceding court ("B") in place of Captain Henderson he had not been designated trial judge advocate of the court ("C") which tried the case and that Captain Henderson was the duly designated trial judge advocate of the latter court.

The Board of Review in CM 200734, Burns (Dig. Ops. JAG, 1912-40, sec. 368(1)), after an examination of the pertinent authorities, answered in the affirmative the question "whether or not the participation as trial judge advocate in the trial of a case before a general court-martial by an officer who was not the regularly detailed trial judge advocate of that court is such an error as to require the vacation of the findings and sentence". In that case a Captain Hettinger was appointed trial judge advocate of a previously constituted court for the trial of the case of Private Burns only. All unarraigned cases in the hands of that court were subsequently transferred to a second court of which a Lieutenant Stansbury was designated the trial judge advocate. Private Burns was brought to trial before the latter court and Captain Hettinger acted as trial judge advocate in conjunction with Lieutenant Stansbury. The authority of Captain Hettinger to participate in the trial of the case was held limited to trial by the court to which he was appointed, and as he had no authority to act as trial judge advocate of the court which tried the case, his participation in its proceedings was held fatal error. In view of the similarity between the facts in the Burns case and the instant case the conclusion therein reached is controlling.

6. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the findings and sentence.

Samuel M. Driver, Judge Advocate.

Kathrin Glennon, Judge Advocate.

F J Lotterhos, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 29 MAY 1944 - To the Secretary of War.

1. In the case of Private Jeffery Adams (39158609), Company K, 368th Infantry, I concur in the foregoing holding of the Board of Review, and, for the reasons therein stated, recommend that the findings of guilty and the sentence be disapproved. A form of action carrying this recommendation into effect is inclosed herewith for signature.

2. This case is submitted for the action of the Secretary of War in order to avoid the delay which would be involved in the return of the approved holding overseas to the reviewing authority for further action.

Myron C. Cramer

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

2 Incls.
Form of Action.
Record of Trial.

(Findings and sentence disapproved. G.C.M.O. 292, 17 Jun 1944)

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

25 AUG 1944

SPJGH
CM 248464

UNITED STATES	)	CAMP HAAN
v.	)	Trial by G.C.M., convened at Camp Haan, California, 18 July 1944. Dishonorable discharge and confinement for four (4) years and four (4) months. Federal Correctional Institution.
Private JEFFREY ADAMS (39158609), Headquarters Company, SCU 1967, Camp Haan, California.	)	

HOLDING 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 upon the following Charges and Specifications:

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

Specification: In that Private Jeffrey Adams, also known as Private Jeffery Adams, also known as Sergeant Jeff Adams, also known as Master Sergeant James Adams, Headquarters Company, SCU 1967, Camp Haan, California, formerly a member of Company K, 368th Infantry, did, without proper leave, absent himself from his command at Camp Clipper, California, from about 7 August 1943 to about 7 October 1943.

CHARGE II: Violation of the 69th Article of War.
(Withdrawn by appointing authority).

Specification: (Withdrawn by appointing authority).

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

Specification 1: In that Private Jeffrey Adams, also known as Private Jeffery Adams, also known as Sergeant Jeff Adams, also known as Master Sergeant James Adams, Headquarters Company, SCU 1967, Camp Haan, California, formerly a member of Company K, 368th Infantry, did at Los Angeles, California, on or about 4 November 1943, wrongfully take and use without the consent of the owner, a certain automobile, to-wit: a Ford sedan, property of Chet Brewer, of a value of more than $50.00.

Specification 2: In that Private Jeffrey Adams, also known as Private Jeffery Adams, also known as Sergeant Jeff Adams, also known as Master Sergeant James Adams, Headquarters Company, SCU 1967, Camp Haan, California, formerly a member of Company K, 368th Infantry, did, at Los Angeles, California, on or about 4 November 1943, without authority, appear in civilian clothing.

Specification 3: (Withdrawn by appointing authority).

He pleaded not guilty to and was found guilty of all Charges and Specifications. He was sentenced to be dishonorably discharged, to forfeit all pay and allowances due or to become due and to be confined at hard labor for five (5) years. Evidence of a previous conviction by a special court-martial for being absent without leave for 36 days in violation of the 61st Article of War was introduced. The reviewing authority approved the sentence but remitted eight (8) months of the confinement imposed, designated the Federal Corectional Institution, Englewood, Colorado, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence is legally sufficient to support the findings of guilty of the Specification, Charge I and Charge I; Specification 2, Charge III and Charge III; and the sentence. The only questions to be considered are the legal sufficiency of the evidence in support of the finding of guilty of Specification 1, Charge III, and the legality of a Federal Correctional Institution as the place of confinement.

4. At about 12:15 a.m. on 4 November 1943 Officer Wayne O. Fudge of the Los Angeles Police Department stopped the accused on Central Avenue in Los Angeles for driving an automobile without lights. The accused, who was accompanied by a girl, could not furnish satisfactory evidence of ownership of the car and was taken to the police station where he "insisted" that he borrowed the automobile from a friend (R. 8-9). Officer Fudge testified that while accused was being questioned at the police station Mr. Chet Brewer, owner of the automobile, arrived to report its loss, that Mr. Brewer asked why accused took the car from the parking lot and where it was wrecked. The accused replied that he used the car to take his girl friend for a ride and that he was not involved in a wreck. Officer Fudge further testified that Mr. Brewer stated in the presence of accused that he did not give accused permission to drive his car (R. 10). The automobile was a 1935 Ford sedan, "wrecked about the front end" and water was leaking from the "busted" radiator (R. 10, 12). Officer Fudge estimated the sale price of a car "in about that condition, that is, in running condition, about that make" at approximately $300 to $350 as he had "observed them in parking lots with prices on" (R. 11-12).

5. The only evidence introduced by the prosecution to prove one of the essential elements of the offense, that accused did not have permission of the owner to use the automobile, was the testimony of Officer Fudge that the owner stated in the presence of accused that he did not give his permission. An incriminating statement of this character made in the presence of accused and not denied by him, although admissible in evidence under certain conditions not applicable here, should not be received when made while the accused is in custody. Under these circumstances the accused has a right to remain silent and his failure to deny such a statement may not be considered as a tacit admission of its truth (McCarthy v. United States, 25 Fed. (2d) 298; Wharton's Evidence in Criminal Cases, Vol. II, sec. 661). The statement being inadmissible, the evidence fails to establish that accused did not have permission to drive the car unless such lack of permission can be inferred from all the surrounding circumstances. After careful consideration of the evidence the Board concludes that the circumstances do not allow the drawing of such inference and accordingly the specification is not sustained.

In view of the foregoing conclusion the question of the sufficiency of the evidence to establish the value of the automobile will not be considered.

6. None of the offenses of which accused was found guilty other than the offense alleged in Specification 1, Charge III is of such a nature as to support confinement in a penitentiary, Federal reformatory or correctional institution.

7. For the reasons stated the Board of Review holds the record of trial legally insufficient to support the finding of guilty of Specification 1, Charge III, legally sufficient to support the findings of guilty of the remaining Charges and Specifications and legally sufficient to support only so much of the sentence as involves dishonorable discharge, total forfeitures and confinement at hard labor for four (4) years, four (4) months in a place other than a penitentiary, Federal reformatory or correctional institution.

Samuel M. Driver, Judge Advocate.

Robert J. Clamor, Judge Advocate.

F. J. Fitzhugh, Judge Advocate.

1st Ind.

War Department, J.A.G.O., AUG 29 1944 - To the Commanding Officer, Camp Haan, Riverside County, California.

1. In the case of Private Jeffrey Adams (39158609), Headquarters Company, SCU 1967, Camp Haan, California, I concur in the foregoing holding of the Board of Review and for the reasons therein stated recommend that the finding of guilty of Specification 1, Charge III be disapproved, and that only so much of the sentence as involves dishonorable discharge, total forfeitures and confinement at hard labor for four years and four months in a place other than a penitentiary, Federal correctional institution or reformatory, be approved. Thereupon, under the provisions of Article of War 50½ you will have authority to order the execution of the sentence. The United States Disciplinary Barracks, Fort Leavenworth, Kansas, should 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 248464).

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.

31 MAR 1944

SPJGH
CM 248494

UNITED STATES v. First Lieutenant JOHN S. KWARCHAK (O-1292909), Infantry.	84TH INFANTRY DIVISION Trial by G.C.M., convened at Camp Claiborne, Louisiana, 18-19 January 1944. Dismissal, total forfeitures, and confinement for five (5) years. Disciplinary Barracks.

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 94th Article of War.

Specification: In that First Lieutenant John S. Kwarchak, Company L, 333d Infantry, did, at or near Leesville, Louisiana, on or about 30 October 1943, wrongfully and knowingly sell one binocular, M-3, 6x30, Westinghouse, Serial Number 179020 of the value of about $76.00, property of the United States, intended for the military service thereof.

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

Specification: In that First Lieutenant John S. Kwarchak, Company L, 333d Infantry, did, at or near Macon, Georgia, on or about 24 November 1943, wrongfully and knowingly dispose of approximately five thousand rounds of twenty two caliber long rifle ammunition of the value of about $17.85, property of the United States, intended for the military service thereof, with the purpose of selling the same, by causing the same to be shipped to Mister Tom F. Smith of Jacksonville, Florida.

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

Specification 1: In that First Lieutenant John S. Kwarchak, Company L, 333d Infantry, did, at or near Macon Georgia on or about 24 November 1943, wrongfully and knowingly dispose of approximately five thousand rounds of twenty two caliber long rifle ammunition of the value of about $17.85, property of the United States, intended for the military service thereof, with the purpose of selling the same, by causing the same to be shipped to Mister Tom F. Smith of Jacksonville, Florida.

Specification 2: In that First Lieutenant John S. Kwarchak, Company L, 333d Infantry, did, at or near Leesville, Louisiana, on or about 30 October 1943, wrongfully and knowingly sell one binocular, M-3, 6x30, Westinghouse, Serial Number 179020 of the value of about $76.00, property of the United States, intended for the military service thereof.

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

3. Evidence for the prosecution:

a. Specification, Additional Charge I; Specification 1, Additional Charge II: Mr. Tom F. Smith of Jacksonville, Florida, testified by deposition (Ex. F) that he received a letter (Ex. 1 to the deposition) from accused dated 18 November 1943, in which the accused offered for sale "a few thousand" rounds of .22 long rifle ammunition at $15 per thousand. Mr. Smith wired (Ex. 2 to the deposition) accused to send by express, "COD", 3,000 rounds or any part thereof. Accused replied by letter (Ex. 3 to the deposition) dated 24 November 1943, stating that he was sending 5,000 rounds, and requested a check or money order for $75. The ammunition was shipped to Mr. Smith by Railway Express (Ex. 4 to the deposition) in a wooden ammunition packing case which had been opened and renailed. The case contained 5,000 rounds of .22 long ammunition packed in cartons, stamped "ARMY LOT 328" (Ex. 5 to the deposition). The same lot number appeared on the exterior of the packing case. On the advice of "Lt. Colonel Keller, Southern Defense Sector", Mr. Smith did not pay accused for the ammunition (R. 32).

Lieutenant Colonel Carl A. Flom, Post Intelligence Officer, Camp Wheeler, Georgia, testified by deposition (Ex. G) that on 2 December 1943, the accused, after being advised of his rights, made a statement (incorporated in the deposition) that he obtained the ammunition in the

spring of 1943, when his organization was stationed at Camp Howze, Texas. After he finished instructing a battalion in firing the anti-aircraft course, he took about 5,500 rounds of unexpended ammunition to the supply room of his company. The ammunition was not called for and as he liked to shoot he thought he would take it for himself. While on maneuvers he saw the manner in which ammunition was handled and did not believe it would make "any damn difference" if he sold it or not, as no accurate account was kept of its disposition. He removed the ammunition, a carton at a time, from the supply room to his home and had it in his possession when the organization left Camp Howze. He located Mr. Smith through an "ad" in the "National Rifleman Association". He identified the correspondence with Mr. Smith (Ex. F) which resulted in his shipping to Mr. Smith the 5,000 rounds of ammunition. He further stated to Colonel Flom that he knew he had "done wrong" (R. 33-34).

On 6 December 1943, the accused, after being advised of his rights, stated to Lieutenant Colonel Winchester Kelso, Inspector General, 84th Infantry Division, that during the month of November 1943 he disposed of 5,000 rounds of .22 caliber ammunition belonging to the Government, that he supposed he was in a "bad way", that the ammunition was obtained from the supply room and sold to a Mr. Smith of Tampa, or Jacksonville, Florida, at $15 per thousand, but that he did not receive the money from the sale (R. 9-10, 29-31).

The court took judicial notice that the value of the ammunition was $3.57 per thousand rounds (R. 34).

b. Specification, the Charge; Specification 2, Additional Charge II: Mr. J. Alden Loring testified by deposition (Ex. A) that he was a dealer in guns, cameras, field glasses and allied items, doing business in Owego, New York. He received a letter from accused offering for sale a "Bausch and Lomb" prism binocular. On 7 October 1943, he sent accused a post card (Ex. A to the deposition) stating that the binocular offered by accused was evidently the "E. E." type, for which he would pay $15, if in good condition. The accused replied by letter (Ex. B to the deposition), dated 11 October 1943, that his binocular was the "new Army binocular", not the "EE", and was identical to the "B. and L. 6 x 30 Individual focus", except that the case and straps were brown instead of black. He further stated that as a dealer Mr. Loring should be able to realize at least $75, if not more, on a resale. In response to the letter Mr. Loring requested accused to ship the binocular subject to examination, and if it was the type described by accused he would pay $55. Mr. Loring then received a package containing a prism, 6 power, M-3, 6 x 30, Westinghouse, 1942, binocular, No. 179020, inclosed in a plain black leather case. A shipping tag (Ex. D to the deposition) attached to the binocular inside of the case bore the return address of Mrs. John S. Kwarchak. In a letter (Ex. C to the deposition) dated 4 November 1943, the accused requested payment of Mr. Loring or the return of the binocular. Mr. Loring had mailed the accused a check for $55, but later directed his bank to stop payment on the check, and forwarded the binocular and case to the Judge Advocate, 84th Infantry

Division, Camp Claiborne, Louisiana. (R. 16).

The Staff Judge Advocate of the 84th Infantry Division received a package (Ex. E) from Mr. Loring, containing the binocular and carrying case (Ex. C). The binocular, valued at $76, was the type manufactured for the Government for military use and particularly identified as property of the United States by the Army identification number "M-3". An admitted genuine signature of accused (Ex. B) was introduced in evidence (R. 18-28).

On 6 December 1943 the accused stated to Colonel Kelso that the M-3 Westinghouse binocular, No. 179020, was never "rightfully" his. He found the binocular on maneuvers, looked in the daily bulletin, but did not see any record of it being lost. In response to an advertizement placed by Mr. Loring in a magazine, accused offered him the binocular for sale. He "personally" wrapped and mailed the binocular to Mr. Loring and received a check for $55. He cashed the check in Leesville, Louisiana, but refunded the money when the check came back. The accused recognized the binocular as Government property and knew it was wrong to sell Government property (R. 9-16).

4. Evidence for the defense:

Captain Robert G. Edison, the company commander of accused, testified that as platoon leader and company executive officer the accused performed his duties in an excellent manner and commanded more respect from the men than any officer in the company. Captain Edison attended infantry school with accused at Fort Benning, where the accused was rated "very high". Captain Edison stated that the accused could serve under him "Any day, any time at all", and he would like to have accused back in his company in "spite" of the charges against him (R. 35-36).

The accused elected to remain silent (R. 38).

5. a. Specification, Additional Charge I; Specification 1, Additional Charge II:

It is shown by the evidence that the accused, while stationed at Camp Howze, Texas, appropriated about 5,500 rounds of .22 caliber long rifle ammunition, property of the United States, that remained unexpended after a course of instruction in anti-aircraft fire conducted by accused. Accused offered to sell a quanity of the ammunition to Mr. Tom F. Smith of Jacksonville, Florida, for $15 per thousand rounds. When the offer was accepted for 3,000 rounds of the ammunition, the accused shipped 5,000 rounds (of a value of $17.85) to Mr. Smith and requested payment of $75. The acts of accused constituted an intentional and wrongful disposition of United States property, in violation of the 94th Article of War, and conduct unbecoming an officer and a gentleman, in violation of the 95th Article of War.

b. Specification, the Charge; Specification 2, Additional Charge II:

The evidence shows that the accused offered to sell Mr. J. Alden Loring, Owego, New York, a binocular. After negotiations had been completed by mail, the accused shipped Mr. Loring a binocular belonging to the United States Government, and received a check for $55 in payment. The binocular, which accused had found on maneuvers, had a value of $76, and was recognized by him as being the property of the United States intended for the use of the military service. It is clearly established by the evidence that the accused wrongfully and knowingly sold the property belonging to the United States as alleged.

6. Consideration has been given to letters from the accused to The Judge Advocate General dated 31 January and 1 February 1944 with inclosures, and to a letter from the division judge advocate dated 1 February 1944, forwarding the letter of 31 January.

7. The accused is 29 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 27 January 1942; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School, and active duty, 8 September 1942; temporarily promoted to first lieutenant, Army of the United States, 14 June 1943.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 94th Article of War and mandatory upon conviction of a violation of the 95th Article of War.

Samuel M. Bruce, Judge Advocate

Allen Clamor, Judge Advocate

F J Lotterhos, Judge Advocate

1st Ind.

War Department, J.A.G.O., 11 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 First Lieutenant John S. Kwarchak (0-1292909), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. The accused sold a binocular of the value of about $76, the property of the United States which he claimed to have found on maneuvers (Spec., The Chg. and Spec. 2, Add. Chg. II) and wrongfully disposed of, after making arrangements to sell, approximately 5000 rounds of .22 caliber ammunition of the value of about $17.85, the property of the United States, which remained unexpended after a course of instruction in antiaircraft fire conducted by accused (Spec., Add. Chg. I and Spec. 1, Add. Chg. II). I recommend that the sentence to dismissal, total forfeitures and confinement at hard labor for five years be confirmed, but in view of all of the circumstances that the period of confinement be reduced to two years and the forfeitures 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 confinement in excess of two years and forfeitures remitted. G.C.M.O. 308, 17 Jun 1944)

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

SPJGK
CM 248497

10 MAR 1944

UNITED STATES	65TH INFANTRY DIVISION
v.	Trial by G.C.M., convened at Camp Shelby, Mississippi, 5 January 1944. Dismissal.
Second Lieutenant RANKIN M. DAUGETTE (O-1322612), 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 2d Lieutenant Rankin M. Daugette, 259th Infantry, did, at Camp Shelby, Mississippi, on or about 20 September, 1943, fail to repair at the fixed time to the properly appointed place of assembly for a meeting of all officers of the 259th Infantry.

Specification 2: In that 2d Lieutenant Rankin M. Daugette, 259th Infantry, did, without proper leave, absent himself from his station at Camp Shelby, Mississippi, from about 27 September, 1943, to about 3 October, 1943.

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

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

Specification 1: In that 2d Lieutenant Rankin M. Daugette, 259th Infantry, did, at New Orleans, Louisiana, on or about 27 September, 1943, wrongfully urinate on the floor of the lobby of the Hotel Monteleone.

Specification 2: In that Second Lieutenant Rankin M. Daugette,

259th Infantry, was, at New Orleans, Louisiana, on or about 27 September 1943, drunk and disorderly in uniform, in a public place, to wit, the Hotel Monteleone.

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

Specification: In that Second Lieutenant Rankin M. Daugette, 259th Infantry, did, without proper leave, absent himself from his station at Camp Shelby, Mississippi, from about 20 October 1943 to about 24 October 1943.

ADDITIONAL CHARGE II: Violation of the 96th Article of War. (Withdrawn by direction of appointing authority.)

Specification: (Withdrawn by direction of appointing authority).

Additional Charge II and its Specification were withdrawn by direction of the appointing authority. Accused pleaded guilty to Additional Charge I and its Specification, and not guilty to all other Charges and Specifications. He was found not guilty of Charge II and its Specification, and guilty of all other Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Summary of evidence.

a. Specification 1, Charge I.

Captain Alonzo L. Nugent, Company F, 259th Infantry, testified that accused was a member of his command at the time of the offenses alleged to have been committed by him. On 18 and 20 September, 1943, there were no enlisted men in Company F, and accused was on duty at Headquarters Company, 2nd Battalion, which was "about 175 yards" distant from Company F's orderly room. Accused was being carried on the morning reports of Company F, but he did not (and apparently was not required to) report to Captain Nugent every day (R.8,12,13).

Announcement was made in paragraph 4 of the Daily Bulletin of the 259th Infantry Regiment for Saturday, 18 September 1943, of a meeting of all officers to be held in the Regimental Recreation Hall at 1845 on Monday, 20 September. This bulletin was received just before noon on Saturday, and was posted "in the in and out box on the company commander's desk where all daily bulletins are posted". Captain Nugent testified that he was present at that meeting, that as company commander he checked the attendance of his company officers, and that accused was not present at the meeting (R.8,12; Pros. Ex. B).

Captain Nugent and Colonel Walter P. O'Brien, 259th Infantry, both testified that all battalion and company officers had been ordered to read and initial the bulletin daily. Captain Nugent had previously verbally notified all his company officers to do so, even if they were on "special duty". He told the other company officers of the meeting by word of mouth, but did not tell accused. In response to questions by accused's counsel and by the president of the court, witness admitted that "there was more or less an agreement between the lieutenant [accused] and the battalion commander that he would not be required" to visit Company F's orderly room every day, that accused had not initialed the daily bulletin, and that "there were no means" of advising accused of the meeting (R.9,12,13,16).

b. Specification 2, Charge I.

Testimony concerning accused's unauthorized absence from 27 September 1943 until 3 October 1943 was offered by Captain Nugent, Colonel O'Brien, and Lieutenant Colonel Emery S. Hunt, 259th Infantry. The 2nd Battalion, with which accused was on special duty, was scheduled to fire on the transition range at 0730 on 27 September. Upon being informed by "Captain Garrett" that accused was not present, Colonel Hunt and Captain Nugent searched in the vicinity of the range, but failed to find accused. They then returned to the 259th Regimental area, searching the hutments of Company F, of Headquarters Company, 2nd Battalion, and the officers' hutments. They did not find accused. Captain Nugent stated that he next saw accused on the morning of 4 October 1943. The morning report of Company F, 259th Infantry, showed accused from "Duty to AWOL 0600, 27 September 1943", and that of 3 October 1943, from "AWOL to ar. in qrs., 0015". Colonel O'Brien, who had authority to grant verbal permission to leave the organization, Colonel Hunt, and Captain Nugent each testified that he did not authorize accused to be absent during the time stated (R. 9-11,15,16; Pros. Exs. C,D).

c. Specification 2, Charge III.

Testimony on this offense, as well as that set forth in Specification 1 of this Charge, was offered by Mr. A. E. Ackerman, Assistant Manager of the Hotel Monteleone, New Orleans, Louisiana, Mr. Robert E. Jerome, house detective of the same hotel, and First Lieutenant Alexander W. Berwick, Corps of Military Police, New Orleans. Accused registered at this hotel on 27 September 1943. At about 2100 Mr. Jerome was called into the cocktail lounge by one of the waiters. Accused "was going from table to table annoying the customers" by making "remarks" to them. Mr. Ackerman stated that accused was "disturbing the guests, creating a nuisance, and also disturbing the employees" (R.17,18,20,25). Mr. Jerome asked accused to step outside. Accused did so. Jerome ascertained his room number at the desk, tried to persuade accused to go to his room, and succeeded in getting

him as far as the elevator. Accused did not want to go farther, saying that he was going to "cut a few more rough edges". Accused promised Jerome not to go back into the cocktail lounge and sat down in the lobby (R.19, 20,25).

Fifteen or twenty minutes later Mr. Jerome found accused on the band stand in the cocktail lounge, directing the entertainers and trying to sing with them. There were many guests in the lounge at this time. Jerome threatened to call the Provost Marshal, and accused agreed to leave the lounge with him. When they reached the elevator accused "again refused to go upstairs", and Jerome left him sitting in a chair in the lobby (R.25-27).

About 2200 or 2215 Jerome and Ackerman found accused sitting at a table in the coffee shop adjacent to the hotel lobby. No guests of the hotel were there at the time. His right hand was "holding his head", "as though he was brooding", while his left hand was "down around his pants", which were open. Ackerman testified that it "appeared as though" accused were trying to urinate, though Jerome stated that accused committed no act of exposure at that time. Ackerman told Jerome to take accused upstairs "because I thought it was the best place for him". In response to Jerome's question whether he wished to go to the gentleman's rest room, accused replied that he did not. Jerome took him from the coffee shop, and to the elevator for the third time, but accused again refused to go to his room, saying, "No, I am not going up". He did tell Jerome that he was going up in a few minutes (R.18,22,26,28,29).

Both witnesses testified that accused was drunk at this time. He was staggering, his eyes appeared "blurry", his hair was ruffled and his speech "slurred just like a drunken man". He did have control of his faculties (R.18,20,28). He was in uniform (R.23,27,31).

d. Specification 1, Charge III.

About 2230 or 2245, Ackerman and Jerome were standing at the desk in the lobby, which is about thirty feet from and which faces the cigar stand at an angle. A young woman was in attendance at the cigar stand; a man and woman, and possibly one other person, were sitting on a settee about twelve or fifteen feet directly in front of the cigar stand; and some fifteen or twenty other people were present in the lobby. Ackerman and Jerome both saw accused in the act of urinating against the cigar stand. He stood on the rug, facing the stand, leaning against the counter with his left hand. His trousers were opened and his right hand was at his private parts, which were exposed. Though neither the young woman nor the couple on the settee said anything about the incident, Ackerman and Jerome were both certain that they observed it (R.17,18,22,24,26-28).

Lieutenant Berwick was summoned, and arrived promptly. He took accused to the 3rd Precinct Police Station, and returned him to his room

at the hotel at 0300 the next morning. Lieutenant Berwick and Mr. Jerome both testified that accused was very drunk at this time. He was "rather * * * noisy" at the police station, and had to be restrained. He was "still under the influence of alcohol" when returned to his room, but "seemed to know what it was all about then". He told Mr. Jerome that he was "sorry that it had happened", and called Mr. Ackerman to his room the next day to learn what he had done. He remained at the hotel until he checked out at 1251 on 29 September 1943 (R.23,27-29, 30-32).

e. Specification, Additional Charge I.

After his return from the absence charged in Specification 2, Charge I, accused again absented himself from 20 October 1943 to 24 October 1943. Captain Nugent testified that upon returning to the company from the range at 0930, he was informed that accused had not reported to the company for duty, and that he immediately made a search of the 259th's complete area, but failed to find accused. He next saw accused on the morning of 24 October, at which time he took accused to the hospital. The company morning report for 20 October 1943 showed accused from "Duty to AWOL, 0730", and that for 24 October 1943 from "AWOL to sick in hospital Camp Shelby, Mississippi". Captain Nugent, Lieutenant Colonel Hunt and Colonel O'Brien, testified that they did not authorize accused to be absent from his station from 20 October to 24 October (R.9,10,11,12,15,16; Pros. Exs. E,F). It was stipulated between accused and his counsel, and the prosecution that accused absented himself without proper leave on 20 October 1943 and returned voluntarily on 24 October 1943 (R. 7; Pros. Ex. A).

Testifying for the prosecution in rebuttal, Major Reuben R. Pliskin, Medical Corps, Assistant Chief of Medical Service at Foster General Hospital, Jackson, Mississippi, stated that he had been the recorder of a disposition board of medical officers who examined accused in order to pass upon his disposition. Major Pliskin read into the record the findings of the board (R.45,46). The board found that accused was in a "constitutional psychopathic state with emotional instability and recurrent alcoholism", that this existed prior to enlistment and entry into active duty, that accused was sane, capable of judging between right and wrong, and legally responsible for his acts (Pros. Ex. G). First Lieutenant Norman J. Kelman, Medical Corps, Headquarters, 65th Infantry Division, Camp Shelby, Mississippi, a neuro-psychiatrist with three years' practice, testified that he had interviewed accused for three-quarters of an hour and believed accused sane and capable of distinguishing right from wrong.

Evidence for the defense.

Accused was advised of his rights, and testified in his own behalf (R.38).

a. Specification 1, Charge I.

Accused admitted that "technically I missed the meeting". He explained that although he "dropped by" Company F occasionally to pick up that part of his mail which was delivered there, he was on duty with Headquarters Company, 2nd Battalion, and "there was an understanding" that he would report to the battalion commander. He did not know whether the bulletin was received in Headquarters Company, stating that he went by there in a hurry about 1100 (apparently on Monday, the day of the meeting) and that he did not think to stop and read the bulletin board (R.42,43).

Accused's testimony with respect to his activities on the weekend preceding the meeting is most confusing, but it appears that there was a general policy to excuse the officers from duty at about 1130 on Saturdays, and that "Captain Garrett" excused accused and others at 1130 or 1145. Accused was scheduled to be range officer on Monday. He seems, however, to have returned to the range on Saturday afternoon to make preparations for Monday's work, and to have been delayed there, with the result that he did not return to camp until 1745 or 1800 on Saturday. He stated that he then "came down to the Service Club and went into town". Officers were not required to read the bulletin board on Sundays. He was in Camp on Sunday, but "wasn't on any duty". He spent the time between 1600 or 1700 and 2100 on Sunday out at the range, reported again to the range at 0530 Monday, and returned to camp separately from the regular convoy. Except for his trip past the Headquarters Company he was "not in that particular area" of the camp (R.42-44). He admitted that "it was a general understanding that we read the Daily Bulletins every day" (R.43).

b. Specification 2, Charge I; Specifications 1 and 2, Charge III.

Accused testified that on Thursday, 23 September 1943, he was told by the regimental Adjutant that the policy of the division was not to grant authority for officers to be absent before noon on Saturdays. He stated that due to this, he was unable to start on his projected journey to Birmingham, Alabama, until about 1900 or 2000 on Saturday, at which time he commenced the drive of 350 miles. He reached Birmingham about 0700 or 0800 Sunday morning, telephoned his family to meet him in town, and had dinner with them at a hotel. They left him about 2000 to drive back to their home in his car. Accused then telephoned an old friend, who came down town and met him at a hotel across the street from the station. Accused drank a cup of coffee, and then he and his friend went in the friend's car to a nearby "drive-in station". Accused stated that his friend "had about three or four drinks in a pint bottle of whiskey and we drank that" (R.38).

Accused boarded his train about 2200, and because of the crowd on the train had to stand "until two or three o'clock in the morning". When he finally found a place to sleep, he asked the colored porter to waken him

at Hattiesburg (Camp Shelby), since he had no watch. He stated that the porter failed to do so, and that he was "half-way to New Orleans" before he woke up. The porter told him that they had passed the one stop between Hattiesburg and New Orleans, and the conductor advised him that the only thing to do was to go on to New Orleans and take a return train. Upon arriving at New Orleans about 0900 he immediately wired Lieutenant Garrett at Headquarters Company that he had slept through Hattiesburg on the train. He then found that the morning train for Hattiesburg had departed, and that the next one would leave at 1940, to arrive at 2300. He did not inquire about bus schedules because he had already sent the telegram saying that he would be back on the next train, and because buses traveled so slowly (R.38-40).

He then went to the Monteleone Hotel, obtained a room, and went to bed. He got up about 1500 and made arrangements with the porter to get tickets on the night train. He then went to one or two nearby bars and restaurants where he appears to have had three or four drinks of Bourbon and soda, then returned to the hotel about 1730 or 1800, and found that the porter had obtained his ticket (R.39,41). This was his last clear recollection (R.43).

Accused was unable to account for his missing the train at 1940 on Monday, and unable to account for the passage of time or his actions after he left the porter. He admitted that "there is no question that I had something to drink and that was probably the trouble" (R.39). Accused stated that he thought that the liquor he had drunk "some time between 5 o'clock and 7 o'clock" had been drugged, and that he found that all his money($35 or $40) was gone. He did not remember going into the Monteleone bar when he returned, but did remember telephoning Mr. Ackerman on 28 September to come to accused's room "to tell me what had happened the night before", and remembered sending a second telegram from New Orleans to Camp Shelby saying that he was trying to locate witnesses to the previous night's incident. He stated that after checking out of the Hotel Monteleone he "ended up at the Senator Hotel", but could not explain why he did not return to Camp Shelby on the evening of the day he arrived in New Orleans (R.40-42).

Captain Marlin D. Moore, Transportation Corps Headquarters, New Orleans, Louisiana, Port of Embarkation, testified that he had known accused for twelve years, that they had been roommates in college, and that accused was his best friend. He stated that he and his commanding officer had sought accused's transfer to their organization because of their need for a person with accused's investigatory experience. Shortly after accused first arrived at Camp Shelby, witness received a call from accused on a Sunday afternoon, and in response thereto went to the Monteleone Hotel. He found accused, who told witness that he was unable to rest, sleep, or eat anything. "Weeks" later, in response to a telegram received "one Saturday morning" from accused's mother that accused was absent without

leave, witness sent an investigator, who located accused on 2 October at the Senator Hotel. The investigator brought accused to witness' office, where accused stated that he had been home on the previous week-end and had failed to get off the train. Asked why he failed to return to camp, accused said that "he planned to and something had happened that he couldn't remember" at the Monteleone Hotel. Captain Moore testified that there was no indication that accused was drunk at that time, but that he "couldn't get anything intelligently from him at all". Accused "was the most nervous and shaky human being" he had ever seen. That evening he took accused to his home, gave him dinner with witness' family, and put him on the train for Camp Shelby at 1900 the same evening (R.36-38).

Lieutenant Colonel Clarence W. Daugette, 375th Infantry Regiment, Fort Huachuca, Arizona, accused's brother and personal defense counsel, testified that accused was educated at the University of Alabama, received his law degree there, and had practiced law "most successfully for a young lawyer". He stated that after practicing for a time, accused received two offers of contracts as an actor in Hollywood, California, but finding himself unsuccessful in this, he was disappointed in himself, returned to Alabama, and received an appointment as a special investigator for the Dies Committee in Washington. During this time he gave several blood transfusions to his father, who had undergone a serious operation in Baltimore. After the start of the war he resigned from the Dies Committee and enlisted in the Army. He was sent to Officers' Candidate School at Fort Belvoir, Virginia, but due to recurrence of his father's illness, the necessity of giving additional transfusions, and the mental and physical strain, he missed work at the school and failed to graduate. In August of 1942 he was transferred to Camp Edwards, Massachusetts, and some time later was sent to Officers' Candidate School at Fort Benning, from which school he did graduate (R.34,35).

Lieutenant Colonel Samuel E. Miller, Medical Corps, the chief of Medical Service at the Station Hospital at Camp Shelby, testified that he was a member of a disposition board appointed to examine accused, and read into the record the finding of the Board. The board diagnosed accused's condition as "Psychoneurosis, mixed type, existed prior to induction, not in line of duty"; was of the opinion that accused was unfit for further military duty; and recommended that he be transferred to a general hospital for further observation, treatment, and disposition. Witness stated that he did not consider accused to be insane at the time the board made its finding (R.32-34).

Captain Nugent, recalled as a witness for the defense, testified that at the time accused was sent to the hospital on 24 October, "he seemed very normal and not unusual at all". Witness saw no noticeable nervous symptoms. Witness also stated that accused "did his job without

at Hattiesburg (Camp Shelby), since he had no watch. He stated that the porter failed to do so, and that he was "half-way to New Orleans" before he woke up. The porter told him that they had passed the one stop between Hattiesburg and New Orleans, and the conductor advised him that the only thing to do was to go on to New Orleans and take a return train. Upon arriving at New Orleans about 0900 he immediately wired Lieutenant Garrett at Headquarters Company that he had slept through Hattiesburg on the train. He then found that the morning train for Hattiesburg had departed, and that the next one would leave at 1940, to arrive at 2300. He did not inquire about bus schedules because he had already sent the telegram saying that he would be back on the next train, and because buses traveled so slowly (R.38-40).

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leave, witness sent an investigator, who located accused on 2 October at the Senator Hotel. The investigator brought accused to witness' office, where accused stated that he had been home on the previous week-end and had failed to get off the train. Asked why he failed to return to camp, accused said that "he planned to and something had happened that he couldn't remember" at the Monteleone Hotel. Captain Moore testified that there was no indication that accused was drunk at that time, but that he "couldn't get anything intelligently from him at all". Accused "was the most nervous and shaky human being" he had ever seen. That evening he took accused to his home, gave him dinner with witness' family, and put him on the train for Camp Shelby at 1900 the same evening (R.36-38).

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a bit of hesitancy and always did what I asked him and was a good soldier". Witness "wouldn't say" that accused was the best man in his company, but that he was "a good officer" (R.44,45).

4. The evidence requires no recapitulation, the testimony of the prosecution's witnesses being undisputed. Accused pleaded guilty to Additional Charge I and its Specification, and all elements of the offense were established independently by the prosecution. There is no reasonable doubt of his guilt of the offenses charged in the Specifications of Charge I and Charge III. That he slept through Hattiesburg and rode on to New Orleans is no defense to the charge of absence without leave. This offense was intensified by his prolongation of the absence during which time he committed the offenses set forth in Specifications 1 and 2 of Charge III. The intoxication was clearly voluntary on his part, and his conduct during it was of a nature to bring discredit upon the military service. He admitted that he missed the meeting set for 20 September. Though he denied having seen or known of the notice, the evidence is uncontradicted that he was under an obligation to read the bulletin board daily. Article of War 61 "is designed to cover every case not elsewhere provided for where any person subject to military law is through his own fault not at the place where he is required to be at a time when he should be there" (MCM, 1928, par. 132). Specific intent is not an element of the offense here involved, "and proof of the act alone is sufficient to establish guilt" (MCM, 1928, par. 126a). To excuse the accused for his absence from the scheduled meeting upon the ground that he neglected his obligation to read the bulletin board does not appeal to our sense of logic. In our opinion the accused was properly convicted under Specification 1, Charge I.

5. The court admitted in evidence (Pros. Ex. H) a report and finding of a neuropsychiatric examination made upon accused by Major John M. Cotton, Medical Corps, Foster General Hospital. It is unnecessary to determine whether or not this document was competent, for even if incompetent, its admission did not prejudice the substantial rights of accused.

6. On 6 January 1944, the day following accused's trial, seven of the nine members of the court-martial signed a recommendation of clemency to the extent of suspension of the sentence, stating that they believed that accused could be rehabilitated. On 15 January 1944 the seven members of the court formally and by an official communication withdrew their recommendation, stating that on the previous day it had been officially reported to the president of the court by the adjutant of accused's regiment that accused was absent without leave.

7. War Department records show that accused is 33-6/12 years of age and single. He graduated from Jacksonville, Alabama, State Teachers' College, and from the University of Alabama with an LL. B. degree. He enlisted in the Army on 6 March 1942, and was commissioned a second

lieutenant, Infantry, Army of the United States, upon graduation from the Infantry School, Fort Benning, Georgia, on 12 July 1943.

8. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of violation of Article of War 61 and Article of War 96.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A. G.O., 24 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 Second Lieutenant Rankin M. Daugette (0-1322612), 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 repetition by accused of his offenses of absence without leave, the third of which occurred after his sentence and after the recommendation of clemency, 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. 202, 26 May 1944)

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

SPJGN
CM 248501

11 FEB 1944

UNITED STATES	)	ARMY AIR FORCES TACTICAL CENTER
	)	
v.	)	Trial by G.C.M., convened at Orlando Air Base, Florida, 8 December 1943. Dismissal, total forfeitures and confinement for five (5) years.
	)	
Captain JAMES H. REED (0-370951), Finance Department.	)	

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Captain James H. Reed, F.D., Headquarters & Headquarters Squadron, 338th Service Group, did at AAF Service Center, Leesburg, Florida on or about 22 November 43 feloniously embezzle by fraudulently converting to his own use $976.00 lawful money of the United States, property of the United States, entrusted to him as a Finance Officer by the Government of the United States.

He pleaded guilty to and was found guilty of the Charge and its Specification. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for a period of five (5) years. The reviewing authority approved the sentence, designated the United States Penitentiary, Atlanta, Georgia, as the place of confinement and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution, supplementing the accused's plea of guilty, shows that on the morning of 22 November 1943 two officers, pursuant to the direction of the Commanding Officer of the Army

Air Forces Service Center, Leesburg, Florida, went to the office of the accused, who was Disbursing Officer of the 338th Service Group, for the purpose of checking the accused's cash account. Upon accused's arrival, he opened his safe and delivered to them the cash blotter. The officers and the accused respectively and without variance counted the cash and tabulated the paid but unentered vouchers which disclosed a shortage of $976 in cash, money of the United States which had been entrusted to the accused. The accused offered no explanation for the shortage at that time but two days later, in the presence of the same two officers and the Provost Marshal, after the 24th Article of War had been read to him, the accused admitted using $826 of the $976 shortage for personal expenses such as payment of pre-existing gambling debts and stated that the difference of $150 had been drawn by him in smaller sums as advances upon his own salary. He offered to make restitution of the $826 and it was suggested to him that he make a statement in writing concerning the shortage. He thereafter prepared a statement admitting his defalcation to the extent of $826 and exhibited it to one of the officers the next day but did not sign it. On the afternoon of the same day, 25 November 1943, the accused in the company of the two officers interviewed the commanding officer of whom he requested permission to repay the sum of $826. The accused was again fully advised of the provisions of the 24th Article of War and thereafter stated he had taken "this money from his accounts over a period of time" but was only able to account for about $200 of it which he had spent for liquor and gambling. He then delivered $826 in cash to the finance officer and agreed to repay the balance of $150 at the end of the month when he received his pay (R. 7-15, 15-21, 21, 22-24).

The cash blotter showing the alleged shortage and also official Form 3, I.G.D., "Report of an Inspection and Statement of the Money Accountability" of the accused, by him certified as to the $976 shortage, were admitted in evidence. It was also in evidence that pursuant to appropriate regulation an audit of the cash account was made at the end of each month (R. 9, 11, 14 and Exs. I, II).

4. The accused, after explanation of his rights as a witness, elected to make an unsworn statement in which he admitted a "mistake" but denied a dishonest intent, the absence of which, he asserted, was manifest from his making restitution and refraining from attempting to falsify his records in an effort to conceal the peculation. He invited investigation of his life as a civilian and implored the court to temper its judgment with mercy and permit him to remain in the service in some other capacity. In reply to the direct question of the defense counsel, he persisted in his plea of guilty and, subsequent to being found guilty but prior to the pronouncement of sentence, explained that he was repaying to the Government at the rate of $100 per month the sum of $4,590.40 for which he had been held accountable because of his negligent loss of eight vouchers (R. 25-26, 27).

5. The Specification alleges that the accused at a designated place on or about 22 November 1943 feloniously embezzled "by fraudulently converting to his own use $976 lawful money of the United States, property

of the United States, entrusted to him as a Finance Officer by the Government of the United States". The offense charged is that of embezzlement which is defined by applicable authority as follows:

> "Embezzlement is the fraudulent appropriation of property by a person to whom it has been entrusted or into whose hands it has lawfully come (Moore v. U.S., 160 U.S. 268).
>
> "The gist of the offense is a breach of trust. The trust is one arising from some fiduciary relationship existing between the owner and the person converting the property, and springing from an agreement, express or implied, or arising by operation of law. The offense exists only where the property has been taken or received by virtue of such relationship." (M.C.M., 1928, par. 149h).

The evidence adduced by the prosecution abundantly supplements the accused's plea of guilty. Two officers definitely ascertained the shortage which is also evidenced by the accused's cash blotter and his accountability report for the time in question. He, although offering no explanation at such time, thereafter was twice warned of his right to speak or remain silent and subsequently voluntarily admitted his peculation and made restitution which, of course, does not obliterate the offense. His statements, while probably amounting to a confession, at least were admissions; and, in either event, were properly admitted into evidence. His unsworn statement also contains an admission of his "mistake" and restitution therefor which could properly be considered by the court as evidence (M.C.M., 1928, pars. 76 and 114b). Although his unsworn statement disavows a dishonest intent and therefore by implication indicates his intention to return the embezzled funds, it is not inconsistent with his plea of guilty because it is no defense to the offense of embezzlement that the defaulting person may have intended to return the misappropriated funds (CM 192530 [1930] Dig. Ops., JAG, 1912-40, sec. 451 [18].) Indulgence in the warranted presumption that the required official audit for the preceding month was made, sufficiently fortifies the evidence adduced to the effect that the conversion took place on or about the time alleged. The evidence therefore amply supplements the accused's plea of guilty, establishes the accused's guilt and fully supports the findings of guilty of the Charge and its Specification.

6. The accused is about 37 years of age. The War Department records show that on 2 August 1938 the accused was appointed a second lieutenant, Finance-Reserve, that on 12 January 1941 he was ordered to active duty since which date he has been so serving, that he was promoted to first lieutenant on 1 November 1941, and that he was promoted to captain on 6 May 1942.

7. The court was legally constituted. No errors injuriously af-

fecting 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 suppose the findings of guilty of the Charge and its Specification and the sentence, and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 93.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Cooper, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

SPJGN
CM 248501

1st Ind.

War Department, J.A.G.O., 18 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 James H. Reed (0-370951), Finance 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. 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.

(Sentence confirmed but forfeitures and three years of confinement remitted. G.C.M.O. 181, 19 May 1944)

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

SPJGQ
CM 248506

15 FEB 1944

UNITED STATES	)	FIRST AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at
	)	Grenier Field, New Hampshire,
Second Lieutenant LEON W.	)	14 and 17 January 1944. Dis-
BLOOM (O-857352), Air Corps.	)	missal.

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OPINION of the BOARD OF REVIEW
ROUNDS, HEPBURN and FREDERICK, 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: In that Second Lieutenant Leon W. Bloom, Air Corps, did, at Manchester, New Hampshire, rent certain apartments for the use of himself and one Helen Gunderson, a woman not his wife, and did wrongfully occupy the said apartments with her as husband and wife, from about 15 November 1943 until about 24 November 1943.

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

Specification 1: In that Second Lieutenant Leon W. Bloom, Air Corps, having received a lawful order from First Lieutenant Beryl H. Freshour, Air Corps, to fire a prescribed weapons course to qualify him for overseas duty, the said First Lieutenant Beryl H. Freshour being in the execution of his office, did, at Grenier Field, New Hampshire, from about 11 November 1943 to about 24 November 1943, fail to obey the same.

Specification 2: In that Second Lieutenant Leon W. Bloom, Air Corps, having received a lawful order from Colonel R. C. Wriston, Air Corps, Base Commander, to remain within the limits of the Post

because his organization was alerted for overseas shipment, the said Colonel R. C. Wriston, being in the execution of his office, did, at Grenier Field, New Hampshire, on about 24 November 1943 fail to obey the same.

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

Specification: In that Leon W. Bloom, 2nd Lieutenant, Air Corps, 34th Base Headquarters & Air Base Squadron, having been duly placed in arrest in quarters at Grenier Field, New Hampshire, on or about 24 November 1943, and the limits of arrest having been on or about 20 December 1943, raised to the limits of Grenier Field, New Hampshire, did, at Grenier Field, New Hampshire, on or about 25 December 1943 break his said arrest before he was set at liberty by proper authority.

Accused pleaded guilty to the Specification of Charge I, and not guilty of a violation of Article of War 95 but guilty of a violation of Article of War 96. He pleaded not guilty to all of the other Specifications and Charges. He was found guilty of all Specifications and Charges, except Charge I. He was found not guilty of Charge I (Article of War 95), but guilty of a violation of Article of War 96. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to be confined at such place as the reviewing authority might direct for a period of three years. The reviewing authority approved the sentence, but remitted the confinement, and forwarded the record of trial for action under Article of War 48.

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

At all times pertinent to the issues involved, accused was stationed at Grenier Field, New Hampshire. On or about the 2nd or 3rd of November 1943 he was assigned as commanding officer of Casual Detachment No. 3 (a unit which was being organized and prepared for an overseas assignment), and continued in that capacity until relieved of command on the 24th of November 1943, as a result of his arrest on charges involved in this prosecution (R. 25).

Specification of Charge I:

On 15 November 1943 accused and Miss Helen Gunderson, representing themselves to be husband and wife, rented an apartment at 64 Merrimack Street, Manchester, New Hampshire, from Edward Holden, the owner. They lived together in the apartment until 22 November 1943. During this time a card bearing the inscription "LT. & MRS. L. W. BLOOM", which accused admitted to be his, was attached to the apartment mail box. Having been requested to vacate this apartment because of a dog and cat they were keeping, accused and Miss Gunderson, on 22 November 1943, moved to another apartment at 134 Peel Avenue, Manchester, New Hampshire. They represented themselves to be Lieutenant and Mrs. Leon Bloom to the owner, Arsene Lacourse, and lived together in this second apartment as husband and wife

until 24 November 1943. Accused, in the presence of Captain Llewellyn C. Martin, Assistant Base S-2, admitted to a civilian police officer, George E. Welch, who warned him that he need not say anything if he so chose, that he and Miss Gunderson had been living together at the places above indicated, holding themselves out as husband and wife, but that, although engaged to be married, they were not, in fact, married (R. 8, 9, 10, 17; Pros. Exs. 1, 2, 3).

Specification 1, Charge II:

At the time accused was assigned to Casual Detachment No. 3, Captain Wendell Bingaman, Base S-1, noticed that accused's War Department A.G.O. Form 66-1 did not show that he had fired the weapons required by War Department directives to be fired by personnel destined for foreign duty. Captain Bingaman, relying upon War Department A.G.O. Forms 66-1 and 66-2, neither of which showed at the time of trial that accused had completed any of the required weapon firing, upon several occasions forwarded accused's name to Base S-3 as one who had not completed firing (R. 25-26).

First Lieutenant Beryl H. Freshour, Base S-3 officer, whose order accused is charged with having failed to obey, testified that he first contacted accused on the 4th or 5th of November with regard to the matter of qualification in weapons. At that time he explained to accused over the telephone that an effort was being made to have all enlisted men fire as quickly as possible, and that arrangements would be made later for officers to fire as a group (R. 27). On the 9th or 10th of November he advised accused that arrangements had been made for the officers to fire. Firing by officers did take place the following day (R. 28).

Testifying with reference to the conversation last above mentioned, and in response to the question, "Did you instruct Lt. Bloom to fire?", Lieutenant Freshour replied, "At that time I explained to him on the telephone that arrangements had been made that all officers of detachments from '1' to '6' would fire and that details were to be gotten from their own units - pit details." And in response to the question, "Did you tell Lt. Bloom that he had to fire the course?", he replied,

> "I explained to him that a course had to be fired in the carbine. The explanation was in this manner: That if he had fired a qualification course with any weapon under POR with regards to the pistol, rifle, or Tommy-gun, it still would not include the fact that you had to fire a familiarization course with the carbine."

In response to a question as to whether he checked up and told accused that he had not fired the required weapons course, Lieutenant Freshour replied,

> "I checked — I can't give you the exact date. I know one telephone conversation I had with Lt. Bloom, he mentioned at that time he had fired both the pistol and

Tommy-gun. I said, ' Have you fired the carbine?' He said, 'No.' I asked him if he had a record on his 66-1, or why we didn't have the records. He said they had been given to him personally. I said, 'Regardless of that, they must be recorded on the 66-1, and if you will bring them up to the S-1 office, they will be recorded, but that still would not exclude you from the fact that you had to fire the carbine.' We had received a telegram from First Air Force to the effect that all officers and personnel will fire." (R. 28).

In response to the question, "Did you at any time give Lt. Bloom instructions in the nature of an order to fire any particular course?", Lieutenant Freshour replied, "No definite orders, no." (R. 29).

The foregoing testimony was followed by the following questions to and answers by Lieutenant Freshour:

"Q. What did you do on the 24th of November with regard to Lt. Bloom?

"A. On the 24th of November, I called both Sergeant Preban and Lt. Bloom. The instructions I gave to Sergeant Preban were we had three men that must go to the range and fire the carbine, two officers and an enlisted man; to get transportation ready; and I mentioned at that time to Sergeant Preban that one of these men was Lt. Bloom. The truck finally left at approximately eight o'clock with the first group. My instructions with the truck were to come back and pick up these three personnel and take them to the firing range. This was approximately at eight o'clock when I talked to Sergeant Preban. Shortly after, I called Lt. Bloom, and told him that the 25th was the shipping date for their group, and it was imperative that he get his firing accomplished in the morning; that it still had to be recorded, and he had to fire the carbine; and it would be impossible for him to get any firing done in the afternoon due to the inspection we were having on the ramp at 1:30 for all the units.

"Q. At that time did you give Lt. Bloom any orders?

* * * * * *

"A. My instructions will stand, as I said. I told him it was imperative. He had to fire. It had to be on his records. That is the wording I made over the telephone. I can't change it any different." (R. 29).

Upon cross-examination Lieutenant Freshour testified that at the time he talked to him on 24 November 1943, accused explained that it was necessary for him to stay at the unit that morning to check records with Major Rogers (R. 31).

Specification 2, Charge II:

Captain John D. DuRie, Air Corps, Base Adjutant, was ordered on 24 November 1943 by Colonel R. C. Wriston, the Base Commander of Grenier Field, New Hampshire, to restrict all officers and men of the casual units about to depart. Captain DuRie delivered this order to Captain Llewellyn C. Martin, Assistant S-2, for delivery to accused (R. 19, 22, 23). At about 3 o'clock p.m., 24 November 1943, Captain Martin called accused by telephone and told him "that all officers of casual units were restricted to the limits of the reservation until further notice" (R. 11, 13) as a security measure. Later in the afternoon Captain Martin made an attempt to find accused but was unable to locate him on the Base. Captain Martin then requested civilian police authorities to see if they could locate accused in the City of Manchester. Accused was found on the street in the City of Manchester by civilian police officers and was taken to police headquarters, where accused told Inspector George E. Welch of the Manchester Police that he had left the Grenier Field Base around 4:30 o'clock that afternoon (24 November 1943) (R. 17, 18). The order restricting the officers and enlisted men to the Base at Grenier Field was countermanded during the afternoon of 24 November 1943, but not until after 5 o'clock (R. 22).

Specification, Additional Charge:

Accused was placed in arrest in his quarters, Room 33, Building T-210, on 24 November 1943, by written order of Colonel Wriston, Commanding Officer, Grenier Field (R. 19, 20; Pros. Ex. 4). On 27 November 1943 a new written order of arrest was issued by order of Colonel Wriston and delivered to accused, in which accused was more fully advised of the grounds for arrest and of the extent of the restrictions he was under (R. 20; Pros. Ex. 5). By a third written order, dated 20 December 1943, the limits of his arrest were extended to the limits of Grenier Field, New Hampshire (R. 21; Pros. Ex. 6). Each of these instruments bears an acknowledgment of receipt over the signed name of accused.

On Christmas night, 25 December 1943, accused was seen at a party at the residence of one Mrs. Straw, North River Road, in the City of Manchester, New Hampshire, by Second Lieutenants John S. Chesnut, Air Corps, and Arthur M. Aldrich, Air Corps (R. 31-34). At no time between 24 November 1943 and 25 December 1943 had accused been released from arrest (R. 22).

4. Evidence for the defense:

The defense introduced the stipulated testimony of Miss Helen Gunderson to the effect that she and accused met at Columbia University in 1941 where they were both studying for the degree of Doctor of Philosophy; that they became engaged; that parental objection to their marriage was strong on the grounds of religion and unfinished schooling; that the declaration of war and accused's entry into the Army, with the attendant possibility of their separation forever, made them want to consummate their feelings for each other and that they then lived together as man and wife

although violent family objections prevented a solemnization of their relationship by a ceremony. Miss Gunderson concluded with the statement that they desired a little happiness from the few days left, which might have been the last they were to spend together, and that they were both proud of their relationship (R. 36; Def. Ex. A).

First Lieutenant Benjamin H. Rodgers, Air Corps, testified that accused had qualified with the sub-machine gun sometime before 15 November 1943, and with the pistol, 18 November 1943, and that he might have given the qualification cards to accused rather than to the Base S-3 (R. 36-41; Def. Exs. B. C.).

Accused, at his own request was sworn, took the stand and testified only with respect to the Additional Charge alleging a breach of arrest. He stated that he was in the Officers' Club, 25 December 1943, with a group of people and that at about 2000 a young lady invited him to go to a party at the home of Mrs. Straw, North River Road, Manchester. He realized he was under arrest and declined the invitation. The group left the Base at about 2000. Accused was left alone at the Officers' Club and it was Christmas night and about 2100 he decided to go to the party. He hired a cab and left the Base at 2130 and arrived at the party at about 2200. Sometime after midnight he left the party. He testified "I sort of felt that under the circumstances I had enough enjoyment so to speak". He returned to the Base by cab with four or five other officers. During the afternoon and evening he was drinking moderately. In response to a question by a member of the court, accused said he knew when he left the Base that he was breaking his arrest (R. 41-44).

5. Accused offered no evidence upon the trial inconsistent with his plea of guilty, and, under such circumstances such plea was tantamount to a judicial confession of guilt, and was an admission of the truth of all material allegations of fact contained in the Specification under the Charge. The prosecution, not relying solely upon accused's plea of guilty, introduced evidence which shows beyond reasonable doubt that accused and Miss Gunderson, representing themselves to be husband and wife when they were not, did, as alleged in the Specification, occupy the same apartment together, living as man and wife, in the City of Manchester, New Hampshire, from on or about 15 November 1943 to on or about 24 November 1943. The conduct of accused in this respect was of a nature to bring discredit upon the military service, and properly constitutes a violation of Article of War 96. CM 218647 (1942), Bull. JAG, January-June 1942, p. 23.

By Specification 1, Charge II, accused is charged with failing to obey a lawful order given him by First Lieutenant Freshour while in the execution of his office, to fire a prescribed weapons course in order to be qualified for overseas duty. As a witness at the trial, Lieutenant Freshour expressly denied that he ever gave accused a direct order to fire any weapons course. He did communicate with accused from time to time with reference to firing the weapons courses, but these conversations amounted to nothing more than reminders to accused that

he had not fired the required courses, and instructions that it would be necessary for him to fire such prescribed courses, including the familiarization course with the carbine, before leaving Grenier Field for overseas duty. Until the morning of 24 November 1943, so far as the record of trial discloses, no definite time when accused should fire any weapon had ever been suggested. The time and place appear to have been left to the discretion of accused. The time within which the evidence indicates accused could have fired the weapons, i.e., from the 11th through the 24th of November, was comparatively short, and yet it is shown that during that period he fired the qualification courses with the pistol and the tommy-gun. Lieutenant Freshour's statement to accused on the morning of 24 November 1943 that his organization was to leave the following day, and that it was imperative that he fire the familiarization course with the carbine that same morning, amounted to nothing more than an exhortation. Accused informed Lieutenant Freshour at the time that he could not fire that morning due to the necessity of helping Major Rogers check records; but even after this indication by accused that he would be unable to fire the carbine that morning, Lieutenant Freshour failed to express his wishes in the form of a definite order.

The various statements made by Lieutenant Freshour to accused are deemed too general and indefinite to constitute an "order" within the contemplation of that term as used in the Specification, and the evidence of record fails to show that degree of culpable neglect or indifference on the part of accused deemed requisite to establish the offense charged. It follows that the evidence is considered insufficient to sustain the finding of guilty of Specification 1, Charge II.

The evidence offered in support of Specification 2, Charge II, is sufficient to establish the material allegations of the offense charged. The order of Colonel Wriston, Air Corps, Base Commander, Grenier Field, made on 24 October 1943, that accused remain within the limits of the post pending further orders was conveyed to accused at approximately 3 o'clock p.m. that day, and he voluntarily admitted to the civilian police officer Welch that he left the field at approximately 4:30 o'clock in the afternoon of 24 November. This admission is corroborated by the testimony of Captain Martin, who testified that he made search for accused during the afternoon and was unable to find him on the post. The order to remain on the post was not countermanded until after 5 o'clock p.m. The order to remain within the limits of the post was lawful, under the circumstances; it was issued by accused's superior officer; and in failing to obey the same, accused was guilty of conduct to the prejudice of good order and military discipline, in violation of Article of War 96.

The evidence shows conclusively that accused was, by proper authority, placed in arrest in quarters on 24 November 1943, and, just as conclusively, that he breached his arrest on 25 December 1943 before he had been set at liberty by proper authority. The limits of his arrest had been enlarged in the meantime, but not beyond the limits of the Base, Grenier Field, New Hampshire. Not only does the evidence introduced by the prosecution show that accused attended a party at a residence in the City of Manchester on the night of 25 December 1943, but accused,

while testifying as a witness in his own behalf, freely admitted that he left the post and attended the party, realizing when he did so that he was breaching his arrest. The findings of guilty of the Additional Charge and its Specification are amply supported by the evidence.

6. The record discloses that this officer is 24 years of age. He graduated from high school and attended the City College, New York, for four years. He received his B.S. degree from the latter institution, his M.A. degree from Louisiana State University, and attended Columbia University (Teachers College) for one year while working for a P.H.D. degree. He majored in speech, education and psychology. After taking a civil service examination, he was certified for a position as Junior Statistician. He has been an actor and has had experience as a radio announcer. He speaks and reads the Jewish language fluently, reads French well and speaks it fairly well. He was an aviation cadet from 1 September 1942 to 26 December 1942, was commissioned a temporary second lieutenant, Army of the United States, on 26 December 1942 and entered on active duty at Scott Field, Illinois, on the same date.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is not legally sufficient to support the finding of guilty of Specification 1, Charge II, but is legally sufficient to support the findings of guilty of the remaining Specifications and Charges and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of violation of Article of War 69 or 96.

William A. Pounds, Judge Advocate.

Earle Stephens, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 21 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 Leon W. Bloom (0-857352), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is not legally sufficient to support the finding of guilty of Specification 1, Charge II (failure to obey lawful order of his superior officer), but is legally sufficient to support all other findings and the sentence as modified and approved by the reviewing authority and to warrant confirmation thereof. I recommend that the sentence as approved by the reviewing authority be confirmed and carried into execution.

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

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 Executive action

(Finding of guilty of Specification 1, Charge II, disapproved. Sentence as approved by reviewing authority confirmed. G.C.M.O. 189, 25 May 1944)

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

SPJGV
CM 248509

17 MAR 1944

UNITED STATES	SECOND AIR FORCE
v.	Trial by G.C.M., convened at Army Air Base, Mountain Home, Idaho, 10 January 1944. Dismissal.
Second Lieutenant GEORGE W. LEWIS (0-1594301), Quartermaster Corps.	

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OPINION of the BOARD OF REVIEW
TAPPY, KIDNER and HARWOOD, 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 George W. Lewis, Quartermaster Corps, 20th Base Headquarters and Air Base Squadron, formerly of 301st Airdrome Squadron, did, without proper leave, absent himself from his station and duties at Army Air Base, Mountain Home, Idaho, from about 23 November 1943 to about 11 December 1943.

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

Specification: In that Second Lieutenant George W. Lewis, Quartermaster Corps, 20th Base Headquarters and Air Base Squadron, formerly of 301st Airdrome Squadron, did, at Carson City, Nevada, on or about 26 November 1943 wrongfully take, carry away and use without the consent of the owner, a certain automobile, to-wit: 1939 model Mercury 4 door sedan, motor number 99A-3585, property of Ray B. Jensen, of the value of more than Fifty dollars ($50.00).

He pleaded guilty to so much of Charge I and its Specification as involves absence without leave from 23 November 1943 to 27 November 1943, in violation of the 61st Article of War, and guilty to Charge II and its Specification in violation of the 96th Article of War. He was found guilty of all Charges and Specifications. No evidence of previous con-

victions 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 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. In support of Charge I and its Specification the morning report of accused's organization showed him from duty to AWOL as of 23 November 1943. By stipulation it was shown that accused was placed in the custody of civil authorities 27 November 1943 and returned to military control 11 December 1943.

Accused having plead guilty to Charge II and its Specification no evidence was presented in support thereof, and prosecution rested.

4. Major Robert W. Brown, 20th Base Hdqrs. and Air Base Squadron, Mountain Home, Idaho, testifying for the defense said that he had known accused very well for more than one and a half years. This acquaintance extended beyond the date of accused's commission, when he was a Special Order Clerk in Headquarters, then stationed at Gowen Field, Idaho. He considered him a good soldier, conscientious, and dependable. His character was never questioned, and he was always present for duty. Accused would sometimes work until one or two o'clock in the morning and report for duty the next morning on time. He was never in any trouble and seemed to be a very superior soldier in all contacts he ever had with him. He believed the accused to be competent officer material (R. 5-8).

It was stipulated that if Lieutenant Colonel R. W. Cassell, Air Corps, Gowen Field, Idaho, were present and sworn as a witness he would testify that he had known accused for two years; that as a sergeant, prior to his commission, he worked under his direct supervision. During this period he never knew accused to even so much as take a drink of liquor; his duties were performed in a superior manner and he often worked continuously for many hours at a time in order that his work would not fall behind; he (Cassell) regretted to learn of accused's misfortune and believed the court-martial proceedings would be conducted in a fair manner (R. 9; Ex. A).

Following an explanation of his rights, accused was sworn and testified that he went to work for a railroad as an apprentice telegraph operator before he had reached his 21st birthday, and when he quit ten years later he was supervisor of materials in the Division Engineers Office. He had never been involved in any trouble in civilian life. Prior to his induction in the Army, 21 February 1942, he had tried to enlist in the Navy and Marine Corps. He was turned down by both because of some bridge work in his mouth. He was promoted progressively from private to the grade of master sergeant prior to attending officer candidate school. During all of this period he was never tried by court-martial nor punished under Article of War 104. Prior to his attendance at OCS he was recommended for a direct commission as a first lieutenant, Transportation Corps.

The recommendation was approved throughout the Chain of Command, but was returned not favorably considered as there was no appropriate vacancy for the appointment. He was commissioned second lieutenant Army of the United States, 16 July 1943. After being transferred to the 301st Airdrome Squadron about 28 October 1943, Captain Bishop, the Commanding Officer, asked accused if he wanted to take some leave. It took him by surprise and he had made no plans. He was short of funds, but Captain Bishop offered to loan him $100, and he accepted the offer. He then contacted the girl he had planned to marry and arranged to have her meet him in Boise, Idaho, to get married. After staying in Boise seven days without her appearing and failing to hear from her, he concluded she had changed her mind, and returned to his station three or four days before his leave expired. The day he got back he reported to Captain Bishop, who told him the secretary of the Officers' Club was in possession of several checks he had written, and which had been returned from the bank dishonored. Accused's father had given him permission to draw checks on his account. The checks were drawn on Farmer's National Bank, Arlington, California, in which he thought his father maintained an account, but it later developed that his father's account was with the Citizens National Bank instead. When he learned about the checks, he was so upset, he left the post immediately intent upon obtaining money to make the checks good. He had only a small sum of money left from the $100 he had borrowed from Captain Bishop, but bought a ticket to Reno, Nevada thinking he might have enough luck with the gambling houses to pay his debts. In this he failed, and the following day was broke - had no money (R. 11). He then went to the military police station in Reno to turn himself in as AWOL, but the military policeman would not believe him. When the provost marshal arrived accused told him his story and the provost marshal advised him to go to the Air Base in Reno and get a partial payment. This he did, and remained there over night. He still did not have enough money to get back to his home station, and decided to try again his luck with the gambling houses to obtain the necessary amount. In this he not only failed but lost the partial payment as well.

It was then he decided on trying to get to his home in California and obtain some money from his father. He caught a ride to Carson City, a distance of about fifty miles from Reno, arriving there in the evening. It was cold and he had no place to sleep, and no money. Someone had told him there was a camp at Carson City, but upon further inquiry he discovered it was a Civilian Air Patrol Camp. It was then about seven o'clock in the evening, and he started to walk. He came upon a parked automobile with the keys in it. In desperation, he got into this car and drove in the direction of Los Angeles, California, until it ran out of gas. This occurred near Bridgeport, California, and about ten o'clock at night. He sat in the car all night, but could not sleep, and had plenty of time to do some thinking. The reason he remained in the car was to prevent the theft of the tires and parts. About 2 o'clock the next afternoon 27 November (R. 13), a sheriff from Bridgeport, drove up to the parked car and took accused into custody. He told the sheriff it was not his car, and the sheriff then took accused into Bridgeport where

he remained until taken by a U.S. Marshal, to Sacramento, California. When arraigned for trial by the civilian authorities in Sacramento the judge dismissed the case and turned him over to military authorities. The provost marshal, Presidio of San Francisco took accused into custody 11 December 1943 (R. 13) and there he remained until two officers from his home station, Mountain Home, Idaho arrived to take him back. While in Sacramento, accused wrote his father and told him what had happened. When he arrived back at his home station he found a certified check for $500 in his name, with which he paid all of his debts (R. 10-13).

5. The Specification of Charge I alleges an absence without leave from 23 November 1943 to 11 December 1943 in violation of Article of War 61. Accused pleaded guilty to the Charge and so much of the Specification as alleges an absence without leave from 23 November 1943 to 27 November 1943. On this latter date he was arrested by civil authorities and remained in their custody until 11 December 1943. His AWOL status was not changed by reason of his retention by the civil authorities or his inability to return for want of money or transportation (page 143, MCM 1928). The evidence conclusively shows that accused was absent without leave during the entire period alleged in the Specification, and the court was fully warranted in finding him guilty as charged.

The sworn statement of accused that on the evening of 26 November 1943 he found a car with the keys in it, parked on a street in Carson City, Nevada, and without the consent of the owner thereof, drove it until the gasoline was exhausted is entirely consistent with his plea of guilty to Charge II and its Specification.

6. Accused is 31 years of age. He completed three years of High School. He was inducted 21 February 1942 and served as an enlisted man until 15 July 1943, when upon graduation from Quartermaster Officer Candidate School, Camp Lee, Virginia, he was appointed second lieutenant, Army of the United States. In recommending accused for the Officer Candidate School, his Commanding Officer stated that accused was of excellent character, and believed he could complete the course of instruction satisfactorily because of his interest and experience in administrative duties.

7. Six of the ten members of the court, the trial judge advocate and his assistant and defense counsel and his assistant signed a written request for clemency, which is appended to the record of trial.

8. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 61 and 96.

Thomas N. Tappy, Judge Advocate.

Herbert W. Kiedinger, Judge Advocate.

Robert B. Hanwood, Judge Advocate.

SPJGV
CM 248509

1st Ind.

War Department, J.A.G.O., 3 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 Second Lieutenant George W. Lewis (0-1594301), 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, to support the sentence as approved by the reviewing authority and to warrant confirmation of the sentence. Accused was absent without leave from 23 November 1943 to 11 December 1943 and during this period of absence wrongfully used the automobile of another without the owner's consent. In view of the previous good record of accused, the recommendation of six of the ten members of the court, personnel of the prosecution and defense counsel for clemency, I recommend that the sentence as approved by the reviewing authority be confirmed, but that the execution thereof be suspended during good behavior.

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

(Sentence as approved by reviewing authority confirmed but execution suspended. G.C.M.O. 231, 29 May 1944)

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

(337)

17 MAR 1944

SPJGH
CM 248522

UNITED STATES v. Captain ALBERT R. WHITE (0-316236), Signal Corps.	EIGHTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Camp Hulen, Texas, 13 January 1944. Dismissal, total forfeitures and confinement for three (3) years. Disciplinary Barracks.

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 94th Article of War.

Specification 1: In that Albert R. White, Captain, Signal Corps, Army of the United States, being at the time Chief, Signal Section and Signal Property Officer, Camp Hulen, Texas, did, at Camp Hulen, Texas, on or about the first day of November 1943, feloniously embezzle by fraudulently converting to his own use two United States Signal Corps radio transmitter and receiving sets, SCR-543-C, of the total value of about $3,460.70, the property of the United States furnished and intended for the military service thereof, intrusted to him, the said Captain Albert R. White, by the Commanding Officer, Camp Hulen, Texas.

Specification 2: In that Albert R. White, Captain, Signal Corps, Army of United States, being at the time Chief, Signal Section and Signal Property Officer, Camp Hulen, Texas, did, at Camp Hulen, Texas, on or about the first day of November 1943, feloniously embezzle by fraudulently converting to his own use one power unit consisting of a one-cylinder gasoline motor of the value of about $85.00; one radio tube and set tester, Model 804, manufactured by Radio Products Company, Inc., of the value of about $60.00; one portable motion picture screen of the value of about $19.50, the property of the United States

furnished and intended for the military service thereof, intrusted to him, the said Captain Albert R. White, by the Commanding Officer, Camp Hulen, Texas.

Specification 3: In that Albert R. White, Captain, Signal Corps, Army of the United States, being at the time Chief, Signal Section and Signal Property Officer, Camp Hulen, Texas, did, at Camp Hulen, Texas, on or about the ninth day of December 1943, feloniously embezzle by fraudulently converting to his own use one Signal Corps chest Ch-73-C, serial number 3049, of the value of about $25.00; one Signal Corps chest Ch-73-B, serial number 1998, of the value of about $25.00; about 200 feet of ½ inch conduit pipe of the value of about $16.00; three 5-panel doors of the value of about $12.00; three panels of Celotex 4 feet by 9 feet by ½ inch of the value of about $10.00; two sacks of Portland cement of the value of about $2.00, the property of the United States furnished and intended for the military service thereof, intrusted to him, the said Captain Albert R. White, by the Commanding Officer, Camp Hulen, Texas.

Specification 4: In that Albert R. White, Captain, Signal Corps, Army of the United States, being at the time Chief, Signal Section and Signal Property Officer, Camp Hulen, Texas, did at Camp Hulen, Texas, on or about 15 September 1943, feloniously embezzle by fraudulently converting to his own use about 30 feet of ¼ inch mesh 3-foot hail wire of the value of about $5.00, about 100 square feet of hardwood flooring of the value of about $6.00, two gallons of Murphy OD enamel of the value of about $3.40, about 12½ pounds of red lead of the value of about $2.00, the property of the United States furnished and intended for the military service thereof, intrusted to him, the said Captain Albert R. White, by the Commanding Officer, Camp Hulen, Texas.

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

Specification 1: In that Albert R. White, Captain, Signal Corps, Army of the United States, being at the time Chief, Signal Section and Signal Property Officer, Camp Hulen, Texas, did, at Palacios, Texas, on or about 14 December 1943, with intent to deceive Colonel Russell J. Potts, his commanding officer, officially state to the said Colonel Russell J. Potts that certain property, to-wit: 3 panel doors, about 200 feet of ½ inch conduit pipe, about 100 square feet of hardwood flooring, about 30 feet of ¼ inch mesh 3-foot hail wire and 2

gallons of Murphy OD enamel belonged to him, the said Captain Albert R. White, which statement was known by the said Captain Albert R. White to be untrue in that the said doors, iron pipe, hardwood flooring, wire and paint were then and there the property of the United States of America, which fact was then and there known by the said Captain Albert R. White.

Specification 2: In that Albert R. White, Captain, Signal Corps, Army of the United States, being at the time Chief, Signal Section and Signal Property Officer, Camp Hulen, Texas, did, at Palacios, Texas, on or about 14 December 1943, with intent to deceive Colonel Russell J. Potts, his commanding officer, officially state to the said Colonel Russell J. Potts that certain property, to-wit: 2 sacks of Portland cement, then and there in the possession of the said Captain Albert R. White, had been purchased at a hardware store by him and belonged to him, the said Captain Albert R. White, which statement was known by the said Captain Albert R. White to be untrue in that the said cement was then and there the property of the United States of America, which fact was then and there known by the said Captain Albert R. White.

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

3. The evidence for the prosecution as to all Charges and Specifications may be summarized as follows:

It was stipulated (Ex. A) between the prosecution, the defense counsel and the accused that the property referred to in the Charges and Specifications, was at all times the property of the United States, furnished and intended for the use of the military service, and was of the respective values as set forth therein; that the accused was at all times mentioned in the Charges and Specifications, Chief of the Signal Section, and Signal Property Officer at Camp Hulen, Texas; and that he was the lawful custodian of the property referred to and described in the Charges and Specifications, the same having been entrusted to him by the commanding officer of Camp Hulen, Texas (R. 6).

On 9 December 1943, the accused directed Corporal Wilton A. Miller to transfer certain property designated by the accused from the

Signal Corps warehouse at Camp Hulen to the farm of accused. Miller aided by another soldier transported by Government truck two signal corps chests, 200 feet of ½ inch conduit pipe, three 5-panel doors, three panels of celotex, and two sacks of Portland cement to the farm, where it was placed in a building on the premises. The accused informed Corporal Miller that he would use the building on his farm for a storeroom. The signal warehouse contained ample room for the storage of all the property (R. 29-36).

On 14 December 1943, the accused was called before his commanding officer, Colonel Russell J. Potts and informed that certain irregularities in the Signal Section reported to him, would have to be investigated. The accused granted written permission (Ex. C) for the search of his property at Palacios, Texas, and accompanied Colonel Potts, Major Eric Eades, of Military Intelligence, and Mr. John Duffy, an agent of the Federal Bureau of Investigation, to the premises. At the request of accused his home was not searched because of the illness of his wife. The group went to a nearby tract of land owned by accused who unlocked the door to one of the buildings then in the process of being converted into living quarters and it was found to contain several items of property, some of which bore labels of the United States Government. The property which was photographed (Ex. H) consisted of two Signal Corps chests, about 200 feet of ½ inch conduit pipe, three 5-panel doors, three panels of celotex, two sacks of cement, about 30 feet of ¼ inch mesh 3 foot hail wire, about 100 square feet of hardwood flooring, two gallons of Murphy O.D. enamel, and 12½ pounds of red lead (R. 7-9, 18-19).

When questioned by Colonel Potts as to the ownership of the property the accused stated that the three 5-panel doors, the 200 feet of ½ inch conduit pipe, the 100 square feet of hardwood flooring, the hail wire and two gallons of Murphy O. D. enamel, belonged to him, had been purchased by him or were on the premises when he acquired it, and that the two sacks of cement had been purchased by him at a local hardware store. When his attention was directed to a tag on the conduit pipes which indicated that it had been shipped to the Signal Office, Camp Hulen, the accused removed the tag and said that "the boys in the shop must have brought it down to the house" through error. After he had returned to Camp Hulen, and had been informed of his rights the accused inquired whether if he returned everything and tendered his resignation, "the whole matter could be dropped". Later he asked whether if he returned the property and procured an overseas assignment, "the matter" could be dropped. Colonel Potts declined to accede to either of these proposals and placed the accused in arrest in quarters (R. 10-11, 19-20).

At about 8:45 p.m. the same day Lieutenant Dan P. Doyle, next door neighbor of accused in Palacios, was requested by Mrs. White, the wife of accused, and Mr. Chester Churchwell, the Signal Corps shop foreman

at Camp Hulen, to remove some property from the basement of the White residence. He took two boxes, which he identified in a photograph (Ex. F) to a garage at 201 First Street, Palacios, Texas. He then returned and with the aid of Mr. Churchwell transported the remaining property in three barrels from the basement of accused to the Doyle garage. On 17 December 1943, realizing that he had implicated himself by having the property in his possession, Lieutenant Doyle placed the contents of the barrels in his car and started to drive to Camp Hulen, but became "terrified" and unloaded in a field beside the road to Port Lavaca, all of the property except a portable screen which he later delivered to Major Eades. A photograph (Ex. G) of these articles showed, among other items, a power unit of a one-cylinder gas motor, one radio tube and testor set and a portable motion picture screen (R. 11-12, 22-26).

On 19 and 20 December 1943, Major Eades and Colonel Potts recovered the property in a field about twenty miles from Camp Hulen where it had been left by Lieutenant Doyle. From information which he obtained in a conversation with Lieutenant Doyle on 21 December, Major Eades located the two boxes which Doyle had moved to the garage at 201 First Street, Palacios. One of the boxes, painted black, was addressed to Mrs. Alice White (mother of accused), Capac, Michigan. A photograph (Ex. E) made of the contents of the two boxes showed two radio transmitters and receiving sets. Additional property was recovered by agents of the Federal Bureau of Investigation in Houston, Texas, on premises owned by the father-in-law of Mr. Churchwell. A photograph (Ex. I) taken of the recovered articles showed that they included antennae masts, motor generator units, a power supply unit, tool chests and a remote control apparatus, all component parts of the radio sets. The Federal Bureau of Investigation also recovered in Port Huron, Michigan, a box of articles which when opened and photographed (Ex. J) disclosed additional component parts of the radio sets (R. 11-17, 21, 27-28).

In a voluntary, signed statement (Ex. D) made by the accused on 30 December 1943, after he had been informed that he was not "required" to make a statement and that any statement made by him could be used against him, he stated that "a month or so ago" he and Mr. Churchwell had transported two radio sets "SCR 543" from the Signal Repair Shop, in Camp Hulen to the home of accused near Palacios, Texas. The sets were removed for the purpose of cleaning up the floor of the shop, as he "kept catching the devil" from his commanding officer for having a dirty floor. The radio sets were "controlled" equipment, and as the records were evidently lost he was never able to determine where they came from or for whom they were intended. He did not know what to do with the sets or how to dispose of them and finally decided to send one of them to Michigan. He had written his mother that he was sending a black box to be stored in the garage, but did not know what prompted him to do this as he could not sell the radio and it would have been of no value to him. Mr. Churchwell hauled the other

radio set away, "probably" with the intention of helping the accused clear out the place. He thought the radio sets were worth $600 or $800 but did not know what the Government had paid for them. Accused had intended to return all of the property found at his home, including that which was removed by Lieutenant Doyle, except the SCR radio sets and their component parts (R. 15).

4. For the defense: In a prepared unsworn statement (Def. Ex. 1) the accused stated that he had been working for the past few months under a person of whom he was afraid. Every time his commanding officer stepped into the Signal Corps buildings he berated accused for one reason or another. When accused returned from a lengthy stay in the hospital following a hernia operation, he found it necessary to work from 12 to 17 hours a day in an effort to put together a dismantled Signal Section. He broke down under the strain, and as a result did things he would never have done at a more settled time. He made mistakes and errors in judgment due to his fear, long hours of work, and nervous tension, but never received any material gain from his actions. All the articles taken by him had been recovered and complete restitution to the Government had been made. He took too literally the order of his commanding officer to "clean the damn place up", and saw no harm in making personal use of tools and equipment if they were not damaged. He further stated that he had spent Christmas day in his hut in fasting and prayer and requested the court to consider his salvage value. He pointed out that his officers' qualification card showed that his efficiency rating in every case had been superior, and that his 201 file contained three letters of commendation from former commanding officers. He was classified as fit for general service, held a civilian pilot's license, three college degrees, completed eight years of active Officer Reserve Corps military training, graduated from four military schools with high grades, and was a qualified Radar specialist. He also requested the court to consider the fact that he was the sole support of his widowed mother, 74 years old (R. 36).

5. a. Specifications 1, 2, 3 and 4, Charge I: The evidence shows and the pleas of guilty admit that the accused embezzled United States Government property, furnished and intended for the military service, and entrusted to his care and control, consisting of Signal Corps equipment of a total value of $3,731.60 as alleged in the Specifications, Charge I.

b. Specifications 1 and 2, Charge II: It is shown by the evidence and the pleas of guilty admit that on 14 December 1943 the accused falsely stated to Colonel Russell J. Potts, his commanding officer, that 3 panel doors, about 200 feet of ½ inch conduit pipe, about 100 square feet of hardwood flooring, about 30 feet of ¼ inch mesh hail wire and 2

gallons of Murphy O.D. enamel belonged to the accused; and that 2 sacks of Portland cement had been purchased by him at a hardware store and belonged to him. The circumstances were such as to support an inference that the false statements were made with the intent to deceive.

6. The accused is 39 years of age. The records of the Office of The Adjutant General show his service as follows: Appointed second lieutenant, Engineer Corps Reserve, Army of the United States, and accepted 9 June 1934; active duty 17 June 1934 to 30 June 1934; promoted to first lieutenant, Army of the United States, 21 July 1937; active duty 13 March 1940 to 15 June 1940, and from 1 March 1942; temporarily promoted to captain, Army of the United States, 8 February 1943.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 94th Article of War and mandatory upon conviction of a violation of the 95th Article of War.

Samuel M. Driver, Judge Advocate

[illegible], Judge Advocate

[illegible], Judge Advocate

1st Ind.

War Department, J.A.G.O., 24 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 Captain Albert R. White (0-316236), Signal 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 serving as Chief of the Signal Section and Signal Property Officer at Camp Hulen, Texas, embezzled property of the United States entrusted to his care and control consisting of Signal Corps equipment of the aggregate value of $3,731.60 (Specs. 1, 2, 3 and 4, Chg. I) and made to his commanding officer false official statements as to the manner in which such property was acquired by him or came into his possession (Specs. 1 and 2, Chg. II). It appears from the papers accompanying the record of trial that a considerable portion of the Government property known to have been embezzled by accused was not included in the Charges and Specifications of the present case, that in May 1943 accused shipped two boxes containing large quantities of such property to a relative in Michigan for storage, that on numerous occasions extending back to the summer of 1943 accused falsified Government records to conceal shortages, and that, as disclosed by an audit not completed on 15 February 1944, the shortage of signal corps property at Camp Hulen approximates in value $110,000. I recommend that the sentence to dismissal, total forfeitures and confinement at hard labor for three years be confirmed and carried into execution.

3. Consideration has been given to a letter dated 4 February 1944, directed to the President and written by Mrs. Albert R. White, the wife of the accused, requesting 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 carrying into effect the recommendation made above.

Myron C. Cramer

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

4 Incls.
Incl.1-Rec. of trial.
Incl.2-Dft. ltr. for sig. S/W.
Incl.3-Form of Action.
Incl.4-Ltr. to the President, dated 4 Feb. 1944.

(Sentence confirmed but confinement reduced to two years. G.C.M.O. 216, 26 May 1944)

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

SPJGK
CM 248587

16 FEB 1944

UNITED STATES	)	TANK DESTROYER CENTER
	)	
v.	)	Trial by G.C.M., convened at Camp Hood, Texas, 16 December 1943. Dismissal.
	)	
Second Lieutenant WILLIAM T. JACKSON (0-1825474), Army of the United States.	)	

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

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

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

CHARGE: Violation of the 61st Article of War.

Specification: In that Second Lieutenant William T. Jackson, Tank Destroyer Officer Replacement Pool, Tank Destroyer Replacement Training Center, North Camp Hood, Texas, attached to Company "A", One Hundred Thirty-first Tank Destroyer Training Battalion, North Camp Hood, Texas, did, without proper leave, absent himself from his organization at North Camp Hood, Texas, from about 13 July 1943 to about 9 November 1943.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous conviction was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. On 13 July 1943 accused told his commanding officer, Captain Bernard L. Smith, Infantry, Company A, 131st Tank Destroyer Training Battalion, to which organization accused was attached as an instructor, that he wished to go to the hospital in order to take a physical re-

examination for transfer to the Parachute Corps. Captain Smith testified that he gave accused "permission to go on sick call"; that accused did not return to his organization that day; and that he was not present the next day. Witness searched for accused at his quarters, at the dispensary, and at the hospital, but did not find him. Captain Smith stated that he did not give accused permission to remain absent from the company or to leave the post, and that accused did not return to the organization at any time prior to 28 July 1943, at which time witness left Company A (R. 16-19). The prosecution also introduced Exhibit F, which was an extract from the company morning report of 14 July 1943 showing "Lt. Jackson fr dy to A.W.O.L." (R. 20).

Captain Thomas W. Alvey, Infantry, Company A, 131st Tank Destroyer Training Battalion, assumed command of the company on 20 August 1943. Learning from the morning reports at that time that accused was being carried as absent without leave, he continued so to list accused on subsequent reports and did not see accused in his organization until "Sunday . . . November 15th". (Note: 15 November 1943 fell on a Monday) (R. 4, 5, 6).

Second Lieutenant William S. Jordan, Company A, 131st Tank Destroyer Training Battalion, testified that he had been attached to that organization since 20 September 1943, as platoon leader of Company A. He stated that he knew of his own personal knowledge that at that time accused had been a member of the company and that he was absent. He testified that on 13 November he was Duty Officer at Battalion Headquarters, and that while he was on duty the door opened and accused walked in. Accused asked witness if he was Officer of the Day. Witness answered that he was Duty Officer. Accused gave his name, and to witness' statement, "you have been AWOL", accused said, "Yes". Witness placed him in arrest in quarters (R. 9, 10).

Evidence for the defense.

Accused was correctly apprised of his rights by the Law Member and made a sworn statement (R. 26). He stated that he had been in the military service since 12 June 1941, and had been commissioned since 4 June 1943. He had been under mental strain for some time, due to his sister's death while he was an enlisted man, and his father's death and a Caesarean operation on his wife during the time he was attending Officer Candidate School. Due to emergency furloughs because of these events he had three times "been put back" into succeeding cycles in the school. His mother's lack of finances and his inability to pay for nursing care for his wife were concurrent difficulties. He stated that he left camp on 13 July 1943, between 1500 and 1600, without permission although at the time he left he intended to return that evening; and that he returned on 17 November 1943.

4. Accused's absence without leave was established beyond reasonable doubt by the undisputed testimony of witnesses who had personal knowledge of his absence and of his return, and by his own statement under oath in court. His reasons for the absence, though mitigating, are not a defense to the Charge.

5. The Specification of the Charge alleges that accused remained absent until about 9 November 1943, while the proof was that the absence continued until either 13 or 17 November. While this was a variance, it was a minor one, had no bearing upon the question of guilt of the original unauthorized absence, and was favorable rather than prejudicial to accused. Several items of hearsay and immaterial testimony were allowed to remain in the record, but there is ample evidence to support the findings without this testimony, and accused was not prejudiced thereby.

6. War Department records show that accused is 29 4/12 years of age and married, and has two small children. He graduated from Cass Technical High School, Detroit, Michigan, in 1933. He entered the Army on 19 June 1941, serving as an enlisted man until graduating from the Tank Destroyer School, Camp Hood, Texas on 4 June 1943, when he was commissioned a second lieutenant, Army of the United States. In recommending him for attendance at Officer Candidate School, Second Lieutenant C. N. Matthews, Field Artillery, his commanding officer, stated that his character was "excellent" and that "he is an excellent student".

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

On leave, Judge Advocate

Thos Trumbull, Judge Advocate

Fletcher R. Andrews, Judge Advocate

1st Ind.

War Department, J.A.G.O., 23 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 William T. Jackson (0-1825474), Army of the United States.

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. In view of the prolonged absence of accused, 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. 207, 26 May 1944)

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

SPJGN
CM 248683

26 FEB 1944
THIRD AIR FORCE

UNITED STATES	
v.	Trial by G.C.M., convened at Drew Field, Tampa, Florida, 8 January 1944. Dismissal.
First Lieutenant EUGENE J. AMARAL (0-799470), Air Corps.	

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that First Lieutenant Eugene J. Amaral, Headquarters 53rd Fighter Group, formerly 13th Fighter Squadron, 53rd Fighter Group, did, on 20 December 1943, at United States Naval Air Station, Fort Lauderdale, Florida, wrongfully violate paragraph 1, Section I, Army Air Forces Regulation 60-16, dated 9 September 1942, by operating an aircraft in a reckless and careless manner, so as to endanger friendly aircraft, on the ground and in the air.

Specification 2: In that First Lieutenant Eugene J. Amaral, Headquarters 53rd Fighter Group, formerly 13th Fighter Squadron, 53rd Fighter Group, did, on 20 December 1943, at United States Naval Air Station, Fort Lauderdale, Florida, wrongfully violate paragraph 10 b, Section I, Army Air Forces Regulation 60-16 A, dated 15 October 1943, by doing acrobatics within a radius of five miles of the center of United States Naval Air Station, Fort Lauderdale, Florida, in a military aircraft.

Specification 3: In that First Lieutenant Eugene J. Amaral, Headquarters 53rd Fighter Group, formerly 13th Fighter Squadron,

53rd Fighter Group, did, on 20 December 1943, at United States Naval Air Station, Fort Lauderdale, Florida, wrongfully violate paragraph 16 a (1) (d), Section II, Army Air Forces Regulation 60-16, dated 9 September 1943, by flying a military aircraft at an altitude of less than 500 feet above the ground.

He pleaded not guilty to and was found guilty of the Charge and its 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. On 20 December 1943 the accused, according to Operations Order Number 363 of the 13th Fighter Squadron, was scheduled to leave the air field at Fort Lauderdale, Florida, at 1515 o'clock in a P-47D on a cross-country flight to Venice, Florida. The order was admitted into evidence and the accused had signed the flight plan for the only P-47D leaving the field at that time. It was also stipulated that the accused piloted the P-47D which took off at the field at 1515 o'clock on such date. After taking off, the P-47D gained altitude and then twice "zoomed" within 20 feet of the runway of the field, coming in between two other planes which were landing and clearing the one already landed by about 15 feet and the other, which was attempting to land, by about 50 feet but forcing it to take a "wave off" and not to land. Three officers observed this, characterized it as endangering other aircraft and so testified. Two of the officers also observed the P-47D engaging in "acrobatics" within a mile and a half of the field. The "acrobatics" consisted of "dipping the wing over after pulling up", doing "a wing back over", and doing "a slow roll" at an altitude of less than 1500 feet (R. 4-8, 8-9, 9-10; Ex. "A").

True extract copies Army Air Forces Regulations No. 60-16, dated 9 September 1942, and No. 60-16A, dated 15 October 1943, were admitted into evidence. They prescribe air traffic rules for flying and respectively prohibit reckless or careless operation of aircraft so as to endanger other aircraft either in the air or on the ground, flying lower than 500 feet above the ground except in taking off and landing unless specially authorized and performing acrobatics within a radius of five miles of any airport (R. 10-11; Exs. B, C).

4. The accused, after explanation of his rights as a witness, elected to remain silent.

5. The three Specifications allege respectively that on 20 December 1943 at Fort Lauderdale, Florida, the accused (a) wrongfully violated a specified paragraph of Regulation No. 60-16 "by operating an aircraft in a reckless and careless manner, so as to endanger friendly aircraft, on the ground and in the air", (b) wrongfully violated a specified paragraph of Regulation No. 60-16A "by doing acrobatics within a radius of five miles of the center of United States Naval Air Station, Fort Lauderdale, Florida, in a military aircraft", and (c) wrongfully violated a specified paragraph of Regulation No. 60-16, "by flying a military aircraft at an altitude of less than 500 feet above the ground". "Dis-

obedience of standing orders" is conduct prejudicial to good order and military discipline" (M.C.M., 1928, par. 152a).

The evidence for the prosecution conclusively establishes the existence and controlling applicability of the regulations prohibiting the acts alleged in the Specifications. They are regulations of general application governing the operation of military aircraft within the continental limits of the United States and the accused, a military pilot, must be presumed to have had both actual and constructive knowledge thereof. The evidence for the prosecution is equally conclusive that the accused violated the specified provisions of such regulations as alleged which fortunately did not result in either injury to person or damage to property. Such attendant good fortune, however, does not exculpate his guilt. The evidence, therefore, beyond a reasonable doubt establishes his commission of the offenses alleged and amply supports the findings of guilty of the Charge and its Specifications.

6. The accused is about 22 years of age. The War Department records show that the accused has had enlisted service from 10 July 1942 until 25 March 1943 when he was commissioned a second lieutenant upon completion of Officers Candidate School and that he was promoted to first lieutenant on 23 November 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 Specifications and the sentence, and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 96.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

SPJGN
CM 248683

1st Ind.

War Department, J.A.G.O., 11 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 Eugene J. Amaral (0-799470), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. I recommend that the sentence of dismissal be confirmed and 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. 187, 25 May 1944)

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

3 MAR 1944

SPJGH
CM 248838

UNITED STATES	)	ARMY AIR FORCES TACTICAL CENTER
v.	)	Trial by G.C.M., convened at Army Air Forces Tactical Center, Orange County, Florida, 30 November 1943. Dismissal and total forfeitures.
Second Lieutenant ARTHUR W. COLLIER (0-574254), 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:

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

Specification: In that Second Lieutenant Arthur W. Collier, Air Corps, 14th Depot Supply Squadron, 14th Air Depot Group, Pinecastle Army Air Field, did, without proper leave, absent himself from his camp at Pinecastle Army Air Field, Army Air Forces Tactical Center, Orlando, Florida, from about 2 November 1943 to about 8 November 1943.

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

Specification: In that Second Lieutenant Arthur W. Collier, Air Corps, 14th Depot Supply Squadron, 14th Air Depot Group, did, without proper leave, absent himself from his organization and station at Pinecastle Army Air Field, Florida, from about 26 November 1943 to about 27 November 1943.

ADDITIONAL CHARGE II: Violation of the 69th Article of War. (Finding of guilty disapproved by reviewing authority).

He pleaded guilty to and was found guilty of all Charges and Specifications. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority disapproved the

findings of guilty of the Specification, Additional Charge II, and of Additional Charge II, approved the sentence, and forwarded the record of trial for action under the 48th Article of War.

3. Evidence for the prosecution:

a. An extract copy (Ex. 4) of the morning report of the 14th Depot Supply Squadron, 14th Air Depot Group, Pinecastle Army Air Field, Orlando, Florida, to which accused belonged, showed him from duty to absent without leave 2 November 1943, and from absent without leave to arrest in quarters 8 November 1943. On 2 November 1943, Colonel Edwin R. French, the commanding officer of the General Depot, at Pinecastle Army Air Field, received a report that accused was not present for duty and had been seen "down town". He immediately directed Second Lieutenant Gordon H. Souther and another officer to locate accused and order him back to the post. The officers found accused at about 3:30 p.m. at "Holloway's Bar" with a woman he called his "girl friend". The accused was "drunk" and said he "picked" the woman up at the bus station. Lieutenant Souther informed accused that they had orders from Colonel French to take him back to the field. Accused replied that he did not have to go back and added "Tell that damned Colonel if he wants to see me he knows where I am". The officers left and reported to Colonel French that the accused refused to return. Lieutenant Souther had talked to accused at about 10:30 a.m. that day, in Orlando, and told him to be at the field at twelve o'clock as he had to go to Leesburg. On that occasion, accused had looked as though he was drinking "pretty hard", and Lieutenant Souther advised him to stay out of sight and trouble. During this conversation accused told Lieutenant Souther that he had given his wife thirteen twenty dollar bills and she had "gone off" (R. 10-13, 18, 21-30).

On 8 November 1943 at about 5:00 p.m., a military police patrol in Orlando received a radio call that the accused was absent from his work at Pinecastle. An inquiry at the Orland Hotel disclosed that accused was registered in room No. 10. Accused was found in his room at about 7:00 p.m. At the request of the military police, he accompanied them to the station. He was returned to Pinecastle the same evening by Lieutenant Souther (R. 27, 30-33).

b. An extract copy (Ex. 3) of the morning report of the 14th Depot Supply Squadron, 14th Air Depot Group, showed accused from arrest in quarters to absent without leave 26 November 1943, and from absent without leave to confinement 27 November 1943. On 26 November 1943 accused stated to Captain James W. Oakes that he would like permission to visit his defense counsel, and received written permission (Ex. 2) to visit Orlando between 1:00 p.m. and 7:00 p.m., 26 November, "to take care of personal affairs". The following morning Captain Oakes was unable to find accused and discovered that the pass issued to him had not been turned

in. After making a thorough search of the camp, Captain Oakes, by direction of Colonel French, notified the military police. At about 11:30 a.m., 27 November 1943, Staff Sergeant Charles E. Runnels, 898th Guard Squadron, proceeded to the Orland Hotel on instruction of the provost marshal and found accused in room No. 10. Accused was taken to the police station (R. 14-16, 17-21, 33-35).

4. For the defense: In an unsworn statement to the court accused stated that his original absence on 2 November 1943 came about because of a misunderstanding with his wife. After a violent quarrel with her he started drinking and took a room with "another fellow" in the Angebilt Hotel. The following morning when he talked to Lieutenant Souther at Holloway's Bar he had been drinking "quite excessively", was despondent, and told Lieutenant Souther of the trouble he had with his wife. He intended to return to camp at "noon", but began drinking again, and "It went on like that" until finally he realized he was in serious trouble. His nerves were in "a terrible state" and his physical condition was "bad". He went home, to his own hotel, took a bath and a drink of whiskey, and went to bed. He was asleep when the "MP" arrived. During all of this time he was "thoroughly drunk". He had no recollection of making the statement with reference to Colonel French and if he did make such a statement it was because he was drunk. He had no disrespect for Colonel French nor did he hold a grudge against him. He "barely" remembered the girl who was with him at Holloway's Bar and had no idea where she came from. He never saw her before or since that time, and did not "chase" other women, because he was in love with his wife (R. 37-39).

With reference to his absence on 26 and 27 November 1943, accused stated that his wife spent Thanksgiving alone and told him over the telephone that she was "pretty blue". He had some questions he wanted to ask his defense counsel about his case. He stopped at the hotel to see his wife, she was "crying", and he felt he should stay with her. He had supper with her, stayed there during the night, and was at the hotel when the military police arrived the next morning. He overstayed his pass because he wanted to be with his wife and build up her morale (R. 39-40).

5. It is shown by the evidence and admitted by the pleas of guilty that accused without proper leave absented himself from his organization from about 2 November to about 8 November 1943 and from about 26 November to about 27 November 1943.

6. The accused is 31 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 16 November 1937 to March 1940 and from 13 June 1940; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School, and active duty, 3 March 1943.

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

Samuel M. Driver, Judge Advocate

Robert C. Cannon, Judge Advocate

F. J. Lotthoiz, Judge Advocate

1st Ind.

War Department, J.A.G.O., 21 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 Second Lieutenant Arthur W. Collier (O-574254), 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 6 days and on another occasion for about one day. An extract copy of the service record of accused, among the papers accompanying the record of trial, shows that accused was absent without leave from 21 July 1943 to 24 July 1943. The report of investigation of the Original Charge states that in July 1943 accused was fined one-half of his pay for one month and reprimanded by his commanding general for violation of curfew regulations and that he was also reprimanded and restricted to camp for one week under the 104th Article of War for absence without leave during the same month. I recommend that the sentence to dismissal and total forfeitures be confirmed but that the forfeitures adjudged be remitted and that the sentence as thus modified be carried into execution.

3. Consideration has been given to a letter to the President, dated 31 January 1944, from Mr. Hal Brown Collier, 2745 May Street, Fort Worth, Texas, a brother of accused, requesting clemency in his behalf, and to letters to The Judge Advocate General, one dated 7 February 1944, from Honorable Fritz G. Lanham, Member of Congress, and another dated 21 February from Honorable Tom Connally, United States Senator, each forwarding for consideration a copy of Mr. Collier's letter. Honorable W. Lee O'Daniel, United States Senator, also has requested clemency in behalf of the accused.

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.

6 Incls.
Incl.1-Rec. of trial.
Incl.2-Drft. ltr. for sig. S/W.
Incl.3-Form of Action.
Incl.4-Ltr. fr. Mr. Collier, 31 Jan. 1944.
Incl.5-Ltr. fr. Hon. Lanham, 7 Feb. 1944.
Incl.6-Ltr. fr. Senator Connally, 21 Feb.

(Sentence confirmed but forfeitures remitted. G.C.M.O. 190, 25 May 1944)

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

SPJGK
CM 248839

17 FEB 1944

UNITED STATES	)	ARMY AIR FORCES TACTICAL CENTER
v.	)	Trial by G.C.M., convened at Orlando Air Base, Orlando, Florida, 30 November 1943. Dismissal and total forfeitures.
Second Lieutenant JUSTIN E. REDDING (O-745845), Air Corps.	)	

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 Charge and Specification:

CHARGE: Violation of the 61st Article of War.

Specification: In that Second Lieutenant Justin E. Redding, Air Corps, 423rd Night Fighter Squadron, 481st Night Fighter Operational Training Group, then attached 420th Night Fighter Squadron and assigned 481st Night Fighter Operational Training Group, did, without proper leave, absent himself from his organization and station at or near Dunnellon, Florida, from about 12 October 1943 to about 11 November 1943.

He pleaded guilty to and was found guilty of the Charge and Specification. No evidence of 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 approved the sentence and forwarded the record of trial for action under Article of War 48.

3. It was shown by the morning report of the 420th Night Fighter Squadron, Dunnellon, Florida, that accused was absent without leave from that organization on 12 October 1943 (R.6; Pros. Ex. I). On 23 October 1943, Major William C. Odell, Air Corps, accused's commanding officer, received through the mail a letter in accused's handwriting addressed to him (R.7). In it accused stated that he had waited for two weeks for his radio observer to get a leave, had gone "on a good 'toot'"; and that when he sobered up had found that he was "half way home". When he

arrived home he wired his radio observer, "Cadet Bartholomew", learned that Bartholomew was leaving on a 15-day sick leave and that he (accused) would also get a leave, and decided that he would stay at home and return with Bartholomew. He further wrote that "I couldn't stand 'sitting' around another day....then....when I got a few drinks in me....I just took off"; that he was "having a swell time"; and that the punishment he would likely receive upon his return would "be worth it" (Pros. Ex. III).

Second Lieutenant James B. Harper, Air Corps, the Acting Executive Officer of accused's squadron, dispatched a telegram to accused at LaPorte, Indiana, on 27 October 1943, directing him to "return to this organization immediately" (R.8; Pros. Ex. IV). In response thereto Harper received a telegram from accused from LaPorte, dated 28 October, stating that he had received Harper's wire and was leaving "on first available train Sunday night" (R.8; Pros. Ex. V). [Note: 28 October 1943, fell on Thursday. The next Sunday was 31 October 1943.]

Major Odell testified that accused telephoned him from Orlando on 10 November, stating that "he was here". Odell told accused to report to "Colonel Morrill", the group commander of accused's squadron (R.7). The organization's morning report for 12 November showed accused from "AWOL to DS per VOCO" (R.6; Pros. Ex. II).

First Lieutenant Robert Calvin McLees, Air Corps, a member of accused's squadron, and the investigating officer in the case, testified that he fully apprised accused of his rights under Article of War 24, that he wrote down the statement which accused made to him, and that accused then swore to and signed it in his presence. This statement was introduced as prosecution's Exhibit VI (R.9,10). In it accused stated that he had been allowed to make only three flights since being stationed at the field, due to the hospitalization of his radio observer, and that he was impatient because of this inactivity. Not intending at the time to absent himself without leave, but "simply letting off steam", he went from Ocala to Jacksonville "on a toot". He got drunk, boarded a train for La Porte, Indiana, was well on his way when he sobered up, and "decided to go on home", where he arrived on 18 October. He stated that after being home for two or three days, he received a wire from his radio observer, "Aviation Cadet Bartholomew", stating that Bartholomew had received a 15-day sick leave, and that Bartholomew would pick up accused's leave papers and forward them. The telegram also stated that Major Odell had told Bartholomew that he (Odell) would give accused a leave also. The accused stated that he had expected that if Bartholomew received a leave, he "would probably get one too".

Accused joined his family at their lake home at Three Rivers, Michigan, returned to LaPorte on 23 October, and wrote the letter to Major Odell reporting his whereabouts. On 27 October he received the telegram from

Lieutenant Harper, and wired him the next morning of his intention to leave on Sunday (31 October). He had intended to be married on the 29th. He received a telegram from Bartholomew on that date notifying him that Bartholomew's leave had been extended for ten days, which relieved his mind of anxiety, caused by Harper's telegram, that their outfit might be moving out. His marriage was postponed until 6 November to allow friends to attend, but on 5 November he was taken to Baer Field by the Military Police. They placed him on the train on 8 November, and he arrived at Orlando on the morning of 11 November (Pros. Ex. VI).

Evidence for the defense.

Accused's rights were explained to him by the President of the court, to which he stated that he desired that the sworn statement made to the investigating officer be accepted as such in the trial. It was so accepted by the court, neither the court nor the prosecution desiring to cross-examine him.

4. No reasonable doubt of accused's guilt of the Charge and Specification exists. The absence without leave was shown by competent evidence covering all elements of the offense, by accused's detailed statement to the investigating officer and by his plea of guilty, the effect of which was fully explained to him in open court. It is clear that accused acted from purely selfish motives and that he showed throughout a callous and studied indifference to his obligations as an officer.

5. War Department records show that accused is 22-8/12 years of age and single. The extent of his education is not specifically indicated in the records, but it may be inferred that he had only a high-school education, since it appears that he enlisted in the United States Army on 17 November 1939. He was appointed an Aviation Cadet 22 May 1942, and was commissioned a Second Lieutenant, Air Corps Reserve, on 20 May 1943.

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

Irving G. Gyer, Judge Advocate

John Wannublick, Judge Advocate

Fletcher R. Andrews, Judge Advocate

1st Ind.

War Department, J.A.G.O., 24 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 Justin E. Redding (O-745845), 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 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.
Incl.1-Record of trial.
Incl.2-Draft of ltr. for sig. Sec. of War.
Incl.3-Form of Ex. action.

(Sentence confirmed but forfeitures remitted. G.C.M.O. 183, 19 May 1944)

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

SPJGV
CM 248867

30 MAR 1944

UNITED STATES	)	THE INFANTRY SCHOOL
v.	)	Trial by G.C.M., convened at Fort Benning, Georgia, 14 January 1944. Dismissal, total forfeitures and confinement for two (2) years.
Second Lieutenant WILLIAM M. LOGAN (0-1316763), Infantry.	)	

OPINION of the BOARD OF REVIEW
TAPPY, KIDNER and HARWOOD, 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 Second Lieutenant WILLIAM M. LOGAN, Officer Replacement Pool, Fort Benning, Georgia, did, at New York, New York, on or about 6 April 1934, wrongfully and unlawfully marry, take and have Anna May Crawford Logan as his lawful wife, the said Second Lieutenant William M. Logan then being lawfully married to Ruth Comegys Logan, who was then living and not divorced from him, and the said Anna May Crawford Logan and the said Ruth Comegys Logan are living and neither the said Anna May Crawford Logan nor the said Ruth Comegys Logan have initiated proceedings for divorce or annulment of marriage from the said Second Lieutenant WILLIAM M. LOGAN and no divorce or annulment of marriage has been granted.

Specification 2: In that Second Lieutenant WILLIAM M. LOGAN, Officer Replacement Pool, Fort Benning, Georgia, did, at Fort Benning, Georgia, on or about 29 October 1943, with intent to deceive Major JACK A. GOODMAN, Investigating Officer and his superior officer, officially state to the said Major JACK A. GOODMAN, that he did not have nor had he ever had a wife by the name of Anna May Crawford (Logan), which statement was known by the said Second Lieutenant WILLIAM M. LOGAN to be untrue.

Specification 3: In that Second Lieutenant WILLIAM M. LOGAN, Officer Replacement Pool, Fort Benning, Georgia, did, at Fort Benning, Georgia, on or about 29 October 1943, with intent to deceive Major JACK A. GOODMAN, Investigating Officer and his superior officer, officially state to the said Major JACK A. GOODMAN, that he did not know the father of the two children of Anna May Crawford (Logan), which statement was known by the said Second Lieutenant WILLIAM M. LOGAN to be untrue.

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

Specification: In that Second Lieutenant WILLIAM M. LOGAN, Officer Replacement Pool, Fort Benning, Georgia, did, at New York, New York, on or about 6 April 1934, wrongfully and unlawfully marry, take and have Anna May Crawford Logan as his lawful wife, the said Second Lieutenant WILLIAM M. LOGAN then being lawfully married to Ruth Comegys Logan who was then living and not divorced from him, and the said Anna May Crawford Logan and the said Ruth Comegys Logan are living and neither the said Anna May Crawford Logan nor the said Ruth Comegys Logan have initiated proceedings for divorce or annulment of marriage from the said Second Lieutenant WILLIAM M. LOGAN and no divorce or annulment of marriage has been granted.

He pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for ten years. The reviewing authority approved only so much of the sentence as involves dismissal from the service, total forfeitures and confinement at hard labor for seven years; remitted five years of the approved confinement imposed, and recommended, in view of the special circumstances of the case, that the execution of the sentence in so far as it relates to forfeitures and confinement be remitted, and forwarded the record of trial for action under Article of War 48.

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

a. The testimony of Ruth Comegys Logan, taken by deposition upon interrogatories and received in evidence without objection shows that she had known accused for 25 years by the name of John William Moncure Logan. She identified accused by his picture attached to the paper containing the interrogatories. She married accused 9 February 1929 in Philadelphia, Pennsylvania. The marriage ceremony was performed at St. Mary's Episcopal Church in Philadelphia, Pennsylvania, by Father Craven. Following this

marriage they lived together as husband and wife at various addresses in Philadelphia, Pennsylvania, for about four years until March 1933. She and accused again lived together as husband and wife from about March 1937 until August 1939. There were two girls born of this marriage, Lois Ann Logan, age 10, and Joan Moncure Logan, age 6. No divorce proceedings had ever been initiated between Ruth Comegys Logan and accused to terminate the marriage relation. As a result of accused's application for dependency benefits, she had received Government checks monthly from August 1942 to March 1943, each in the amount of $72, and from May 1943 accused sent her $75 per month. She received Class E allotments for December 1943 and January 1944 (R. 9; Ex. 1).

b. Anna May Crawford (Logan), whose testimony was also taken by deposition upon written interrogatories, and received in evidence without objection, testified that she had known accused for the past eleven years. She knew him by the name of Moncure and identified accused by his picture attached to the paper containing the interrogatories. She contracted a marriage with accused about April 1934 in New York City, New York. The marriage license was obtained in New York City and the ceremony performed by the Reverend Lawrence H. King of St. Mark's Methodist Church in New York City. Following this marriage they lived together for only three months at 761 N. 47th Street in Philadelphia, Pennsylvania. There were two boys born of this marriage, Richard Logan, age 9, and Moncure Logan, age 8. No divorce proceedings had ever been initiated to terminate the marriage relation. She had never received any money as a result of accused's application for dependency benefits, nor was accused contributing to either her support or that of the children (R. 9; Ex. 2).

c. Major Jack A. Goodman, 1st Student Training Regiment, the Infantry School, Fort Benning, Georgia, was the investigating officer for the 1st Student Training Regiment during the month of November 1943, and in the course of his duties sent for accused, who appeared before him. He told accused he was making an investigation which concerned him and warned accused of his rights before placing him under oath. This investigation took place before any charges were preferred against accused. Accused told Major Goodman that he had no wife nor had he ever had a wife by the name of Anna May Logan; that his wife's name was Ruth Comegys Logan; gave her address, and said he had two children by her. He asked accused if he was married to the writer of a communication who signed herself Anna May Logan and if he knew her. Accused said he knew her as Anna May Crawford. When asked if Anna May Logan had any children, accused stated that so far as he knew she had two, but he did not know the father (R. 7).

d. Lieutenant Colonel Russell H. Anderson, Truck Regiment, the Infantry School, Fort Benning, Georgia, who was detailed to investigate the charges against accused, testified that he conducted this investigation 8 December 1943, after acquainting accused fully of his rights in the matter. He made it clear to accused that one of the specifications had to do with his alleged marriage to a woman by the name of Anna May Crawford, and

exhibited to him a photostat copy of a marriage certificate purporting to bear evidence of the marriage ceremony. Accused admitted to him that he had taken out a marriage license and gone through a marriage ceremony with a woman named Anna May Crawford. Accused stated to Lieutenant Colonel Anderson that he was married in 1929 to another woman, and as far as he knew that marriage was still valid; that while estranged from his first wife he became acquainted with Anna May Crawford, who suggested marriage to him because she believed herself to be pregnant; that although Anna May Crawford knew he already had a wife and had never been divorced, she nevertheless, suggested strongly to him that they get married on account of her condition and the possible social ostracism that might attach to her; that he foolishly married Anna May Crawford while trying to be gallant in the situation. A photostat copy of marriage certificate was shown to the witness, who identified it as identical to the one he had exhibited to accused during his investigation of the charges, and which accused admitted, reflected the circumstances under which he was married to Anna May Crawford. The photostat copy of marriage certificate was received in evidence, without objection, as Prosecution's Exhibit 3 (R. 9-12).

4. a. After being fully informed of his rights as a witness, accused elected to make a sworn statement and testified substantially as follows: Ruth Comegys Logan was his lawful wife, and from his marriage to her there had been born two children, viz: Lois Ann and Joan. He was the lawful father of these two children because his wife's character was such as to give him that confidence.

b. Following his marriage to Anna May Crawford in New York he returned to Philadelphia, Pennsylvania and was in a dilemma as he realized what he had done. He married her simply because she claimed she was pregnant and shame was attached to it. He did it to help her. He was financially unable to employ a lawyer to dissolve the marriage as he was supporting his wife Ruth and his mother. Anna May Crawford (Logan) obtained $150 from her mother and gave it to accused to employ a lawyer for the purpose of divorcing his wife Ruth Comegys Logan. He gave this money to a lawyer, but the lawyer did not file the suit. He later gave him $35 more, but nothing was done. After some time had elapsed the lawyer returned by check $150 of the money accused had paid him. The check was dishonored and subsequently the lawyer refunded the money to accused in small payments. Accused in turn gave the money to Anna May Crawford's mother. He and Anna May Crawford (Logan) had never lived and cohabited together as husband and wife. She did not live with him in Philadelphia, Pennsylvania as his mother would not allow a woman not his wife to live in the house. He did not believe the children of Anna May Crawford (Logan) were the result of any relations he had with her. Her children were not his for a number of reasons, viz: that when he had intercourse with her he used contraceptives; that other men had preceded him; that there was no resemblance of the children to him; there were other reasons that would not be admissible in a statement, and further, it was a physical impossibility. He had not seen Anna May Crawford (Logan)

since 1942, when he called at her mother's home to pick up some books he had left there. He remained only ten or fifteen minutes. Accused identified a letter (Ex. 4) dated 27 September 1941 as having been written by him and addressed to Mrs. Anna May Logan, 1515 Pike Street, Philadelphia, Pennsylvania. On cross-examination accused admitted that he had had sexual intercourse with Anna May Crawford (Logan) since entering into the marriage ceremony.

At the time Major Goodman questioned him about his marital status accused was under the impression that a husband could have but one wife, and wishing to make a truthful statement told Major Goodman that he could not have another wife unless he had married her prior to his marriage to Ruth Comegys; that as far as accused knew, with respect to a bigamous marriage, the second wife was not a lawful wife, and that any issue born of such a marriage would not have the right to use the surname of the husband. Anna May Crawford (Logan) could not know that these children were his, nor could accused state truthfully that he was the father; he does not believe the children are his, nor do any of his friends who have seen them; it happened a long time ago, and he believed he would be giving a false statement had he told Major Goodman that Anna May Crawford (Logan) was his wife and he was the father of her children. He knew a person could be the father of a woman's children without being legally married to her; it did not occur to him that his failure to volunteer the information concerning his second marriage contract might tend to mislead Major Goodman. He thought he was making an accurate statement, and it never crossed his mind to disclose the whole situation. He did not intend to deceive or mislead Major Goodman when he made his statement to him (R. 15-24).

5. The evidence shows that accused was lawfully married to Ruth Comegys in 1929 and that while the marriage relation still existed he contracted a bigamous marriage 6 April 1934 with Anna May Crawford as alleged. Bigamy is an offense under the Articles of War (CM 217931, Jenkins). It has been generally defined as "The criminal offense of willfully and knowingly contracting a second marriage (or going through the form of a second marriage) while the first marriage, to the knowledge of the offender, is still subsisting and undissolved" (Black's Law Dictionary, 3rd Ed., p. 215; CM 220518, Quigley). Under the laws of New York, where the accused went through the marriage ceremony with Anna May Crawford (Logan), the offense is committed when "A person who, having a husband or wife living, marries another person * * *" (McKinney's Consolidated Laws of New York, Annot., Book 39, sec. 340). Such is also the law of Georgia, where accused was tried. It is committed where the accused enters into the bigamous marriage, rather than where he carries on bigamous cohabitation (Code of Ga; Annot., sec. 26-5601, 5602; 85 S.E. Rep. 86 (Ga.)). Indeed, cohabitation with the second woman is not necessary to constitute the offense (Code, supra, sec. 26-5601, 5602; 10 S.E. Rep. 1087 (Ga.)). Nor does subsequent cohabitation render bigamy a continuing offense, so as to fix the time of

cessation of cohabitation as the point from which the statute of limitations will begin to run (Code, supra, sec. 26-5601, 5602;95S.E. Rep. 706, 935 (Ga.)).

Thus, it is apparent that the offense of bigamy was committed by the accused in New York City, New York, 6 April 1934, about eight years prior to the entry of the offender into the military service. In the absence of statute, the general rule is that a court-martial has no jurisdiction of an offense committed prior to the entry of the offender into the military service (Dig. Op. JAG, 1912-40, sec. 369 (2), p. 180-181). There is no statute making the general rule inapplicable in this case. Accordingly, the evidence is legally insufficient to support the findings of guilty of Specification 1 of Charge I and Charge II and its Specification.

In support of Specifications 2 and 3, Charge I, the evidence shows that during the course of an investigation into the marital status of accused by Major Jack A. Goodman, investigating officer, the accused officially stated to Major Goodman that he did not have nor had he ever had a wife by the name of Anna May Crawford (Logan), and further that he did not know the father of the two children of Anna May Crawford (Logan). Each of these two statements was false, as shown by the evidence for the prosecution and the sworn testimony of accused himself. He admitted entering into a marriage contract with Anna May Crawford in New York City, 6 April 1934, and of having sexual intercourse with her subsequent to the marriage. He tried to justify his statement to Major Goodman as being truthful upon the ground that he believed "there could be but one wife" and that any issue born of such a bigamous marriage could not bear the father's surname (R. 16). Hence, he did not consider that Anna May Crawford (Logan) was in fact his wife nor that he was her children's father. Accused's whole defense to Specifications 2 and 3, Charge I, rests upon the proposition that accused believed he was not married to Anna May Crawford (Logan); that she was not his lawful wife; that any issue born of such marriage would not have the right to use his surname; that he did not believe the children were his; that the children did not resemble him; and that he thought he would be giving a false statement had he told Major Goodman that Anna May Crawford (Logan) was his wife and that he was the father of her children. Such defense is untenable and inconsistent with accused's action in writing and mailing a letter to Mrs. Anna May Logan (Anna May Crawford) at 1515 Pike Street, Philadelphia, Pennsylvania, as recent as 27 September 1941, thereby designating her by his surname. At the time he talked to Major Goodman he knew that he had gone through the form of a second marriage with Anna May Crawford (Logan) on 6 April 1934 but was careful to avoid disclosing all of the facts concerning the matter by limiting his answers to statements that he had never had a wife by the name of Anna May Logan and that he did not know the father of her children. Every act of accused and each and all of his statements to Major Goodman with respect to his second marriage is consistent with only one

hypothesis, and that is, his intent to deceive this officer by stating that he had only one wife.

Specification 2 of Charge I alleges that accused did officially state to Major Goodman that he did not have nor had he ever had a wife by the name of Anna May Crawford (Logan). He was not asked in so many words by Major Goodman if he had ever gone through the form of a second marriage with Anna May Crawford (Logan), but the evidence presented in support of this Specification clearly shows that the investigating officer used the word "wife" in a liberal or commonplace sense, and not in its restricted meaning of "lawful wife". The court was justified in assuming, as it must have in reaching its findings of guilty as to this Specification, that accused knew the word "wife" as used in the Specification and in the question addressed to him by the investigating officer, referred not to a lawful wife, but to his bigamous wife, Anna May Crawford (Logan).

From the foregoing the Board of Review is of the opinion that the evidence is legally sufficient to support the findings of guilty of Specification 2, Charge I.

Based upon the testimony of Anna May Crawford (Logan) that she contracted a marriage with accused in New York City in April 1934, and thereafter lived and cohabited with him; that from this marriage two boys were born, one of whom bore accused's middle name (Moncure) and accused's own admissions of this marriage ceremony, and subsequent sexual intercourse with Anna May Crawford (Logan), the court was justified in concluding that accused did know that he was the father of Anna May Crawford's children and that his contrary statement to Major Goodman was known by him to be untrue as alleged.

The Board of Review is, therefore, of the opinion that the evidence is legally sufficient to support the findings of guilty of Specification 3 of Charge I.

7. Consideration has been given to a letter signed by Lieutenant Colonel Russell H. Anderson, accused's commanding officer, in which he attests to accused's initiative, energy and leadership and requests clemency.

8. Accused is about 37 years of age. He was inducted 4 July 1942, and upon graduation from the Infantry Officer Candidate School, Fort Benning, Georgia, was appointed second Lieutenant, Infantry, Army of the United States, 8 April 1943, and ordered to active duty the same date.

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 insufficient

to support the findings of guilty of Specification 1 of Charge I, and Charge II and its Specification; legally sufficient to support the findings of guilty of Specifications 2 and 3 of Charge I and Charge I, legally sufficient to support only so much of the sentence as provides for dismissal and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of a violation of Article of War 95.

Thomas N. Tappy, Judge Advocate.

Hartwell McKeever, Judge Advocate.

Robert B. Harwood, Judge Advocate.

SPJGV
CM 248867

1st Ind.

(371)

War Department, J.A.G.O., 27 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 Second Lieutenant William M. Logan (0-1316763), 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 Specification 1 of Charge I, and Charge II and its Specification, legally sufficient to support the findings of guilty of Specifications 2 and 3 of Charge I and Charge I; legally sufficient to support only so much of the sentence as provides for dismissal; and to warrant confirmation thereof. The accused, a colored officer, on 6 April 1934, while his lawful wife was still living, unlawfully married another woman, as alleged in Specification 1, Charge I, and Charge II and its Specification. The court was without jurisdiction to try accused for this offense as it was committed prior to his entrance in the military service. In the course of an investigation which was being made concerning his marital status in November 1943 by Major Jack A. Goodman, the investigating officer, accused falsely stated that he did not have nor had he ever had a wife by the name of Anna May Crawford (Logan), and that he did not know the father of the two children of Anna May Crawford (Logan), each of which statements was untrue and known by the accused to be untrue. While the court was justified in finding that accused knew his statements respecting his bigamous wife and the two children born of this bigamous marriage were false at the time he made them, it is believed that the gravity of the offense is lessened by the fact that the false statements made by accused concerned events which happened long prior to his entry into the military service. His commanding officer in a letter attached to the record requests clemency premised upon accused's superior qualities of initiative, energy, leadership and usefulness, as well as upon the tolerant view of marriage irregularities that exist among many colored soldiers and civilians. In view of accused's previous good military record and the fact that the sentence of the court may have been based to some extent upon its improper findings of guilty of bigamy, I recommend that the sentence of dismissal be confirmed but that it be commuted to a reprimand, 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 foregoing recommendation, should such action meet with approval.

Myron C. Cramer

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

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

(Findings of guilty of Specification 1, Charge I, and Charge II and its Specification disapproved. Only so much of sentence as provides for dismissal confirmed. Sentence commuted to reprimand.
G.C.M.O. 245, 30 May 1944)

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

SPJGN
CM 248914

12 FEB 1944

UNITED STATES	)	98TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Camp Rucker, Alabama, 12 January 1944. Dismissal.
Second Lieutenant JACKSON STEWART (0-1294747), 389th Infantry Regiment.	)	

OPINION of the BOARD OF REVIEW
LIPSCOMB, SLEEPER and GOLDEN, 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 61st Article of War.

Specification: In that Second Lieutenant Jackson (NMI) Stewart, then 98th Infantry Division, unassigned, did, at Camp Forrest, Tennessee, without proper leave, absent himself from his place of duty at the Tennessee Maneuver Area, vicinity of Camp Forrest, Tennessee, from about 20 September 1943 to about 24 November 1943.

He pleaded not guilty to and was found guilty of the Charge and its Specification. 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 by Special Orders No. 222, dated 9 September 1943, of the Headquarters Infantry Replacement Training Center, Camp Wheeler, Georgia, the accused was assigned to the 98th Infantry Division, Camp Forrest, Tennessee, and directed to proceed thereto on 11 September 1943 and report to the Commanding Officer, 2nd Army Replacement Depot, Camp Forrest, Tennessee, for duty. A copy of this order was introduced into evidence. The Assistant Adjutant General for the 98th Infantry Division testified that the accused did not report to the Division at any time prior to 24 November 1943 when he appeared and voluntarily explained that his delay in reporting had been occasioned by his self-treatment for claimed physical disability although claiming that he had reported about 14 September 1943 to the 2nd Army Replacement Depot, Camp Forrest, Tennessee, and had continued to so report daily through 20 September 1943. The accused in the presence of the Assistant Adjutant likewise voluntarily reiterated his explanation with considerable elaboration to the Division's Adjutant General and Chief of Staff. During the time that he had failed to report it had been ascertained that the above mentioned order had not been cancelled and the accused was shown as absent without leave from 18 September 1943 until 24 November 1943 on the Division's morning report which was admitted into evidence (R. 3-13; Exs. 1, 2).

On 26 November 1943 the accused was interviewed by the Division's Inspector General who, after advising him of the provisions of Article of War 24, interrogated the accused under oath. In this conversation, while under oath, the accused stated that he had reported to the 2nd Army Replacement Depot on 14 September 1943 when he was given written instructions relative to what he should do pending transportation to the Division in the field, that he was told that he was free except for reporting each morning which he did until 21 September 1943 when he determined that he was sick and needed some hot baths, that he thereafter remained with his family in nearby Tullahoma, Tennessee, without making any effort to secure military medical treatment or to contact the division, and that although he realized he was "A.W.O.L." he did not report to the 98th Division until 24 November 1943 (R. 14-17).

4. The accused, after explanation of his rights as a witness, testified at length. He recounted his entire military career including a history of rheumatism appearing during February 1943, for which he had received unsatisfactory medical treatment from the Army. About 21 September 1943, he had deliberately elected to attempt self-treatment by taking hot baths which had formerly been recommended to him and which he continued daily until he reported on 24 November 1943 as he thought he would each day feel able to report although he realized he was absent without authority. He had not received any pay for the period of his absence and had made no effort to contact the Division until it returned from maneuvers and had been transferred to another station (R. 18-26).

5. The Specification alleges that the accused at Camp Forrest, Tennessee, without proper leave absented himself from his place of duty

at the Tennessee Maneuver Area, vicinity of Camp Forrest, Tennessee, from about 20 September 1943 to about 24 November 1943. The elements of the offense of absence without leave 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 was without authority from anyone competent to give him leave" (M.C.M., 1928, par. 132).

The evidence for the prosecution conclusively shows that the accused deliberately absented himself from his designated place of duty as alleged for a period in excess of two months commencing on or about 18 September 1943 when he failed to report to the 98th Division pursuant to his orders. The testimony of the Division's assistant adjutant and the Division's morning report constitutes ample proof of the accused's commission of the alleged offense. The accused, furthermore, admitted his guilt to the Division's Inspector General and likewise in his own testimony upon the trial, asserting on both occasions a physical infirmity which was self-diagnosed and by him claimed to have been self-treated. His testimony presents no defense whatsoever and sounds so weakly even in extenuation that it amounts to effrontery. All of the evidence, therefore, beyond a reasonable doubt establishes his guilt of the offense alleged and abundantly supports the findings of guilty of the Charge and its Specification.

6. The accused is about 29 years old. The War Department records show that he has had prior enlisted service from 14 February 1942 until 28 September 1942 when he was appointed a second lieutenant upon completion of Officers' Candidate School.

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 authorized upon conviction of a violation of Article of War 61.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

SPJGN
CM 248914

1st Ind.

War Department, J.A.G.O., 24 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 Jackson Stewart (0-1294747), 389th Infantry Regiment.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. 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,
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. 195, 25 May 1944)

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

SPJGV
CM 248919

26 APR 1944

UNITED STATES	13TH ARMORED DIVISION
v.	Trial by G.C.M., convened at Camp Bowie, Texas, 17 January 1944. Dismissal, total forfeitures and confinement for eight (8) years.
Captain RAYMOND H. CHRIST (0-1292836), Infantry.	

OPINION of the BOARD OF REVIEW
TAPPY, KIDNER and HARWOOD, Judge Advocates

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

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

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

Specification: In that Captain Raymond H. Christ, 16th Armored Infantry Battalion, did, at Marysville, California, on or about November 19, 1943, with intent to defraud, falsely make a certain check in the following words and figures, to wit:

90-232 RIDEOUT BRANCH 90-232
BANK OF AMERICA No. A7
NATIONAL TRUST & SAVINGS ASSOCIATION

MARYSVILLE, CALIF., November 19 1943

PAY TO THE
ORDER OF _____ $ 30--

Thirty ----------00/100 DOLLARS

/s/ Raymond H. Shlepps
67th A.I.R.

which said check was a writing of a private nature, which might operate to the prejudice of another.

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

Specification: In that Captain Raymond H. Christ, * * *, did, near Brownwood, Texas, on or about December 25, 1943, knowingly and willfully apply to his own use a one-quarter ton four by four Ford truck of the value of about $768.00, property of the United States, furnished and intended for the military service thereof.

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

Specification 1: In that Captain Raymond H. Christ, * * *, did, at or near Brownwood, Texas, on or about December 25, 1943, wrongfully and unlawfully authorize Private Archie Orian Blakely, Company "C" 124th Armored Engineer Battalion, to use a one-quarter ton four by four Ford truck of a value of about $768.00, property of the United States, furnished and intended for the military use thereof, on affairs personal to said Private Archie Orian Blakely.

Specification 2: In that Captain Raymond H. Christ, * * *, did, at or near Brownwood, Texas, on or about December 25, 1943, wrongfully and falsely state to Private Archie Orian Blakely, Company "C" 124th Armored Engineer Battalion, that he, the said Captain Raymond H. Christ, was Captain Fifield, Company "A" 67th Armored Infantry Battalion.

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

Specification: In that Captain Raymond H. Christ, * * *, did at Camp Bowie, Texas, on or about 0130, January 5, 1944, desert the service of the United States by absenting himself without proper leave from his organization and did remain absent in desertion until he was apprehended at Abilene, Texas, on or about 1900 January 5, 1944.

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

Specification: In that Captain Raymond H. Christ, * * *, did, at Camp Bowie, Texas, on or about January 5, 1944, knowingly and willfully misappropriate the following property of the United States furnished and intended for the military service thereof, to wit: one one-quarter ton four by four Ford truck of the value of about $768.00; one carbine of the value of about $50.00; one 1903 rifle of the value of about $48.00; seventy-two caliber .30 cartridges of a value of about $1.44; six carbine ammunition clips of a value of about $1.00; said property being of a total value of about $868.44.

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

Specification: In that Captain Raymond H. Christ, * * *, did, at Camp Bowie, Texas, on or about January 5, 1944, immediately prior to his unauthorized departure from said station, wrongfully and with intent to prevent pursuit and capture, write a threatening note in words as follows, to wit:

> "To whom it may concern----
> I have T/5 George Scott with
> me as a hostage--any attemp [t]
> to rescue him will result in
> his demise----
> /s/ R H Christ
> the bad Job"

and did for the purpose of publishing the contents thereof leave said note on the date above mentioned upon his desk in his office at the 16th Armored Infantry Battalion Motor Pool, Camp Bowie, Texas.

ADDITIONAL CHARGE IV: Violation of the 96th Article of War. (Finding of guilty disapproved by the reviewing authority).

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

He pleaded not guilty to all Charges and Specifications. He was found guilty of Charge I and its Specification, Charge II and its Specification, Charge III and its two Specifications; not guilty of Additional Charge I, but guilty of a violation of the 61st Article of War, and guilty of the Specification thereunder, except the words "desert the service of the United States by absenting himself without proper leave from his organization and did remain absent in desertion", substituting therefor the words "without proper leave absent himself from his organization and did remain absent without leave" of the excepted words not guilty, of the substituted words, guilty; guilty of Additional Charge II and its Specification and Additional Charge III and its Specification, and guilty of Additional Charge IV and its Specification, except the word "compel", substituting therefor the word "order", and except the words "for the purpose of assisting the said Captain Raymond H. Christ to desert the service of the United States", substituting therefor the words "for an illegal purpose, personal to the said Captain Raymond H. Christ", of the excepted words, not guilty, of the substituted words, 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 eight years. The reviewing authority approved only so much of the findings of guilty of Additional Charge II and its Specification as involves findings of guilty of knowingly and willfully misappropriating at Camp Bowie, Texas, on 5 January 1944, the following property of the United States furnished and intended for the military service thereof, to wit: one one-quarter ton four by four truck of the value of about $768; one carbine of the value of about $50; one 1903 rifle of the value of about $48; and an undetermined quantity of ammunition; of a total value not in excess of $867; disapproved the findings of guilty of Additional Charge IV and its Specification; approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The reviewing authority having disapproved the findings of guilty of Additional Charge IV and its Specification, evidence pertaining to that Charge and Specification will be discussed only to the extent that it may bear on the other Charges.

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

a. Specification, Charge I.

The accused participated in a dice game in Marysville, California, on 19 November 1943 with several other officers, among whom were Warrant Officer Paul B. Manuian. Manuian won about sixty dollars, including a check for thirty dollars, drawn on the Bank of American, Rideout Branch, and signed "Raymond H. Shlepps, 67th AIB" (R. 10-15, 75; Ex. F).

After being cashed by Manuian, this check was returned for the reason that the bank had no such account (R. 12; Ex. A). Manuian went to the 67th Infantry Battalion commanded by Colonel Schepps (R. 94) in an effort to locate the drawer of the check. During the trial Private First Class James S. Davis, Supply Clerk, 16th Armored Infantry Battalion, testified that he had known accused about a year and was acquainted with his handwriting, having seen memorandum receipts signed by accused. He identified five photostats of checks drawn on the Rideout Branch of the Bank of America, signed "Raymond H. Christ", and admitted in evidence without objection, and a military pass signed "Raymond H. Christ", also admitted in evidence without objection, as being in the handwriting of accused (R. 17; Exs. B, C), and in the opinion of this witness the "Raymond H." signed to the check given Manuian appeared to be the writing of the accused (R. 17, 18). The accused himself, during cross-examination, admitted that Exhibit F "looks like one of my checks" (R. 91).

b. Specification, Charge II, and Specifications 1 and 2, Charge III.

Sometime after midnight on 24 December 1943, Private William J.

Robinson, Military Police Platoon, 13th Armored Division, parked the "peep" he was driving in front of the Tip Top roadhouse about three miles out of Brownwood, Texas, and went inside. He stayed there five or ten minutes, and saw the accused in the Tip Top during that time. When he went outside, the "peep" was gone, and after considerable search he located it later in front of the Military Police station. Private Archie O. Blakely who was being detained in the station was found to be in possession of the "peep" (R. 21, 22). Private Blakely testified that on 24 December he was asked by accused the way to camp. After giving accused directions he was asked by accused if he was going to camp and Private Blakely replied that he was going to Fort Worth. Accused then told Blakely if he would drive him to camp he could have the "peep" until nine o'clock (R. 26). When Blakely asked accused if he was sure it was all right, accused replied, "Sure, that is my peep. This is Christmas". Blakely drove accused in the "peep" to his hut at the camp and there asked accused his name. Accused told Blakely his name was "Fifefield" of the 67th Infantry, and Blakely wrote the name down on a sheet of paper, as well as the address of the hut. Blakely used this memorandum to refresh his recollection while testifying as a witness (R. 27, 32). On the way to camp accused gave Blakely a drink. After leaving accused in his hut, Blakely returned to Brownwood in the "peep" and was picked up by military police and taken to the station and locked up until Private Robinson arrived (R. 28). Robinson and Blakely then proceeded to the camp where they found accused asleep. Despite strenuous efforts to arouse him they were unable to awaken accused (R. 23, 29, 79). Accused did not appear drunk during the ride to camp (R. 34).

c. Specification, Additional Charge I, Specification, Additional Charge II, and Specification, Additional Charge III.

The beginning of accused's unauthorized absence was shown, in addition to the testimony of witnesses having knowledge of such absence by the duly authenticated extract copy of the morning report of the 76th Armored Infantry Battalion for 5 January 1944 (R. 57; Ex. E). The other entries on this report for 5 January 1944 and 6 January 1944 showing accused's return to military control at Abilene, Texas, and to "absent Conf Camp Barkely, Texas" are obviously based on hearsay testimony and therefore were improperly received in evidence. However, the accused's apprehension by military police in Abilene, Texas, on 5 January 1944 is amply proved by witnesses having actual knowledge of such facts.

On 26 December 1943, accused had been restricted to the battalion area pending investigation of court-martial charges. On the evening of 4 January 1944 he went to the hut of Lieutenant Joseph R. Melpignano where he remained until about 0100 the next morning, drinking and playing cards. When he left he was "pretty well drunk" (R. 36). He then went to Technician Fourth Grade Grady Battle, Charge of Quarters, and requested that a "peep" be sent to pick him up at his quarters in about 20 minutes, and that Technician Fifth Grade George Scott be assigned as driver. Scott reported to accused as requested and assisted him in packing some clothes in a suitcase. Accused

told Scott he was going after a prisoner (R. 44-47). They then went to the motor shop, at accused's direction, where they siphoned gasoline from other cars (R. 46). While Scott was making coffee, accused wrote a note which Scott testified was written "so he could clear me. He didn't want me to get into trouble" (R. 47). A note was found on accused's desk on 5 January by Warrant Officer Louis J. Brown. This note was later introduced in evidence (R. 98; Ex. G), and is as follows:

> "To whom it may concern----
> I have T/5 George Scott with
> me as a hostage--any attemp /t/
> to rescue him will result in
> his demise----
> R H Christ
> the bad Job"

Accused and Scott drove away in the "peep". Accused before departing had put a carbine, a 1903 rifle and some ammunition in the "peep". Accused told Scott they would go to California (R. 48). Technical Sergeant Harold E. Fisher, chief battalion mechanic, testified that a rifle was missing from his shop on 5 January 1944, and that his carbine had been taken (R. 68). After driving through Brownwood, Texas, accused fired the guns "to see if they would shoot". Later he had Scott stop the "peep" and went over into the brush where he extracted the cartridges and then threw away the 1903 rifle (R. 49). Accused returned to the "peep" and was driven to the main part of Abilene, Texas, where he had Scott stop the "peep", took out his bag, and told Scott to return to camp, which Scott did (R. 50). Accused left the carbine and ammunition in the "peep". Accused was apprehended in a hotel room in Abilene on the night of 5 January 1944 (R. 59, 60). When the note, signed "R H Christ", set out above, was received in evidence by the court, defense counsel requested that the record show that it was "admitted over the objection of the accused" (R. 98). No witness was able to say that this note was in the handwriting of the accused. However, Scott saw the accused writing a note and saw him leave it on his desk, and saw his (Scott's) name on the first line of the note (R. 97). The note admitted as Exhibit G was found the next morning on the desk.

Captain David R. Wall, Medical Corps, Division Neuropsychologist, 13th Armored Division, testified that he had examined the accused on 6 January 1944. From the examination his conclusions were that accused was, from a legal standpoint, mentally responsible at the time of the examination, and capable of distinguishing between right and wrong, and of adhering to the right, and, to the best of his belief, was mentally responsible at the time he committed his offenses (R. 73). On cross-examination and examination by the court, Captain Wall stated accused was sober at the time of his examination, and he had never examined accused after he had been drinking; that accused is not a psychopath, but normal (R. 74).

5. For the defense.

Technician Fourth Grade Nick Kusic testified that on the Saturday night before Thanksgiving he and accused had taken part in comedy skits at the Officers' Club, Camp Beale, California. After completing the skits the accused came to the dressing room and wanted to put the skits on again, and was hard to convince that the skits had already been on. In the opinion of this witness accused was under the influence of alcohol at this time (R. 79, 80).

First Lieutenant Charles O. Henry, Captain Edward C. Manyos, and Lieutenant Colonel Robbins L. Conn testified that accused had performed his duties as motor officer in a highly efficient and capable manner (R. 82-86).

The accused, after having his rights as a witness explained to him, elected to testify under oath. He testified that he had visited the Elks Club in Marysville, and had participated in dice games there on several occasions. On the night of 19 November 1943 he went to the Marysville Hotel where he had a date and recalls that he drank some cocktails. He could not recall where he went when he left the hotel, and it is quite possible that he went to the Elks Club and participated in a dice game, although he could not recall such facts specifically, nor could he recall writing a check on 19 November 1943 (R. 87, 88).

On the night of 24 December 1943, after several drinks in his hut, accused and another officer went to the Tip Top tavern in Brownwood. There they drank and danced until their liquor ran out, and accused returned to camp, got another quart of liquor, and returned to the Tip Top, where he resumed his drinking. As he left the Tip Top he saw a "peep" in front, and, thinking it belonged to a soldier in his battalion, he took it. He remembered asking a soldier drive him to camp, but remembered nothing that happened thereafter. When he awoke the next morning he was entirely unaware of what had happened the night before (R. 88, 89).

On 4 January 1944, around seven o'clock, feeling depressed, accused took two drinks in his hut, then went to Lieutenant Melpignano's hut where he and Lieutenant Melpignano played cards and drank a quart of liquor. The last thing he remembered of his actions on that night was standing in the door of Lieutenant Melpignano's hut sometime after taps had blown, and remembered nothing further until he was apprehended in Abilene (R. 89, 90).

Accused testified that in September 1929 he received a fractured skull in a football game and was in a hospital unconscious for five days, and that since that time he suffers lapses of memory after drinking, that

his "memory train stops" (R. 93, 95).

6. The evidence shows that on 19 November 1943 accused participated in a dice game in the Elks Club, Marysville, California. During the course of the game Warrant Officer Manuian, another participant, received a thirty-dollar check as part of his winnings. This check was signed "Raymond H. Shlepps", and was later dishonored by the bank on which it was drawn for the reason that the bank had no such account. Specimens of accused's known handwriting in the form of checks and a military pass were received in evidence, and Private Davis, Supply Clerk, 16th Armored Infantry Battalion, who was familiar with accused's writing, testified that the "Raymond H." signed on the check was, in the opinion of this witness, the writing of the accused. The accused himself admitted that the check signed "Raymond H. Shlepps" looked like one of his checks.

It is apparent that the accused intended to either forge the name of Colonel Schepps, or of a fictitious person. Because of the great dissimilarity between the names of Colonel Madison Schepps and the name Raymond H. Shlepps signed to the check, the intent on the part of accused to fraudulently sign the name of a fictitious person seems more probable. Forgery may be committed by signing a fictitious name (MCM, 1928, par. 149i). The fact that no payee was named in the check is without significance as it is immaterial that anyone be actually defrauded or injured if the false writing be made with the intent to defraud or injure another (MCM, 1928, par. 149i).

On the night of 24 December 1943, the accused, following considerable drinking on his part, left the Tip Top tavern near Brownwood, Texas. Seeing a "peep" which had been parked in front of the tavern by Private Robinson, a military policeman on patrol duty, who had gone into the tavern a few minutes before, the accused appropriated the "peep" to his own use. Shortly thereafter, accused saw Private Blakely and told him if he would drive him out to camp he could have the "peep" until nine o'clock. Blakely drove the accused to camp and followed him into his hut where accused told Blakely his name was Captain Fifefield. Immediately upon leaving the hut Blakely wrote this name and address of the hut on a piece of paper, from which he refreshed his memory while testifying. Blakely was later picked up in Brownwood with the "peep" and taken to the military police station. From there Blakely was taken by Private Robinson back to the hut where they found accused in bed. Despite strenuous efforts the accused could not be aroused. Blakely testified that accused was drinking during the time he was with him but did not appear to be drunk.

On the evening of 4 January 1944 accused visited Lieutenant Melpignano's hut where the two drank and played cards until about 0100 the next morning. When accused left the hut he was "pretty well drunk". Accused had the Charge of Quarters send a "peep" to pick him up, specifically requesting that T/5 George Scott be sent as driver. Scott reported to accused in

about 20 minutes and assisted him in packing a suitcase. Accused told Scott they were going after a prisoner. At accused's direction they proceeded to the motor shop where they siphoned gas from other cars. While Scott was making coffee, accused wrote the following note to "clear" Scott:

> "To whom it may concern----
> I have T/5 George Scott with
> me as a hostage--any attemp [t]
> to rescue him will result in
> his demise----
> R H Christ
> the bad Job"

Accused left the note on his desk where it was found the next day. These facts, together with the further fact that the court, having proved handwriting of accused before it, was competent to determine the author of the note in question by comparison with the known writings of accused, fully sustains the court's action in admitting Exhibit G in evidence. Before accused and Scott drove away in the Government vehicle the accused had put a Government carbine and a 1903 rifle and some ammunition in the vehicle. After driving through Brownwood, Texas, accused fired the guns "to see if they would shoot". Later on the ride he had Scott stop the "peep" and got out and went into the brush where he extracted the cartridges and threw away the 1903 rifle. They then continued on to the main part of Abilene, Texas, where accused had Scott stop the vehicle. Accused removed his suitcase, and then told Scott to return to camp, which Scott did. Accused was apprehended in a hotel room in Abilene on the evening of 5 January 1944.

The vehicles alleged to have been wrongfully misapplied and misappropriated by the accused were referred to throughout the record as "peeps", rather than by their proper designation as quarter-ton four by four Ford trucks. In the "standard nomenclature list" read to the court in connection with assisting the court in taking judicial notice of the value of the articles misappropriated, the value of a "one quarter ton Ford jeep" is shown to be $768.75 (R. 8). The vehicles taken by accused were shown to have been taken from the possession of a military policeman while on official duty, and from a base motor officer. Such facts were sufficient for the court to infer that the vehicles were the property of the United States, furnished and intended for the military service thereof. It is clear that accused misappropriated and misapplied such vehicles. Failure to refer to such vehicles by their proper description is not considered material as it is well known that in the parlance of the Armored Command a "peep" is one standard type of Government vehicle, i.e., a one-quarter ton four by four truck.

7. War Department records show that accused is 29 years old. He graduated from the Collingswood (New Jersey) High School, and in civil life was a salesman for a motor parts company. He enlisted in the New Jersey National Guard in 1935 and served therein continuously until the Guard was federalized in 1941. In September 1942, after graduation from the Infantry School, Fort Benning, Georgia, he was appointed second lieutenant, Army of the United States; promoted to first lieutenant 22 December 1942; and to captain 14 August 1943.

8. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty as approved by the reviewing authority, to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 58, 93,94 or 96 and mandatory upon conviction of a violation of Article of War 95.

Thomas H. Tappy, Judge Advocate.

Arthur J. Wittenauer, Judge Advocate.

Robert B. Harwood, Judge Advocate.

SPJGV
CM 248919

1st Ind.

War Department, J.A.G.O., 8 MAY 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 Raymond H. Christ (0-1292836), 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 as approved by the reviewing authority, to support the sentence and to warrant confirmation of the sentence. I recommend that the sentence be confirmed, but that the forfeitures imposed be remitted, that the period of confinement be reduced to two years, and that the sentence as thus modified be carried into execution. I also recommend that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

3. A letter requesting clemency in behalf of accused written by his sister, Mrs. Marie Christ, and addressed to Senator Arthur Walsh, has been considered.

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-Ltr. fr. Mrs. Marie Christ.
Incl.3-Dft. ltr. for sig. Sec. of War.
Incl.4-Form of action.

(Sentence confirmed but forfeitures remitted and confinement reduced to two years. G.C.M.O. 379, 18 Jul 1944)

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

SPJGN
CM 248934

26 FEB 1944

UNITED STATES	)	ARMY AIR FORCES EASTERN TECHNICAL TRAINING COMMAND
v.	)	Trial by G.C.M., convened at Keesler Field, Mississippi, 10 January 1944. Dismissal.
Second Lieutenant JOHN E. MURRAY (0-560155), Air Corps.	)	

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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 95th Article of War.

Specification 1: In that 2nd Lieutenant John E. Murray, 724th Training Group, Seymour Johnson Field, North Carolina, did, at Keesler Field, Mississippi, during the months of June and July, 1943, borrow the sum of Twenty-One Dollars ($21.00) from Private Arakel A. Sayadian, an enlisted man, to the prejudice of good order and military discipline.

Specification 2: In that 2nd Lieutenant John E. Murray, 724th Training Group, Seymour Johnson Field, North Carolina, did, at Keesler Field, Mississippi, during the month of August, 1943, borrow the sum of Twenty Dollars ($20.00) from Private Damon Kopsky, an enlisted man, to the prejudice of good order and military discipline.

Specification 3: In that 2nd Lieutenant John E. Murray, 724th Training Group, Seymour Johnson Field, North Carolina, did, at Keesler Field, Mississippi, during the month of June, 1943, borrow the sum of Twenty Dollars ($20.00) from Sergeant Joseph W. Saybolt, an enlisted man, to the prejudice of good order and military discipline.

Specification 4: In that 2nd Lieutenant John E. Murray, 724th Training Group, Seymour Johnson Field, North Carolina, did, at Keesler Field, Mississippi, about 14 December 1942, borrow the sum of Twenty-Five Dollars ($25.00) from Sergeant Newton L. Reynolds, an enlisted man, to the prejudice of good order and military discipline.

Specification 5: In that 2nd Lieutenant John E. Murray, 724th Training Group, Seymour Johnson Field, North Carolina, did, at Keesler Field, Mississippi, about 15 October 1943, borrow the sum of Six Dollars ($6.00) from Corporal R. B. Farrar, Jr., an enlisted man, to the prejudice of good order and military discipline.

Specification 6: In that 2nd Lieutenant John E. Murray, 724th Training Group, Seymour Johnson Field, North Carolina, being indebted to Private Arakel A. Sayadian, 59th Base Headquarters and Air Base Squadrons, Keesler Field, Mississippi, in the sum of Twenty-One Dollars ($21.00) by reason of a loan, did, at Keesler Field, Mississippi, from about 1 August 1943 to about 1 December 1943, dishonorably fail and neglect to pay said debt.

Specification 7: In that 2nd Lieutenant John E. Murray, 724th Training Group, Seymour Johnson Field, North Carolina, being indebted to Private Damon Kopsky, 59th Base Headquarters and Air Base Squadrons, Keesler Field, Mississippi, in the sum of Ten Dollars ($10.00) by reason of a loan, did, at Keesler Field, Mississippi, from about 1 October 1943 to about 1 December 1943, dishonorably fail and neglect to pay said debt.

Specification 8: In that 2nd Lieutenant John E. Murray, 724th Training Group, Seymour Johnson Field, North Carolina, being indebted to Sergeant Joseph W. Saybolt, 59th Base Headquarters and Air Base Squadrons, Keesler Field, Mississippi, in the sum of Fifteen Dollars ($15.00) by reason of a loan, did, at Keesler Field, Mississippi, from about 1 September 1943 to about 1 December 1943, dishonorably fail and neglect to pay said debt.

Specification 9: In that 2nd Lieutenant John E. Murray, 724th Training Group, Seymour Johnson Field, North Carolina, being indebted to Sergeant Newton L. Reynolds, Headquarters and Headquarters Squadron, Keesler Field, Mississippi, in the sum of Twenty-Five Dollars ($25.00) by reason of a loan, did, at Keesler Field, Mississippi, from about 1 April 1943 to about 1 December 1943, dishonorably fail and neglect to pay said debt.

Specification 10: In that 2nd Lieutenant John E. Murray, 724th Training Group, Seymour Johnson Field, North Carolina, being indebted to Corporal R. B. Farrar, Jr., 59th Base Headquarters and Air Base Squadrons, Keesler Field, Mississippi, in the sum of Six Dollars ($6.00) by reason of a loan, did, at Keesler Field, Mississippi, from about 1 November 1943 to about 1 December 1943, dishonorably fail and neglect to pay said debt.

Specification 11: In that 2nd Lieutenant John E. Murray, 724th Training Group, Seymour Johnson Field, North Carolina, being indebted to Warrant Officer Wilkie C. Tyhurst, 59th Base Headquarters and Air Base Squadrons, Keesler Field, Mississippi, in the sum of Twenty-Five Dollars ($25.00), by reason of a loan, did, at Keesler Field, Mississippi, from about 1 July 1943 to about 1 December 1943, dishonorably fail and neglect to pay said debt.

Specification 12: In that 2nd Lieutenant John E. Murray, 724th Training Group, Seymour Johnson Field, North Carolina, being indebted to Warrant Officer Wilkie C. Tyhurst, 59th Base Headquarters and Air Base Squadrons, Keesler Field, Mississippi, in the sum of Seventy-Eight Dollars ($78.00) by reason of a loan, did, at Keesler Field, Mississippi, from about 1 October 1943 to about 1 December 1943, dishonorably fail and neglect to pay said debt.

Specification 13: In that 2nd Lieutenant John E. Murray, 724th Training Group, Seymour Johnson Field, North Carolina, did, at Keesler Field, Mississippi, on or about 2 August 1943, gamble with Sergeant Henry J. May and Private Arakel A. Sayadian, to the prejudice of good order and military discipline.

The accused pleaded not guilty to, and was found guilty of, the Charge and each of the Specifications thereunder. He was sentenced to be dismissed the service. The reviewing authority approved only so much of the findings of guilty of Specifications 1 and 6 of the Charge as involves findings of guilty of the borrowing and dishonorable failure and neglect to repay the sum of $10, as alleged, only so much of the findings of guilty of Specifications 4 and 9 of the Charge as involves findings of guilty of wrongfully borrowing from and wrongfully failing to repay money to an enlisted man, as alleged, in violation of the 96th Article of War, and only so much of the findings of guilty of Specification 13 of the Charge as involves a findings of guilty in violation of Article of War 96; 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, while stationed at Keesler Field, Mississippi, the accused, a Second Lieutenant, borrowed

various sums of money from enlisted men of his acquaintance. The first of his loans was contracted in December of 1942. He telephoned Sergeant, then Corporal, Newton L. Reynolds, whom he had met while working at "Service Records Number 2" and asked him to come to the "administrative inspector's office". After some conversation, the sergeant advanced twenty-five dollars and "mentioned" that he "could do without the money for three months". No part of this debt was satisfied during the ensuing months. The sergeant refrained from broaching the subject of repayment until September of 1943, when he wrote a letter requesting his money. Neither a reply nor a remittance was ever received by him (R. 25-28).

Sometime in June of 1943 the accused was visiting the "Henderson Bar". He asked Sergeant W. Saybolt, who was also present, to lend him twenty dollars. The Sergeant gave him the sum requested upon the understanding that it would be returned in "a few days or pay day". This promise was not kept, but in August the accused made a payment on account of five dollars (R. 22-23).

One of the accused's friends and neighbors was Chief Warrant Officer Wilkie C. Tyhurst. During the month of June he was approached by the accused and solicited for a loan of twenty-five dollars. The money was advanced, and "next pay day" fixed as the date of repayment. On "June 30th" or "June 31st", Mr. Tyhurst demanded that his loan be satisfied and repeated his demand on several occasions during the next few weeks. In each instance the accused replied that he did not have any available funds. Around the 1st of October 1943 Mr. Tyhurst had seventy-eight dollars in his wallet. The accused again asked for a loan, stating that "he was in some trouble and he needed money pretty badly". On the basis of this plea he was able to borrow all of Mr. Tyhurst's available cash. He again represented that he would return the entire amount "in a few days". He failed to do so and, upon being pressed for payment later in the month, said that, "he didn't have it at the present time, but that he would get some of it for me" (R. 33-36).

"Approximately around June" the accused also asked Private Arakel R. Sayadian, an orderly room clerk, for a loan of five dollars. The private had only a ten dollar bill. He handed it to the accused who asserted that "he would bring the five back * * * after he had the ten changed". This promise was not fulfilled. Several weeks later the accused became indebted to the private for gambling losses and cash advances in a stud poker card game aggregating eleven dollars. The total of twenty-one dollars was soon increased by another thirty dollars representing gambling losses at pool. After playing several games of "nine ball" at a dollar a game, the accused owed Private Sayadian fourteen dollars and Sergeant Henry J. May sixteen dollars. Since Sergeant May was indebted to Private Sayadian in the sum of sixteen dollars as a result of the same games, the accused agreed to pay his total "nine ball" losses to the private. According to Sergeant May, this novation was entered into without his knowledge (R. 8-17).

On or about payday in August of 1943 the accused solicited Private Damon Kopsky for an advance to be repaid that very evening. The private

had twenty dollars on his person, representing his entire monthly pay after deductions for allotments and insurance. The accused borrowed all of it. Nothing was paid by him that day. "In approximately two weeks or a month" Private Kopsky was in need of funds with which "to get some cleaning from town" and accordingly requested some money on account. The accused gave him five dollars. "A couple of months" later the accused made another repayment in the same amount (R. 18-22).

His last loan from an enlisted man was made in "the middle of October". He borrowed six dollars from Corporal R. B. Farrar, Jr. and promised to return that amount "the next day or so". Although Corporal Farrar requested his money "about three times", the accused procrastinated saying that he did not then have it but that he would pay it later (R. 29-30).

The accused was transferred to another station shortly after this last transaction. Before leaving he prepared a list of his obligations and checked the amounts with at least one of his creditors. He informed Private Kopsky that "he remembered the debt * * * and that he would leave a check with [Technical] Sergeant [William A.] Wagner to take care of" it. After arriving at his new post, the accused sent two remittances, one for five dollars and the other for thirty dollars, to Mr. Tyhurst. They were received on 3 December and 17 December respectively. About the same time the accused sent a money order to Sergeant Wagner to satisfy most of his other obligations. Between 17 December 1943 and 2 January 1944 twenty-one dollars of the proceeds were distributed to Private Sayadian and the balance was used to pay Sergeant Saybolt, Corporal Farrar and Private Kopsky in full. Sergeant May and Sergeant Reynolds received nothing. The balance due to Mr. Tyhurst was satisfied on 3 January 1944 (R. 12, 14, 19-20, 23, 30, 35).

In the meantime the accused had learned that his borrowings from enlisted men were under investigation. He was placed in arrest in quarters on 8 December 1943, and Charges were preferred against him on 9 December 1943. The date of trial was 10 January 1944.

4. The accused, after he had been apprized of his rights relative to testifying or remaining silent, took the stand in his own defense. His testimony and that of the other witnesses called on his behalf shows that he had attended Citizens Military Training Camp during the years 1937 to 1939 while still at school. In August of 1940 he enlisted in the Regular Army as a Private. He rose to the grade of staff sergeant, and in 1942 was sent to OCS. There he "attained the rank of cadet captain". Upon graduation he was discharged from the Regular Army to accept an appointment as a second lieutenant in the Army of the United States. He had married and at the time of his trial was the father of a four-month old baby (R. 53-54, 59-60, 62).

While still in the ranks, he had spent his money freely and had been constrained to borrow from other enlisted men. When commissioned, he was in debt. Having "borrowed from enlisted men to start with", he "just never stopped borrowing from them".

He had never endeavored to evade payment of his obligations. In his own words,

> "Before I departed from this post, I spoke to each man that I had borrowed money from and told him that I didn't have it at that time, explained that I was going to try to pay off and that I would pay off. I had every full intention in the world of repaying them the various amounts of money that I had borrowed from them. I had spoken to Sergeant Wagner about them. I explained the amount of money, and I explained that I did not have the money with me at that time, but that I would leave a check in the amount of fifty dollars, with a descriptive list of what I owed each man, and to pay off a proportionate share, and also on there was the balance that was due them at that time for that amount of money, which would be paid from my travel pay, which I would draw when I arrived at [Seymour Johnson] Field" (R. 61).

In keeping with his word he on 16 October 1943 drew a check on the National Bank of Sam Houston, Texas, in the sum of fifty dollars and delivered it to Sergeant Kent, to hold for Sergeant Wagner, the payee, who was then absent. Sergeant Kent was instructed that the instrument was not to be cashed until about a week after the first of November. This delay was necessary because:

> "I didn't have sufficient funds * * *. It took all the money I had to give to my wife, mother-in-law and baby, so they could go home to Texas, and I had no idea of what would happen to me after I arrived [at Seymour Johnson Field]. My orders read for immediate movement overseas to semi-tropical climate, and it took all my available funds to give to my wife until I got there and found out what would happen to me".

The directions as to the time of deposit were not conveyed to Sergeant Wagner. It was his understanding that he was to wait only until the end of the month. He accordingly deposited the check for collection before the time specified. It was returned to him marked "NSF". The accused has explained that:

> "I was paid on approximately the fifth of November, at Seymour Johnson Field, for the month of October, and at such time I wired one hundred and fifty dollars of my money to my bank, and if the sergeant had cashed the check as I requested, allowing my money time to reach the bank, the check would undoubtedly have been honored."

The accused started to write Sergeant Wagner to put the check through again but "I was so all mixed up about it * * * in one paragraph I told him to submit it, and in another paragraph, I told him not to." "I intended to send the money order down for the complete thing, because it is not customary for that bank to accept a check twice. If it has been re-

turned once for insufficient funds, they will never accept it back" (R. 47, 49, 56, 64-65, 67, 69, 72, 77; Def. Ex. "E").

Sergeant Wagner immediately wired the accused that he "would take the matter up further with his commanding officer unless I heard from him". The accused on 12 November 1943 replied by telegram as follows:

> "Request you destroy check as money order has been forwarded today. Get yourself a crying towel and lay off the kid business of letter writing.
>
> Ed."

The night before he had received a wire from the Red Cross stating that his wife, who was in Wichita Falls, Texas, was about to undergo an emergency operation and that he was needed at home. He had promptly contacted his commanding officer and obtained leave (R. 49-50, 57, 66-67, 81; Pros. Ex. "1").

When paid on 5 November 1943, he had not only wired one hundred and fifty dollars to his bank in Houston but he had purchased a money order for thirty-seven dollars payable to Sergeant Wagner. This sum in addition to the fifty dollars covered by the check given to Sergeant Kent would have been sufficient to satisfy all of the accused's obligations with the exception of his gambling debts to Sergeant May and Private Sayadian, aggregating thirty dollars, and the amount he owed to Sergeant Reynolds. Being without other ready and available funds, the accused cashed the money order and used the proceeds to defray part of his traveling expenses (R. 57, 65-68, 73-74).

After receiving the telegram of 12 November 1943 requesting the destruction of the check for fifty dollars and stating that a money order had been forwarded, Sergeant Wagner "didn't do anything" for a week. When the promised instrument did not materialize, he wrote a letter to the commanding officer as he had threatened to do (R. 50).

The accused returned to duty on 30 November 1943, and forthwith sent a money order for eighty-seven dollars to Keesler Field. Sergeant Wagner "didn't exactly know what to do with it", "whether it would be all right to cash" it. Finally after having consulted with the local Judge Advocate's office, he several days later distributed the proceeds in accordance with "the slip that came with the check" on the National Bank of Fort Sam Houston, Texas (R. 43, 47-48, 58).

The accused on the day on which he dispatched his money order for eighty-seven dollars was summoned to appear before Brigadier General Brady, the Commanding Officer of Seymour Johnson Field. He was asked whether he had borrowed money from enlisted men. Upon answering in the affirmative the conversation was terminated, and he was told to return to his organization. On 8 December he was restricted to the post (R. 58).

Two days thereafter he was examined by an Investigating Officer. Upon being reminded of his debt to Sergeant Reynolds, which he had completely forgotten, he requested "permission that afternoon to go to the telegraph officer, at which time I made out a postal money order for twenty-five dollars, payable to Sergeant Reynolds. I sent it to him in care of Sergeant Abe Siegel of his organization, for which I have the money order receipt made on December 10th". The remittance was never delivered and may have been included among certain items of mail which were stolen at Keesler Field (R. 54, 69, 102; Def. Ex. "C").

The reason the money order for twenty-five dollars was addressed to Sergeant Siegel was that the accused had intended to write him anyway and was too embarrassed to correspond with Sergeant Reynolds. The accused testified further that he was better acquainted with Sergeant Siegel than with Sergeant Reynolds. Sergeant Siegel, on the other hand, remarked "I don't think my relationship was as close" (R. 68, 69, 97, 102).

Before leaving Keesler Field on or about 16 October 1943 the accused was told by Mr. Tyhurst that he could repay the loans of twenty-five dollars and seventy-eight dollars at his "convenience". On 13 December 1943 Mr. Tyhurst executed a statement reading as follows:

> "TO WHOM IT MAY CONCERN:
>
> "This will serve as evidence that I have authorized Lt. John E. Murray, to repay the balance of his indebtedness to me, at Lt. Murray's convience [sic]".

This document was signed at the accused's specific request. Mr. Tyhurst denied that he had previously orally authorized payment when convenient. He did recall that the accused had "informed me before he left that he wouldn't be able to pay me all the cash before he left the field, and I said that would be all right" (R. 37, 75-77, 92-93; Def. Ex. "A").

The accused admitted that he had gambled at pool with Private Sayadian and Sergeant May. His version of the incident was that:

> "I was assisting in setting up the new day room over here. We had just bought some pool tables. Nobody knew how to lay the slates and I had done that type of work during various odd jobs I had done during the summer, so I volunteered to help put them up. We had put up the slates, and I was waiting to go bowling, and it was about five or five-thirty, after duty hours. I was playing pool and two of the boys came in. They wanted to play for money. Foolishly enough, I stayed right in the game with them, and I was indebted to both of them when we left the game. Prior to my departure from this field, I asked this boy about it, Private Sayadian, and he said, 'What shall we do about the pool debt?' He said, 'Shall we forget it?' and I said, 'If you care to, because I am unable to pay it at this time.' I said,

'However, if I ever get an extra five or ten dollars,' I said, 'I'll gladly send it to you.' I asked him if he needed the money at that time, and he said, 'No, I don't', so that terminated that—I mean as far as we were concerned."

The defense introduced considerable evidence of the accused's previous good character and efficiency. Colonel Harold L. Kreider who had known him for a year and a half stated that the accused:

"always impressed me as being a model young officer." "During an inspection of the Technical School by the Inspector General * * * Colonel Wright mentioned to me that he thought that [the accused] was one of the brightest and most efficient young officers he had met in his inspection of Technical Training Command stations * * *."

Colonel Wright reduced his opinion to writing in the form of a letter of commendation dated 1 January 1943. It asserted that "Lieutenant John E. Murray, who assisted me in the recent investigation conducted at Keesler Field relative to messes, proved himself to be a superior officer in every respect". The testimony of Major Kendall B. Gedney, the Post Housing Officer, was to the same effect. He stated, among other things, that the accused, who had helped him in the performance of his duties on numerous occasions, had "always reflected ability and efficiency" (R. 77-80, 44-46; Def. Ex. "D").

On the other hand Lt. Col. William P. Baker said that between January and March or April of 1943 the services of the accused were unsatisfactory. With respect to the period covered by the months of June, July, and August 1943 Major James W. Smith was of the opinion that the "first thirty days were satisfactory. The last sixty unsatisfactory." "The first thirty days I rated him superior because I thought he was doing a superior job". Major Lee M. Rose asserted that "around September or October, or November or December of 1943; and part of January" 1944 the accused "at times served in an efficient manner, and at times he was not efficient. He at one time conducted himself in such a manner I had to rate him as unsatisfactory" (R. 85-90).

The accused's Officers Classification Card contains the following notations:

From	To	Manner of Performance
7-6-42	12-31-42	S
1-1-43	2-15-43	S
2-16-43	3-31-43	S
4-1-43	5-4-43	S
5 May 43	30 June 43	Sup
1 July 43	15 Oct 43	VS

Concerning part of the period embraced by this last entry Major Smith commented that "I rated him satisfactory. I wanted to rate him lower than

that, and they said not to do it as it would make the record look too bad". "I made an original recommendation to Captain Vogeler of Officers Personnel, and he said lower then satisfactory wouldn't look good" (R. 86, 93-95; Def. Ex. "F").

The accused is twenty-three years old. He is "positive that if I am allowed to remain in the service as a commissioned officer and be returned to ORTC where I may go overseas in the service of my country in the time of war, I know I will be of benefit to the service, and I will never again lay myself open for anything like this, nor disgrace my rank as a commissioned officer by dealings with privates or non-coms" (R. 63).

5. Specifications 1 to 5 of the Charge allege that the accused on various dates between 14 December 1942 and 15 October 1943 borrowed sums of money from enlisted men "to the prejudice of good order and military discipline". Specifications 6 to 10 allege that, "being indebted" to the said enlisted men he did "dishonorably fail and neglect to pay said debt". Specifications 11 and 12 allege that "being indebted to Warrant Officer Wilkie C. Tyhurst" in the sums of twenty-five dollars and seventy-eight dollars respectively he did "from about 1 July 1943 to about 1 December 1943 dishonorably fail and neglect to pay said debt". Specification 13 alleges that he did "on or about 2 August 1943 gamble with Sergeant Henry J. May and Private Arakel A. Sayadian, to the prejudice of good order and military discipline". All of these acts are charged in violation of Article of War 95.

The record presents no controversy as to any material fact. It is not disputed that the accused borrowed money from enlisted men, that he failed to repay them promptly, and that on one occasion he played pool with two of them for stakes. The only question to be determined is the legal significance to be given the evidence adduced. The findings of guilty of Specifications 4, 9, and 13 have already been approved only in so far as they involve a violation of Article of War 96 instead of Article of War 95 under which they were originally alleged. Whether the remaining Specifications should be similarly disposed of remains to be considered.

There are numerous precedents for the proposition that it "is prejudicial to good order and military discipline for an officer to borrow money from an enlisted man in the same organization. The obligation that flows from indebtedness to a subordinate tends to weaken authority; it can become the cause of improper favor; it impairs the integrity of required relationships" (CM 230736 (1943); II Bull. JAG, April 1943, p. 144). While the "mere act of an officer borrowing money from an enlisted man is an offense under A.W. 96, it is not an offense under A.W. 95 unless it is accompanied by such conduct on the part of the officer as evidences a moral delinquency" (CM 122920 (1918); Dig. Op. JAG, 1912-1940, sec. 453 (5)).

The conduct which constitutes "moral delinquency" falls into two categories. It may consist of (1) the use of dishonorable and disreputable methods in inducing or compelling the loan; or (2) of inexcusable and unduly prolonged delay in repayment, whether intentional or neglectful.

The accused did not use his position as a commissioned officer to force enlisted men under his command or subordinate to him to lend him money. On this point the record is explicit. The only possible exception is to be found in Private Sayadian's testimony that he "felt a little embarrassed" to ask his superior officer for repayment. This self-consciousness is inherent and unavoidable in all financial dealings between commissioned and enlisted personnel and is the gist of the offense under Article of War 96. It is a natural consequence of the relationship between superior and subordinate. It was not in this instance attributable to any irresponsible or despotic abuse of authority (R. 14, 20, 24, 27, 32, 36).

In taking a ten dollar bill from Private Sayadian upon the representation that it would be changed and five dollars immediately returned, the accused was guilty of reprehensible conduct denoting moral delinquency and unworthy of an officer and a gentleman. Specifications 1 to 5 however, do not allege an offense under Article of War 95. As was said in CM 122920 (1918), Dig. Op. JAG, 1912-1940, sec. 453 (7):

> "Where there is no allegation that the obligations were incurred under dishonorable circumstances or that the sums of money had become due and payable, the Specification does not allege facts showing conduct such as would constitute a violation of AW 95."

Specifications 1 to 5 merely allege borrowing with no attendant dishonorable circumstances. The offense thus charged is a violation of Article of War 96 and not of 95. This conclusion is strengthened by the use of the words "to the prejudice of good order and military discipline" at the end of the specifications. This language should never be employed in setting forth offenses under Article of War 95. It should be used only to charge violations of Article of War 96 from whose context it has been taken verbatim.

The accused did make rash promises of early repayment in connection with his other loans, but there is nothing to indicate that he was motivated by an intention to defraud or deceive. While the debt to Sergeant Reynolds is still unpaid, there is ample evidence that a money order for the full amount was sent to Sergeant Siegal (R. 17, 24, 54, 100).

Unquestionably the accused unduly procrastinated in repaying his other loans. But there were mitigating circumstances which refute any imputation of "moral delinquency" on his part. He had become financially involved while an enlisted man and had entered into his commissioned status while still encumbered by debt. His wife's pregnancy, her subsequent illness, and her emergency operation all inevitably postponed his extrication from the financial difficulties into which he had fallen. He never denied any of his obligations, other than his alleged gambling losses at pool, and, prior to the investigation of his transactions, he made several payments on account. Since the preferment of charges against him, he was paid or attempted to pay all of his debts with the exception again of his gambling losses amounting to thirty dollars which he believed had been forgiven.

In neglecting promptly to satisfy his debts to enlisted men he has unquestionably committed an offense. But from the record it appears that his conduct was free from the taint of dishonor. Notevery failure to pay is indicative of a fraudulent or deceitful mind. Inability and hardship must be given due consideration. The evidence clearly supports the findings of guilty in so far as they involve a violation of Article of War 96 but not of Article of War 95.

6. The accused is about 23 years of age. The records of the War Department show that he had enlisted service from 7 February 1941 to 24 June 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 only so much of the findings of guilty of Specifications 1 to 3, 5 to 8, and 10 to 12, inclusive, as involve findings of guilty in violation of Article of War 96, legally sufficient to support the other findings and the sentence, and to warrant confirmation thereof. Dismissal is authorized upon a conviction of a violation of Article of War 96.

Abner E. Lipscomb, Judge Advocate.

Benjamin Sleeper, Judge Advocate.

Gabriel H. Tolbert, Judge Advocate.

SPJGN
CM 248934

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 Second Lieutenant John E. Murray (0-560155), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty of Specifications 1 to 3, 5 to 8, and 10 to 12 inclusive, as involves findings of guilty in violation of Article of War 96, legally sufficient to support the other findings as approved by the reviewing authority and legally sufficient to support the sentence and to warrant confirmation thereof. I recommend that the sentence of dismissal be confirmed but suspended during the good behavior of the accused.

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 execution suspended. G.C.M.O. 156, 4 Apr 1944)

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